No. 11-___

IN THE

Supreme Court of the United States

MARVIN L. BEAUCHAMP,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari
to the Wisconsin Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the admission of unconfronted testimonial dying declarations against a criminal defendant violate the Sixth Amendment to the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marvin Beauchamp respectfully petitions for a writ of certiorari to the Wisconsin Supreme Court in *State v. Beauchamp*, 2009 AP 806-CR.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is published at 2011 WI 27, ____ Wis. 2d ____, 196 N.W.2d 780. The opinion of the Wisconsin Court of Appeals, District I, is published at 2010 WI App 42, 324 Wis. 2d 162, 781 N.W.2d 254. The Milwaukee County Circuit Court's decision denying Beauchamp's motion for post-conviction relief is not published, nor is the same court's Judgment of Conviction.

JURISDICTION

The opinion of the Wisconsin Supreme Court was entered on May 3, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him . . .".

RELEVANT STATUTORY PROVISIONS

Wis. Stats. § 908.045(3): *Statement under belief of impending death*. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

FRE § 804.03(b)(2): *Statement under belief of impending death*. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

STATEMENT OF THE CASE

Marvin Beauchamp and Bryon Somerville knew each other—they dated women from the same family and attended some of the same family functions. On the morning of June 16, 2006, Somerville was shot five times in the front yard of his girlfriend's mother's house. As Somerville lay bleeding on the pavement next to his green Range Rover, Marvin Coleman arrived on the scene. Coleman was a heavy equipment operator and emergency medical technician for the Milwaukee Fire Department. When Coleman approached the scene, he recognized the Range Rover as belonging to Somerville, an acquaintance he knew as "Tick."

After Coleman confirmed that Somerville had been shot, he asked him: "Who did this to you?" Somerville responded: "Marvin." Coleman asked Somerville: "Who, me?" Somerville responded: "No. Big Head Marvin." Coleman had no idea who Somerville was talking about. Coleman then asked Somerville what had happened, and Somerville told him that he had been arguing with a woman and he felt like he had been lured outside and shot.

Coleman transported Somerville to the hospital in his Milwaukee Fire Department medical rig. While at the hospital, one of the doctors approached Milwaukee Police Officer Wayne Young and told him that if he had any questions for Somerville he better ask them now. Young then asked Somerville who shot him. Somerville said "Marvin," describing him as dark-skinned, with a bald head and big forehead. He provided no last name or nickname. Somerville died shortly thereafter.

Police searching Somerville's Range Rover at the scene found a funeral program listing Marvin Beauchamp as a pall bearer. Beauchamp quickly became a suspect. Shainya Brookshire, the sister of Somerville's girlfriend, was present outside the house when Somerville was shot. Beauchamp's girlfriend, Dominique Brown, was also there.

When Brown and Brookshire were first interviewed by police, they did not implicate Beauchamp in the shooting. After being taken into custody and threatened with prosecution, the women gave statements alleging that Beauchamp shot

Somerville. Beauchamp was charged with first degree intentional homicide.

Prior to trial, the State moved to admit Somerville's statements to Marvin Coleman and Wayne Young as dying declarations under Wisconsin Statute § 908.045(3)[1], statements under a belief of impending death. The circuit court held an evidentiary hearing over two separate days; at the conclusion of the hearing on October 6, 2006, the court issued an oral ruling from the bench. Over a defense objection, the circuit court ruled that the statements were admissible under Wis. Stats. §908.045(3), and that their admission did not violate *Crawford v. Washington* or the Confrontation Clause:

> …[O]bviously the declarant is not available and the belief of impending death may be inferred from the fact of death itself and the circumstances such as the nature of the wounds and, of course, the wounds in this case were a number. There were more than one in the chest area.
>
> And it would appear that based upon what was said and who said it, that these were life threatening, life threatening wounds – you know – considering the shots, the bullets, the exit wounds. What the doctor had indicated in

[1] But for the Federal Rule's limitation to prosecutions for homicide and civil proceedings, Wisconsin's statute is identical to Federal Rule of Evidence 804(b)(2).

> the emergency room would indicate to the Court that this was an exception to the hearsay rule as far as the dying declaration is concerned.
>
> And I think they are exempt from the restrictions of *Crawford* and the Confrontation Clause because they are a firmly rooted hearsay exception exempt from these restrictions and limitation because I don't think the defendant can use the Confrontation Clause as a shield from the unavailable witness because allegedly the defendant procured the unavailability of the dead declarant. And there is also a rule of forfeiture by wrongdoing and so the Court would allow those statements as to the admissibility.

At trial, Brown and Brookshire testified that they did not see Beauchamp shoot Somerville, and that the police had coerced them into making the statements incriminating Beauchamp. In exchange for consideration on a pending drug case, the State put on a jailhouse informant with 15 prior convictions to testify that Beauchamp confessed to him in jail. Lastly, the State presented the jury with Somerville's statements to Coleman and Young. Beauchamp was convicted and sentenced to life in prison.

Beauchamp filed a motion for postconviction relief, seeking a new trial on the grounds that the admission of Somerville's statements violated the

Confrontation Clause and the principles articulated by this Court in *Crawford v. Washington*, 541 U.S. 36 (2004). Beauchamp also argued that the statements were not properly admitted as dying declarations due to lack of foundation, and that the substantive use of the prior inconsistent statements of Brookshire and Brown violated due process. The circuit court denied Beauchamp's motion in a one-page decision, holding that it "[did] not believe it erroneously admitted the victim's dying declarations as evidence."

The Wisconsin Court of Appeals, District I, affirmed the circuit court. The court of appeals, citing this Court's decision in *Giles v. California*, 554 U.S. 353, 357 (2008), held that the Sixth Amendment's guarantee of confrontation did not apply "where an exception to the confrontation right was recognized at the time of the founding." *State v. Beauchamp*, 2010 WI App 42, ¶11, 324 Wis. 2d 162, 781 N.W.2d 254. The court of appeals further relied on *Giles* to conclude that dying declarations were admitted at common law and thus did not implicate the confrontation right. The court of appeals also denied Beauchamp's other claims.

The Wisconsin Supreme Court granted discretionary review. It also relied on *Giles* to conclude that the "dying declaration exception" to the right of confrontation existed at the time of the founding and, therefore, admission of unconfronted dying declarations does not "offend the Constitution." *State v. Beauchamp*, 2011 WI 27, ____ Wis. 2d ____, 196 N.W.2d 780. The Wisconsin Supreme Court

agreed with the analysis of the California Supreme Court in *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004), by noting that excluding dying declarations as violative of the right to confrontation "would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion would set at naught."

In *Crawford v. Washington*, 541 U.S. 36, 69 (2004), this Court held that the admission of testimonial hearsay against the accused would satisfy the Sixth Amendment right to confrontation only if the defendant had a previous opportunity to cross-examine the declarant about the statement. In a footnote, the Court explicitly stated that it "need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations." *Id.* at 56, n. 6.

This year, in *Michigan v. Bryant*, 131 S. Ct. 1143, 1151 n.1 (2011), this Court noted its prior suggestion in *Crawford* that testimonial dying declarations might be admissible as a historical exception to the Confrontation Clause; however, the Court stated that it did not need to decide the issue in *Bryant* because the State had not preserved the argument.

The Wisconsin Supreme Court in *Beauchamp* acknowledged that the question has not been settled by this Court; however, the Wisconsin Supreme Court ruled that the admission of testimonial dying declarations was consistent with *Crawford* and *Giles* and thus did not violate Beauchamp's confrontation right.

Beauchamp v. Wisconsin presents the question that has explicitly been left open by this Court in *Crawford* and *Bryant*: whether the Confrontation Clause is violated by the admission of unconfronted testimonial dying declarations.

REASONS FOR GRANTING THE WRIT

The Wisconsin Supreme Court decided that the admission of unconfronted testimonial[2] dying declarations did not violate Beauchamp's constitutional right to confront the witnesses against him. Whether testimonial dying declarations are an exception to the Confrontation Clause is an important question of federal law that has not been, but should be, settled by this Court.

I. Whether Testimonial Dying Declarations Are an Exception to the Confrontation Clause Is an Unsettled Question.

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[2] From the beginning, Beauchamp has taken the position that the statements at issue were testimonial. In the court of appeals, the Wisconsin Attorney General did not contest this argument; the Attorney General "assumed" that the statements were testimonial. The Wisconsin Court of Appeals likewise "assumed" that the statements were testimonial in its opinion. *State v. Beauchamp*, 2010 WI App 42, ¶ 10, 324 Wis. 2d 162, 781 N.W.2d 254. At the Wisconsin Supreme Court, the Attorney General argued for the first time that Somerville's statements to Marvin Coleman were non-testimonial. Like the Wisconsin Court of Appeals, the Wisconsin Supreme Court "assume[d]" that the statements at issue were testimonial. *State v. Beauchamp*, 2011 WI 27, ¶ 18, 196 N.W.2d 780 (2011).

This Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), established a clear framework for determining the admissibility of testimonial hearsay against an accused: such evidence was inadmissible unless the defendant had a prior opportunity to cross-examine the declarant concerning the statement. A prior opportunity to cross-examine the witness about the statement is required because the Confrontation Clause commands that the reliability of a statement be assessed in a particular manner: "by testing in the crucible of cross-examination." *Crawford* at 61.

In *Crawford*, the Court's historical analysis concluded that there was "scant evidence that exceptions were invoked to admit testimonial statements against an accused in a criminal case." 541 U.S. at 56. The Court noted that it had found one deviation from this principle—dying declarations. The Court continued, however: "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*." *Crawford* at 56, n.6.

In 2008, this Court decided *Giles v. California.* In *Giles*, the Court stated that it "ha[s] previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted." 554 U.S. at 358 (citing *Crawford*). The Court identified the two forms of testimonial statements as dying

declarations and those admitted pursuant to the doctrine of forfeiture by wrongdoing. *Id.* at 358-59. Although the Court in *Giles* described dying declarations as a "historic exception," the question of whether the admission of testimonial dying declarations violated the confrontation right was not before the Court or necessary to the Court's decision regarding forfeiture by wrongdoing; accordingly, this statement is dictum.

Despite *Crawford*'s specific statement withholding a decision on the issue, and despite the fact that the Court's brief statements about dying delcarations in *Giles* were dictum, virtually every court to take up the question has relied upon *Crawford*, *Giles*, or a combination thereof, to hold that the admission of unconfronted testimonial dying declarations does not violate the Confrontation Clause. *See*, *e.g.*, *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004) (dying declarations admissible at common law, *Crawford* refers to right of confrontation at common law, therefore dying declarations do not violate Sixth Amendment); *People v. Taylor*, 737 N.W.2d 790 (Mich. App. 2007) (same); *State v. Bodden*, 661 S.E.2d 23 (N.C. App. 2008) (same); *Cobb v. State*, 16 So.3d 207 (Fl. App. 2009) (dying declarations remain an exception to Confrontation Clause because historical exception; alternatively, defendant could still confront officers who testified about the dying declaration); *State v. Jones*, 197 P.3d 815 (Kan. 2008) (In light of dicta in *Crawford* and *Giles*, Kansas supreme court confident

U.S. Supreme Court will one day hold that dying declarations are an exception to Confrontation Clause); *People v. Gilmore*, 828 N.E.2d 293 (Ill. App. 2005) (Crawford's historical discussion is strong statement of admissibility of dying declarations).

To the extent that courts that have addressed the question believe it is settled by looking to *Crawford* and *Giles*, this Court's recent decision in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), confirms that the question is not settled. In the *Bryant* majority opinion, the Court cited *Crawford* as where it "first suggested that dying declarations, even if testimonial, might be admissible as a historical exception to the Confrontation Clause." *Bryant,* at 1151, n.1. The Court continued: "We noted in *Crawford* that we 'need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.' Because of the State's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here." *Id.* (internal citations omitted).

Beauchamp presents the Court with an opportunity to decide this important question about the fundamental Constitutional rights of the accused.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 2009AP806-CR

(L.C. No. 06-CF-3184)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,
Plaintiff-Respondent,

v.

Marvin L. Beauchamp,
Defendant-Appellant-Petitioner.

FILED

MAY 3, 2011

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 N. PATRICK CROOKS, J. This is a review of a published court of appeals decision[3] in a case arising from a shooting on a Milwaukee street on a summer morning. The murdered man, Bryon Somerville, made statements to an ambulance driver and a police officer just before he died that gave a brief description of his assailant——a man named Marvin, whose last name Somerville did not know, who was dark-skinned with "a bald head and big forehead." Somerville distinguished him from another man named Marvin by saying he meant "big head Marvin." Other witnesses gave statements

[3] *State v. Beauchamp*, 2010 WI App 42, 324 Wis. 2d 162, 781 N.W.2d 254.

about seeing Marvin Beauchamp at the scene and seeing him shoot Somerville point blank, statements they later said had been coerced and were untrue. The case proceeded to trial in the Circuit Court for Milwaukee County, the Hon. Jeffrey A. Wagner presiding. When two witnesses testified that their previous statements implicating Beauchamp had been lies coerced by the police, the court permitted the State to impeach their testimony by cross-examining them with their prior inconsistent statements. The jury convicted Beauchamp of first-degree intentional homicide while using a dangerous weapon. Beauchamp appealed, arguing that he is entitled to a new trial because the admission of the Somerville statements and the prior statements of the two recanting witnesses violated his constitutional rights to confrontation and due process. The circuit court admitted the statements under the dying declaration and prior inconsistent statement hearsay exceptions found in Wis. Stat. §§ 908.045(3) and 908.01(4)(a)1, respectively. The court of appeals affirmed the circuit court's rulings on both issues.

¶2 Beauchamp argues that the circuit court erred in admitting into evidence the statements made by Somerville prior to his death because there was no opportunity for Beauchamp to cross-examine Somerville about his statements, and Beauchamp was therefore deprived of his constitutional right to confront the witnesses against him.[4] He argues

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[4] "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' We have held that this bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (citing *Pointer v. Texas*, 380 U.S. 400, 406

that the hearsay rules' so-called "dying declaration" exception, applicable to statements made by a declarant who believes he is facing imminent death, is not compatible with the holding of *Crawford v. Washington*,[5] a case in which the United States Supreme Court reaffirmed the confrontation of witnesses as "the only indicium of reliability sufficient to satisfy constitutional demands"[6] for testimonial statements. Beauchamp argues that while the *Crawford* Court declined to rule on whether or how its bright line rule applied to dying declarations, its holding compels this court to exclude all unconfronted testimonial hearsay statements, including dying declarations.

¶3 Beauchamp further argues that even if a hearsay exception for dying declarations was recognized and implicitly incorporated by the framers of the United States Constitution in the Confrontation Clause,[7] it is now time to abrogate the common law on this point. He claims that the rationales given for the exception, such as wide acceptance of particular religious beliefs and the evidentiary necessity of such statements, are now antiquated and irrelevant. Beauchamp argues that

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(1965)). Article 1, Section 7 of the Wisconsin Constitution guarantees the accused, inter alia, "the right . . . to meet the witnesses face to face . . . ."

[5] *Crawford v. Washington*, 541 U.S. 36 (2004).

[6] *Id.* at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.")

[7] *See*, e.g., *Crawford*, 541 U.S. at 54: "[T]he [Sixth Amendment] 'right . . . to be confronted with the witnesses against him' . . . 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."

he is entitled to a new trial because Somerville's statements implicating Beauchamp were testimonial statements that were admitted into evidence in violation of his right under *Crawford* to test their reliability by cross-examination, because there is no longer a basis for presuming the reliability of such statements, and because in fact there are reasons to doubt it.

¶4 Beauchamp also claims that the admission of the two witnesses' prior inconsistent statements violated his right to due process.[8] This court has stated that due process requirements are satisfied in such a situation so long as the declarant is "present and subject to cross-examination."[9] Specifically, he argues that in order to protect a defendant's due process right to have unreliable prior inconsistent statements excluded, this court should discard that standard and instead adopt a multi-

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8 The right to due process of law is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the Fourteenth Amendment makes the Fifth Amendment applicable to the states). Article 1, Section 7 of the Wisconsin Constitution provides the following guarantees:

> In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

9 *Robinson v. State*, 102 Wis. 2d 343, 349, 306 N.W.2d 668 (1981).

factor test set forth by the Seventh Circuit Court of Appeals in *Vogel v. Percy*.[10] He contends that if the court were to apply the *Vogel* test, under which the availability of the declarant for cross-examination is just one consideration among several, the statements in question would be deemed too unreliable to be admitted, and he contends that their erroneous admission was a violation of his right to due process and thus entitles him to a new trial.

¶5 We hold that the admission of the dying declaration statement violates neither Beauchamp's Sixth Amendment right to confront witnesses nor his corresponding right under the Wisconsin Constitution.[11] As the court of appeals noted, "the

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10 *Vogel v. Percy*, 691 F.2d 843, 846-47 (7th Cir. 1982). The court cited a Fifth Circuit case establishing the following "guidelines" for determining "whether substantive use of a prior inconsistent statement would comport with due process":

> (1) the declarant was available for cross-examination; (2) the statement was made shortly after the events related and was transcribed promptly; (3) the declarant knowingly and voluntarily waived the right to remain silent; (4) the declarant admitted making the statement; and (5) there was some corroboration of the statement's reliability.

11 The concurrence would avoid reaching the question that is squarely before us, the question of whether a dying declaration constitutes an exception to an accused's Sixth Amendment right to confrontation. We do not think it is appropriate to dodge this question. First, the record is sufficiently developed with evidence to establish, as even defense counsel essentially conceded at trial, that the statements involved here constitute dying declarations under Wis. Stat. § 908.045(3). Second, the parties have fully briefed the question presented. Third, the Supreme Court has set forth principles in Giles and Crawford that get us to an answer on this question. And fourth, many other jurisdictions have answered this question. The United States Supreme Court was barred, given the procedural history

Sixth Amendment's guarantee of the confrontation right does not apply 'where an exception to the confrontation right was recognized at the time of the founding.'"[12] Beauchamp concedes that the dying declaration exception was an established hearsay exception at common law. The *Crawford* Court acknowledged the dying declaration hearsay exception and indicated that the exception might be an exception that survives a Confrontation Clause challenge.[13] Without a direct answer from *Crawford* on this point, we are given the task of resolving this question by applying the principles set forth in

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of the case before it in Michigan v. Bryant, from addressing the question of dying declarations; as a matter of state law, the opportunity for that legal theory had been deemed waived below. *See Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143 (2011) (holding that unconfronted statements made by a shooting victim to police on the scene were nontestimonial and therefore admissible without violation of the Confrontation Clause). Had the Bryant Court had a properly developed record and properly presented question regarding a dying declaration, it might well have chosen to address that question instead.

The *Bryant* Court acknowledged that it was reviewing "a record that was not developed to ascertain the 'primary purpose of the interrogation.'" *Id.* at 1163. However, the first step in the Court's analysis, *id.* at 1163-65, focused on "the available evidence, which suggests that [the victim] perceived an ongoing threat." *Id.* at 1164 n.16. Nothing in the Court's analysis indicated that every incident in which a shooting victim is treated by emergency responders constitutes an "ongoing emergency" such that the victim's statements are rendered non-testimonial. Having granted the petition for review in this case and having the benefit of a properly developed record, we see no need to leave this important question to be answered another day.

[12] *State v. Beauchamp*, 324 Wis. 2d 162, ¶11 (citing *Giles v. California*, ___ U.S. ___, 128 S. Ct. 2678, 2682 (2008)).

[13] *Crawford*, 541 U.S. at 56 n.6.

Crawford and a related case, *Giles v. California*,[14] which bases its holding on an analysis of what specific hearsay exceptions were permitted at common law at the time of the ratification of the Sixth Amendment and were therefore incorporated into its confrontation right. Those principles compel the conclusion that allowing this hearsay exception comports with the protections of the Confrontation Clause. While the United States Supreme Court has yet to give its explicit blessing to the dying declaration exception, it has given us no reason to abandon a principle that is so deeply rooted in the common law. Nor does Beauchamp. The fairest way to resolve the tension between the State's interest in presenting a dying declaration and a defendant's concerns about its potential unreliability is not to prohibit such evidence, but to continue to freely permit, as the law does, the aggressive impeachment of a dying declaration on any grounds that may be relevant in a particular case.[15] In other words, if there is evidence the declarant had a motive to accuse falsely, introduce it. If there is evidence that the declarant was cognitively impaired and incapable of perceiving events accurately, introduce it. Such

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[14] *Giles v. California*, ___ U.S. ___, 128 S. Ct. 2678 (2008).

[15] In a concurrence in a dying declaration case, a state court justice critical of the reliability of dying declarations asserted that when jurors hear the dramatic circumstances surrounding a dying declaration, "there is no effective way to challenge its truth and it is more than just likely that the jury will attach undue importance to it and give it undue weight in arriving at a verdict." *Kidd v. State*, 258 So. 2d 423, 430 (Miss. 1972) (Smith, J., concurring). A statement about whether such evidence can be successfully challenged cannot be readily disproved, of course, by recourse to appellate case law research given that a case involving a successfully impeached dying declaration that results in an acquittal would not be the subject of appeal.

facts may, in particular cases, justifiably undermine the reliability of a dying declaration. The reliability of evidence is an issue for the trier of fact, and the assertion that some dying declarations may be unreliable can not justify the per se exclusion of such potentially valuable evidence.

¶6 We are likewise unpersuaded by Beauchamp's argument that the failure to exclude the prior inconsistent statements of recanting witnesses here violated due process rights and, as he argued before the court of appeals, constituted either plain error by the circuit court or prejudicial error by counsel necessitating remand for a *Machner* hearing, when the grounds for the claim is that a test different from Wisconsin's should have been applied and that, if applied, the test would have barred the statements from evidence. The statements in question were admitted without objection and consistent with controlling Wisconsin law. Beauchamp was not prejudiced by his counsel's failure to urge the court to apply the law of another jurisdiction, nor can the circuit court be said to have committed plain error when it applied what was then the controlling law in Wisconsin. There was no violation of Beauchamp's right to due process here.

¶7 We therefore affirm the court of appeals.

BACKGROUND

¶8 According to statements by witnesses and testimony at the trial, the conflict that ultimately led to the shooting was a couple's fight over rumored infidelity, though the shooting itself was by a person whose interest in the argument seems impossible to discern from the evidence in the

record. On the morning of June 16, 2007, Somerville was angrily going from one residence to another trying to find his girlfriend, Dalynn Brookshire, and a flurry of phone calls were being made to and from Somerville, Brookshire, and her friends and relatives. One of those calls came to Marvin Beauchamp as he was driving home with his girlfriend from an appointment, and his girlfriend testified that after he took that call, they quickly headed toward the Sherman Avenue address where Somerville had said he was going next. They parked a block away, and Beauchamp and his girlfriend took different routes to the house. Dominique Brown, Beauchamp's girlfriend, who had just arrived with him moments before, found Shainya Brookshire, the sister of Somerville's girlfriend, near the house. According to a signed statement given to police but later recanted, Beauchamp's girlfriend told the second woman that "Marvin" was "hiding in the bushes on the side of the house, and he has a gun."

¶9 Witnesses testified to seeing Somerville walk out of the house and hearing Somerville briefly exchange words with someone outside the house. Just before the gunshots, witnesses told police, they heard Somerville say, "Oh, you got a gun. Oh, you're going to shoot me. Shoot me then." In a statement to police that she later said was untrue, Beauchamp's girlfriend said she then saw Beauchamp point a gun at Somerville and shoot him in the stomach from a distance of about five feet. A boy who was selling bottled water at the intersection nearby testified that he saw a man come up from behind the house, saw Somerville walk out of the house, heard the two exchange words, and saw the man shoot Somerville, though when shown a group of photographs that included Beauchamp, he was unable to identify him

as the shooter. He then saw the wounded man walk toward his vehicle and open the door before falling to the ground.

¶10 When police and fire department units responded to the call reporting the shooting, that is where they found Somerville, conscious but gravely injured with five gunshot wounds. The EMT who arrived on the scene, Marvin Coleman, testified that he asked Somerville, "Who did this?" Somerville responded, "Marvin." When Coleman, who was an acquaintance of the victim and had recognized his vehicle at the scene, asked, "Who, me?" Somerville responded, "No, big head Marvin."[16]

¶11 Police officer Wayne Young rode in the ambulance with Somerville. In the ambulance, Somerville stated that "Marvin" shot him. An emergency room doctor told Young shortly before Somerville died that his time for asking questions was short. In response to Young's questions, Somerville described "Marvin" as dark-skinned, bald, and having a big forehead. People who had known Beauchamp prior to his arrest in this case described his physical appearance in trial testimony in ways that were consistent with the description Somerville provided of the man who shot him. Somerville's girlfriend described Beauchamp as having a bald head and dark skin. An acquaintance who grew up with Beauchamp and was housed in the same county

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[16] Somerville also repeatedly said things like "Please don't let me die." Those statements were evidence that the statements were made "under belief of impending death," *see* Wis. Stat. § 908.045(3), which was a contested issue at the circuit court and before the court of appeals. However, Beauchamp is not disputing in this review that the statements fit the definition of "dying declaration."

jail with him for three days described him as having "a big head," and "particularly a large forehead."

¶12 The two women, Brown and Brookshire, were at the house where the shooting occurred, and it is their "prior inconsistent statements" whose admissibility Beauchamp challenges. Both gave multiple statements to the police. First, each gave initial statements that did not implicate Beauchamp. Second, when re-interviewed by police after other witnesses told the police that the two women had actually been in the front yard quite close to where the shooting occurred, each signed statements that put Beauchamp at the scene with a gun and identified him as the shooter. There was evidence of statements that each feared Beauchamp; his girlfriend's statement to police was that she had received a call from him after the shooting telling her to "keep [her] mouth shut." However, at the preliminary hearing and at the trial, each characterized the statements given to police as lies coerced by law enforcement officers who demanded a specific story. Each recanted the statements to the extent that they implicated Beauchamp as the shooter.

¶13 At a pre-trial motion hearing, over defense counsel's objection, the circuit court ruled that the evidence of Somerville's statements to the EMT and police officer, as well as the evidence of Somerville's grave wounds, supported a finding that the statements were made while Somerville thought he was dying and that the statements were therefore admissible under Wis. Stat. 908.045(3) as exceptions to the hearsay rule.[17] The court of appeals rejected

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[17] Wis. Stat. § 908.01 provides as follows:

Beauchamp's challenge, grounded on the holding in *Crawford*, to the dying declaration exception, reasoning that the *Giles* Court's "deliberate recognition of the Sixth Amendment's reach" and its "further analysis of the pre-founding [dying declaration] cases it cited" made it clear that the dying declaration hearsay exception is not

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> The following definitions apply under this chapter:
>
> (1) Statement. A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> (2) Declarant. A "declarant" is a person who makes a statement.
>
> (3) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> (4) Statements which are not hearsay. A statement is not hearsay if:
>
> (a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> 1. Inconsistent with the declarant's testimony . . . .

Wis. Stat. § 908.02 provides, "Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute."

constitutionally prohibited. We review Beauchamp's confrontation clause challenge de novo. "Whether admission of a hearsay statement violates a defendant's right to confrontation presents a question of law that this court reviews de novo." *State v. Weed*, 2003 WI 85, ¶10, 263 Wis. 2d 434, 666 N.W.2d 485 (citing *Lilly v. Virginia*, 527 U.S. 116, 136-37 (1999)).

¶14 The standard of review for the second issue Beauchamp presents is determined by the fact that the recanting witnesses' prior inconsistent statements were read into the record at trial without objection. Because the claimed error was not preserved by an objection at trial, the court of appeals reviewed the claim as a claim of ineffective assistance of counsel, pursuant to *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (noting that in the absence of an objection an appellate court addresses issues "within the rubric of the ineffective assistance of counsel"). The court of appeals affirmed the circuit court's judgment and order denying Beauchamp's motion for post-conviction relief seeking a new trial, or in the alternative a *Machner* hearing to pursue his ineffective assistance of counsel claim. For the same reason, the court of appeals reviewed for plain error the circuit court's failure to exclude the statements on the basis of a *Vogel* analysis.[18] The court of appeals held Beauchamp's plain error claim to be without merit because such error must be "obvious and substantial,"[19] and that standard cannot be met in a case such as this where there is not even a

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[18] *See State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77.

[19] *Id.*

citation to the Vogel factors, much less an adoption of the standard, in any published Wisconsin case. It therefore affirmed the judgment and order.

¶15 We likewise review the claimed error involving the admission of the prior inconsistent statements recognizing that these are unobjected-to matters. We therefore determine whether Beauchamp is entitled to the *Machner* hearing he sought in his post-conviction motion and on appeal to pursue a claim of a new trial due to ineffective assistance of counsel. That claim is premised on the argument that Beauchamp was prejudiced by his counsel's error in failing to object to the admission of the statements and also failing to advocate for the statements to be excluded on due process grounds based on an allegedly more restrictive standard adopted by the Seventh Circuit Court of Appeals. We also must determine whether it was plain error for the court not to apply the Seventh Circuit's standard sua sponte.

I. SOMERVILLE'S DYING DECLARATIONS

¶16 Beauchamp argues that the admission of unconfronted hearsay statements made by Somerville to the medical and law enforcement personnel who arrived at the scene violated his constitutional right to confront witnesses against him, as guaranteed by the United States Constitution and the Wisconsin Constitution. He contends that a proper reading of *Crawford v. Washington*, in which the United States Supreme

Court abrogated a previous rule[20] that allowed unconfronted testimonial hearsay deemed reliable by a judge, compels the conclusion that the dying declaration hearsay exception is no longer constitutionally permitted. The State responds that the *Crawford* Court declined to address the question of dying declarations, and appeared to leave open the

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20 The rule abrogated was that of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which favored a balancing approach applied by the circuit court for determinations of reliability of unconfronted testimonial statements. After noting that the Court had held in 1965 that the Sixth Amendment's right of confrontation is applicable in state as well as federal criminal trials, one commentator briefly summarized the subsequent history of Confrontation Clause jurisprudence thus:

> Since that time, the Court has tried to define the circumstances under which statements can be offered by the prosecution against the accused without having to accord the accused an opportunity to cross-examine the declarant. Eventually the Court developed a two-part test: (1) if the statement offered against the defendant fell within a "firmly rooted" exception to the hearsay rule, cross-examination could be done away with; (2) but if the statement did not fall into such an exception, then cross-examination could be dispensed with only if the prosecution convinced the judge that the statement offered was reliable. In *Crawford v. Washington*, the Court abandoned the two-part test, at least when the statement offered against the defendant qualifies as a "testimonial statement."

Miguel A. Méndez, *Crawford v. Washington*: A Critique, 57 Stan. L. Rev. 569, 571 (2004)(footnotes omitted).

possibility that such statements would be found to constitute an exception to Confrontation Clause guarantees.[21] Further, the State argues here that the analysis in *Giles*, as well as further commentary on the dying declaration hearsay exception in that case, confirms that the Supreme Court has clearly signaled that a dying declaration may safely be deemed an exception to the Confrontation Clause by virtue of its acceptance at common law at the time of the founding.

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[21] *Crawford* concerned the admission of the defendant's wife's prior statements to police concerning the defendant; the prosecution sought to admit the prior statements to rebut the defendant's assertion of self-defense. The defendant's wife was unavailable to testify in that case due to a relevant marital privilege statute. The Court asserted that confrontation was the only constitutionally sound way to determine reliability, and noted, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62. Nevertheless, the court conceded the following:

> 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. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. 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*.

Crawford, 541 U.S. at 56, n.6 (citations omitted).

¶17 The State also argues that Somerville's statement to the emergency medical technician (EMT) was not testimonial and therefore is exempted by *Crawford* from the confrontation requirement that applies to testimonial statements. After this case was briefed and argued, the United States Supreme Court decided *Bryant*, which examined the parameters of the "ongoing emergency" rule established by the holding in *Davis v. Washington* that statements to police are non-testimonial when the "primary purpose of the interrogation" that produced them "is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822 (2006). Though the underlying facts and the statements at issue in this case and *Bryant* are similar, the legal questions presented are different. In *Bryant*, the statements at issue had been admitted under a different hearsay exception, and no factual foundation was established for a finding that they qualified as dying declarations. The Court stated, "Because of the State's failure to preserve its argument with regard to dying declarations, we . . . need not decide that question here." *Bryant*, 131 S. Ct. at 1151, n.1. It thus proceeded with its analysis of whether the *Davis* "ongoing emergency" rule rendered statements made to police by a shooting victim nontestimonial. The Court concluded that the statements were made in the context of an ongoing emergency and deemed them nontestimonial, ruling that the admission of the unconfronted statements did not violate the defendant's constitutional confrontation right. *Id.* at 1167. In her dissent, Justice Ginsburg recapped the brief mentions of the dying declaration hearsay exception in *Crawford* and *Giles* and acknowledged

that the Court has yet to address its continued viability:

> In *Crawford v. Washington*, this Court noted that, in the law we inherited from England, there was a well-established exception to the confrontation requirement: The cloak protecting the accused against admission of out-of-court testimonial statements was removed for dying declarations. This historic exception, we recalled in *Giles v. California*, applied to statements made by a person about to die and aware that death was imminent. Were the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions. The Michigan Supreme Court, however, held, as a matter of state law, that the prosecutor had abandoned the issue. The matter, therefore, is not one the Court can address in this case.

Id. at 1177 (Ginsburg, J., dissenting) (citations omitted).

¶18 The State argues that Somerville's statements to the EMT were nontestimonial,[22] but it

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[22] This argument was not presented below, but the State raised it before this court in light of the fact that an appellate court "may review the record to determine if a statement is admissible under a particular hearsay exception even though the trial court did not admit the statement on that basis." *State v. Kutz*, 2003 WI App 205, ¶33, 267 Wis. 2d 531, 671 N.W.2d

does not argue that Somerville's statements to the police officer were nontestimonial. Both sets of Somerville's statements, those made to the EMT and those made to the police officer, were admitted pursuant to the dying declaration hearsay exception. Therefore, while we recognize the different treatment required by *Crawford* for testimonial and nontestimonial statements, we are presented in this case the question of the dying declaration exception's viability under *Crawford*'s restrictive standard for testimonial statements, and we assume for purposes of our analysis that the statements admitted here pursuant to the dying declaration hearsay exception were testimonial.[23] We consequently acknowledge but need not address further in this case the argument that Somerville's unconfronted statements to the EMT are non-testimonial and for that reason their admission does not violate his confrontation right.

¶19 "[W]hether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." *State v. Jensen*, 2007 WI 26, ¶ 12, 299 Wis. 2d 267, 727 N.W.2d 518.

¶20 We begin by acknowledging the circuit court's determination that the statements Somerville

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660. Our holding in this case makes it unnecessary to address the State's additional harmless error arguments.

[23] We note that under the multi-factor approach taken by *Bryant* in determining whether a statement is nontestimonial under *Davis* because its "primary purpose" is "to enable police assistance to meet an ongoing emergency," a statement that qualifies as a dying declaration under Wis. Stat. § 908.045(3) could, depending upon the circumstances, be categorized as testimonial or as nontestimonial. See *Bryant*, 131 S. Ct. at 1160(citing to *Davis*, 547 U.S. 813, 827 (2006)).

made to the EMT and to the officer in the ambulance and in the operating room were dying declarations. Beauchamp's counsel conceded that a motion to exclude the statements was unlikely to succeed:

> I am well aware of what the case law says and as it relates to what the State must show. Whether or not the victim either knew he was dying or had a reasonable belief that he was dying. I think it's clear from the fire fighter who testified today that the victim at least indicated don't let me die and I think that is one indication that the victim may have been under the impression that he was going to die.
>
> It's also clear to me that what was being done to Mr. Somerville during the time that he was on scene, while in transport and at the facility, the hospital facility, that it's clear that he could have believed he was going to die.
>
> It seems to me also that the information that the victim has indicated was answers that were given upon questions being asked by law enforcement or fire fighters. So, as a result of that I think it would be very difficult for me to do anything other than a pro forma motion to exclude the statements of the victim.

¶21 The circuit court then noted that upon the evidence provided, it would permit the statements to come in under Wis. Stat. § 908.045(3).

We agree with the circuit court that the statutory requirements are met on the facts presented.

¶22 There is a dual framework for our analysis, as Professor Daniel Blinka has explained: "In effect, the government's use of hearsay is regulated by both the rules of evidence and the confrontation clause. Put differently, there are two distinct hearsay rules, one rooted in constitutional law and the other found in evidence law. While there is overlap and even some interrelationship, the two doctrines are nonetheless fundamentally different."[24] The question presented then is, as another court phrased it, "whether the statutorily proper admission of [a] statement was nonetheless an unconstitutional violation . . . ." *Vogel*, 691 F.2d 843, 846 n.9 (7th Cir. 1982).

¶23 If we were to accept that the Confrontation Clause, as set forth in *Crawford*'s seemingly unbending declaration, requires that all testimonial statements be subject to confrontation to test their reliability, we would exclude dying declarations as, by definition, unconfrontable, and therefore, statements whose reliability cannot be tested. In fact, where the admissibility of a statement is governed by the *Crawford* analysis, one never reaches the issue of reliability[25] because of the Confrontation Clause threshold question: "Where testimonial statements are at issue, the only

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[24] Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence, § 802.301 at 711 (3d ed. 2008).

[25] As one law review article author stated, "The key test of *Crawford* for a Confrontation Clause violation is whether the hearsay statement offered against a criminal defendant is testimonial." Michael J. Polelle, The Death of Dying Declarations in a Post-*Crawford* World, 71 Mo. L. Rev. 285, 286 (2006).

indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford* at 65-69.

¶24 But such a seemingly rigid approach cannot prevail here. As noted above, the *Crawford* Court deliberately avoided the question of how such a rule would apply in a dying declaration case. In addition, in *Giles*, the Court made clear that notwithstanding the categorical language employed in *Crawford*, there remain situations in which a defendant may not successfully invoke the Confrontation Clause to exclude testimonial hearsay statements. In *Giles*, the court rejected a California hearsay exception that was a broader version of the exception than the one that was accepted at common law at the time of the Sixth's Amendment's ratification. *Giles* involved a murder case in which the California courts had ruled that statements of the murder victim had been properly admitted under a theory of forfeiture by wrongdoing. As applied in *Giles*, the theory had permitted the judge to determine, without a specific showing of the defendant's intent to keep the person from testifying, that the defendant had forfeited by his wrongdoing the right to confront the witness. The *Giles* Court's analysis of the Confrontation Clause issue turned on a determination of the contours of the common law forfeiture rule in existence at the time of the Constitution's drafting, and it made clear that the flaw in the application of the California forfeiture rule was that it permitted evidence that the common law rule in existence in 1791 would have excluded. The Court made two statements in that regard that are of significance to our analysis.

¶25 First, in answering the question of whether a doctrine of forfeiture by wrongdoing comports with the guarantees of the Confrontation Clause, the Supreme Court found that it does so only where there has been a showing of the defendant's specific intent to keep the victim from testifying. The basis for its holding was that there had not been, at the time of the Sixth Amendment's ratification,[26] an exception to the Confrontation Clause for forfeiture by wrongdoing doctrine that required no showing of intent to prevent the witness's appearance at trial. However, the court documented the numerous instances in the pre-founding common law where the right to confrontation of testimonial statements had indeed been deemed waived where there had been a showing of the defendant's intent to prevent the witness's appearance.

¶26 It considered the following fact "conclusive" to the question:

> [The fact of] the common law's uniform exclusion of unconfronted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in the innumerable cases in which the defendant was on

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[26] *Giles*, 554 U.S. 353, 358 (2008) ("We held in *Crawford* that 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.'") The *Crawford* analysis noted that the Sixth Amendment was ratified in 1791, 541 U.S. 36, 46, and stated, "As the English authorities [cited] above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations." *Crawford*, 541 U.S. at 54-55 (internal citations omitted).

> trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony.

Giles, 554 U.S. at 368 (emphasis added). Notably, the Court did not say that the Confrontation Clause barred all testimony admitted pursuant to a forfeiture by wrongdoing doctrine. It merely described what kind of forfeiture by wrongdoing doctrine would comport with constitutional guarantees. After all, the Court remanded the case to the California court with the observation that "the court is free to consider evidence of the defendant's intent on remand." *Id.* at 377. In other words, *Giles* stands for the proposition that the permissible contours of the doctrine of forfeiture by wrongdoing, and the point beyond which it becomes a violation of Confrontation Clause guarantees, are co-extensive with the contours of that exception at the time of the founding of our nation and specifically the Sixth Amendment's ratification.

¶27 The second statement the *Giles* Court made that is relevant to this case was its specific reference to the dying declaration exception:

> We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted. The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying.

Giles, 554 U.S. at 358.

¶28 Given the Court's recent acknowledgement of the dying declaration hearsay exception under the common law at the time of the

founding and specifically the ratification of the Sixth Amendment, as well as the assertion of treatise writers such as Wigmore that the exception was not merely in existence but was centuries old by that point,[27] the logic of *Giles* cannot support the conclusion that the hearsay exception afforded for dying declarations offends the constitution. We had concluded as much in 1892 when we considered a challenge based on Article 1, Section 7 of the Wisconsin Constitution, the provision that corresponds to the federal Confrontation Clause. In a case concerning a different facet of the hearsay exception, we explained the scope of the Wisconsin Constitution's confrontation clause:

> It is claimed that such ruling [permitting the introduction, over objection, of testimony from a previous trial when the witness had died] was an infringement of a right secured to the accused by that clause of the constitution of this state which declares that "in all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face." Section 7, art. 1. . . .
>
> [T]he right of the accused to meet the witnesses face to face was not granted, but secured, by the constitutional clauses mentioned. It is the right,

[27] See Wigmore on Evidence § 1430-1431, citing the leading case from 1761, *Wright v. Littler*, which articulated a notion that had even at that point, according to Wigmore, been long accepted. Wigmore states, "The custom of using dying declarations probably comes down as a tradition long before the evidence system arises in the 1500s . . . ." *Id.*

> therefore, as it existed at common law that was thus secured. That right was subject to certain exceptions. One of these exceptions was that the declarations of a murdered person, made when he was at the point of death, and every hope of this world gone, as to the time, place, and manner in which, and the person by whom, the fatal wound was given, are admissible in evidence, notwithstanding such deceased person was not sworn nor examined, much less cross-examined. This court has frequently held that the constitutional clause quoted is no bar to the admission in evidence of such declarations.

Jackson v. State, 81 Wis. 127, 131, 51 N.W. 89 (1892).

¶29 While acknowledging the deep historical roots of the dying declaration hearsay exception, Beauchamp argues that such statements were previously presumed to be reliable and considered to be necessary evidence but that those rationales are no longer tenable. Further, he argues that courts have ignored factors that would tend to show that such statements are likely to be especially unreliable and should therefore be subject to exclusion under *Crawford* just as other unconfronted testimonial statements are. He argues that there is no reason to presume that all dying declarations are reliable given possible motives to accuse falsely and the likelihood that a mortally wounded victim is too cognitively impaired by his injuries to give an accurate account of the crime. He discounts the

necessity of such evidence given the advances of forensic science. The State counters that Beauchamp had the opportunity at trial to impeach Somerville's statements pursuant to Wis. Stat. § 908.06 by introducing evidence of any fact that would have called into question the reliability of Somerville's statements on grounds of malice or mental status, and that he did not do so. As to the presumed reliability of dying declarations, the State points to legal precedent that affirms such a presumption on other than religious grounds.[28]

¶30 The hearsay exception has sometimes been justified on the grounds that a dying person was presumed under the common law to have, due to commonly held religious beliefs concerning the afterlife, such a fear of dying without the opportunity to expiate a lie that the reliability of any statement made in those circumstances was deemed equivalent to that of sworn testimony.[29] As one commentator noted, "The original premise of this assumption was that the fear of divine judgment for lying provided

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[28] *See*, e.g., *Commonwealth v. Douglas*, 337 A.2d 860, 864 (Pa. 1975) (upholding a dying-declaration exception where a defendant had claimed the exception was "without meaning in our modern society" and rejecting the notion that "the sophistication of mankind today is such that the knowledge of impending death no longer engenders apprehension of the unknown and fails to deter falsehood and is incapable of inspiring truth.") *See also* Fed. R. Evid. 804, Adv. Comm. Notes, Note to Subdivision (b), Exception (2) (1972) ("While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present.")

[29] *See*, e.g., The *Queen v. Osman*, 15 Cox. Crim. Cases 1, 3 (Eng. N. Wales Cir. 1881)("No person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips.") (cited in *Idaho v. Wright*, 497 U.S. 805, 820 (1990)).

religious assurance that the dying person would speak the truth."[30] As early as 1860, however, a treatise writer disputed the notion that the doctrine's underpinnings were religious:

> [A dying declaration] is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he is being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission. . . . [T]he rule is no doubt based upon the presumption that in the majority of cases there will be no other equally satisfactory proof of the same facts. This presumption and the consequent probability of the crime going unpunished is unquestionably the chief ground of this exception in the law of Evidence.

1 Greenleaf, Evidence § 156, editorial note (1860) (cited in Wigmore on Evidence, § 1431).

¶31 We do not disagree with Beauchamp's contention that we live in "a society more secular than the one in which the exception originated."[31]

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30 Polelle, *supra*, at 300.

31 Stanley A. Goldman, Not So "Firmly Rooted": Exceptions to the Confrontation Clause, 66 N.C. L. Rev. 1, 24 (1987). For example, whether the religious justification was the "original premise" or not, religiously-based reasoning is cited in cases in ways that can be jarring to a present-day reader. In a case challenging a trial court's admission of a murder victim's statement under the dying declaration hearsay exception, the Supreme Court of Illinois reversed, focusing on the profanity

Nor do we disagree with his contention that under certain circumstances, factors exist which may undermine the reliability of a particular dying declaration. However, those facts cannot justify eliminating this hearsay exception and creating a per se prohibition against dying declarations on the grounds that such statements are in almost all cases unconfronted and unconfrontable. We find persuasive the California Supreme Court's analysis of this question in *People v. Monterroso*:

> Thus, if, as *Crawford* teaches, the confrontation clause "is most naturally read as a reference to the right of

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employed in the victim's many statements concerning the accused (e.g., "What will you do if I die; will you hang the damned son of a bitch?", "[I will] meet [the defendant] in hell and have it out with him there," and "You are a hell of a set of doctors not to help a fellow with as little cuts as these." *Tracy v. Illinois,* 97 Ill. 101, 110-11 (Ill. 1880)) The court reasoned that the statement implicating the defendant had to be excluded from the jury on the following grounds:

> Assuming that the deceased was a believer in a future state of rewards and punishments, and such is the presumption where nothing appears to the contrary, the use of profane language immediately preceding the statement is hardly to be reconciled with the assumption that he was at the time of sound mind and impressed with a sense of almost immediate death. . . . It is hard to realize how any sane man who believes in his accountability to God can be indulging in profanity when at the same time he really believes that in a few short hours at most he will be called upon to appear before Him to answer for the deeds done in the body.

Id. at 105-06.

> confrontation at common law, admitting only those exceptions established at the time of the founding," it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment.

Monterroso, 101 P.3d 956, 972 (Cal. 2004).

¶32 We further agree with that court's observation that 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." *Id.* (internal citations omitted).

¶33 This case is an example of that possibility. Notwithstanding advances in forensic science, there was in this case, as in many cases, no fingerprint evidence, no DNA evidence, and no definitive ballistics evidence that would tie the defendant directly to the crime. In any event, of course, such evidence, as valuable as it may be, does not necessarily prove a defendant's guilt any more than its absence necessitates his acquittal.

¶34 We therefore, like every state court that has considered the dying declaration exception since *Crawford*, take a position consistent with the language of *Crawford* and *Giles* and decline to hold that the constitutional right to confront witnesses is violated by the admission of statements under the dying declaration hearsay exception. As the State notes, no published decision of any state court in the country has eliminated the dying declaration hearsay

exception based on the reading of selected language of *Crawford*. We concur with the courts[32] that have addressed this question after *Crawford*: a hearsay exception as long-standing, well-established and still necessary as this one, as indeed this case illustrates, cannot be lightly dismissed. Regardless of the religious justifications that have been articulated for dying declarations over the centuries, this hearsay exception is a crucial one, and it retains its vitality. We disagree with Beauchamp that scientific advances have changed criminal law such that there is always sufficient evidence without admitting the inculpatory words of a dying victim to fairly try a defendant accused of murder.

¶35 We therefore affirm the court of appeals' holding that the statements made by Somerville to the EMT and the officer were properly admitted and did not violate Beauchamp's confrontation rights under the state and federal constitutions.

II. PRIOR INCONSISTENT STATEMENTS

¶36 Beauchamp argues that the court erred when it allowed admission of the prior inconsistent

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[32] *Cobb v. State*, 16 So.3d 207, 212 (Fla. App. 2009); *People v. Gilmore*, 828 N.E.2d 293, 302 (Ill. Ct. App. 2005); *Wallace v. State*, 836 N.E.2d 985, 996 (Ind. Ct. App. 2005); *State v. Jones*, 197 P.3d 815, 822 (Kan. 2008); *Commonwealth v. Nesbitt*, 892 N.E.2d 299, 310-11 (Mass. 2008); *People v. Taylor*, 737 N.W.2d 790, 795 (Mich. App. 2007); *State v. Martin,* 695 N.W.2d 578, 585-86 (Minn. 2005); *State v. Minner*, 311 S.W.3d 313, 323, n.9 (Mo. App. 2010); *Harkins v. State*, 143 P.3d 706, 711 (Nev. 2006); *State v. Calhoun,* 657 S.E.2d 424, 427-28 (N.C. App. 2008); *State v. Lewis*, 235 S.W.3d 136, 147-48 (Tenn. 2007); *Gardner v. State*, 306 S.W.3d 274, 289 n.20 (Tex. Crim. App. 2009); *Satterwhite v. Commonwealth*, 695 S.E.2d 555, 568 (Va. App. 2010).

statements of the two women, Brown and Brookshire. As described above, each woman gave initial statements to the police that did not implicate Beauchamp, and then each woman gave a statement detailing that she had seen and heard Beauchamp commit the murder. Each later recanted the portions of the statements implicating Beauchamp. Beauchamp contends that the admission of the inculpatory statements as substantive evidence was error because they are insufficiently reliable and thus their admission constituted a violation of his constitutional right to due process.

¶37 The State argues that the statements were properly admitted under Wis. Stat. § 908.01(4)(a) because the women's statements at the preliminary hearing and at trial recanted the portions that implicated Beauchamp. The State argues that the declarants were available for cross-examination at trial, and therefore the admission of the prior statements satisfied the due process test set forth in *Robinson*. The State also notes that any appellate review of unobjected-to matters is governed by the analysis appropriate for claims of plain error or ineffective assistance of counsel. The State's brief also notes that "an appellate court may not conclude that counsel was ineffective without a *Machner* hearing," a proposition stated in *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998).

¶38 We review the unobjected-to admission of the prior inconsistent statements to determine whether Beauchamp is entitled to a new trial due to plain error by the circuit court. Though failure to object ordinarily constitutes waiver of an issue, a defendant is entitled to a new trial where unobjected-

to error is "plain error."[33] As this court stated in *State v. Mayo*, the determination of plain error is made in the context of the facts of a case:

> Under the doctrine of plain error, an appellate court may review error that was otherwise waived by a party's failure to object properly or preserve the error for review as a matter of right. This court has not articulated a bright-line rule for what constitutes plain error, acknowledging that there is no "hard and fast classification" relative to its application. *Virgil v. State*, 84 Wis.2d 166, 190-91, 267 N.W.2d 852 (1978). Rather, the existence of plain error will turn on the facts of the particular case. *Id.* Of particular

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33 Wis. Stat. § 901.03(1) and (4) state as follows:

> Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
> (a) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
> (b) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.Plain error. . . .
> Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

> importance is the quantum of evidence properly admitted and the seriousness of the error involved. *Id.* The burden is on the State to prove that the plain error is harmless beyond a reasonable doubt. *State v. King*, 205 Wis.2d 81, 93, 555 N.W.2d 189 (1996).

State v. Mayo, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115.

¶39 Additionally, we review whether Beauchamp was prejudiced by his counsel's failure to object to the admission of the statements and whether Beauchamp is, as a result, entitled to a remand for a *Machner* hearing to pursue a new trial via an ineffective assistance of counsel claim.[34] The standard set forth for reviewing a denial of a motion seeking a *Machner* hearing was set forth and applied in *State v. Roberson*, 2006 WI 80, ¶¶43-44. There, this court stated that a circuit court may deny a postconviction motion for a *Machner* hearing "if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations,

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[34] A *Machner* hearing is "a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Wis. App. 1979) and *State v. Curtis*, 218 Wis. 2d 550, 555, 582 N.W.2d 409 (1998) (stating that "the lack of a *Machner* hearing prevents our review of trial counsel's performance.") Though he did not directly ask this court to remand for a *Machner* hearing, Beauchamp did seek such a hearing in his post-conviction motion and in his brief to the court of appeals. Given the context in which Beauchamp's due process claim arises, we construe his arguments as seeking either a remand for a new trial because the circuit court's admission of the evidence was plain error, or a remand for the *Machner* hearing that is necessary for him to pursue the claimed error as a claim of ineffective assistance of counsel.

or if the record conclusively demonstrates that the defendant is not entitled to relief." *Id.*, citing *State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). In *Roberson*, this court concluded, "[b]ecause . . . the record sufficiently establishes that Roberson was not prejudiced by his counsel's actions . . . the circuit court did not err in denying Roberson a [*Machner*] hearing . . . ." *Id.*

¶40 The law governing the admissibility of such statements is well settled in Wisconsin, and, given the standard of review that governs here, that is dispositive in either analysis. As noted above, this court has stated that due process requirements are satisfied in such a situation so long as the declarant is "present and subject to cross-examination."[35] Both declarants in this situation were present and subject to cross-examination.

¶41 Beauchamp urges a different standard for determining whether due process considerations are satisfied by the admission of a prior inconsistent statement: a test in which the availability of the declarant for cross-examination is only one of five factors to consider. That test, as noted above, is taken from *Vogel v. Percy*, 691 F.2d 843, 846-47 (7th Cir. 1982). That court cited a Fifth Circuit case establishing the following "guidelines" for determining whether "substantive use of a prior inconsistent statement would comport with due process":

> (1) the declarant was available for cross-examination; (2) the statement was made shortly after the events related and was transcribed promptly; (3) the

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[35] *Robinson v. State,* 102 Wis. 2d 343, 349, 306 N.W.2d 668 (1981).

> declarant knowingly and voluntarily waived the right to remain silent; (4) the declarant admitted making the statement; and (5) there was some corroboration of the statement's reliability.

Id.

¶42 In *Vogel*, which concerned the prior inconsistent statement of a co-defendant against the defendant in a case arising from a Beloit armed robbery, the co-defendant had given a prior statement to police implicating the defendant, but in trial testimony gave a different version that minimized the defendant's role in the robbery. *Id.* at 844. The Seventh Circuit bolstered its analysis of the admissibility of the statements with consideration of the test originally set forth by the Fifth Circuit, to be used when a court is determining "whether the statutorily proper admission of [the co-defendant's] statement was nonetheless an unconstitutional violation of petitioner's due process rights." *Id.* at 846 n.9. After applying the five factors, the Seventh Circuit concluded that there was no due process violation.[36]

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[36] The State points out that even if the *Vogel* test were applied, the statements in this case would satisfy the test. We agree. We are hard pressed to see how the application of the test would change the outcome in this case. Each of the applicable factors would in the case of Brookshire's and Brown's statements favor admissibility. Both declarants were available for cross-examination. The statements were made shortly after the events related and were transcribed promptly. Brookshire was not taken into custody, but Brown, who was interrogated while in custody, knowingly and voluntarily waived the right to remain silent. There was corroboration of the statements' reliability because there were statements from other witnesses

¶43 We are unpersuaded that our simple, straightforward and workable requirement for the admission of prior inconsistent statements——that the declarant be present and available for cross-examination——needs any revision, and we decline the invitation to reformulate Wisconsin's standard on this question.

¶44 Even if we favored the test set forth in *Vogel*, we could not determine that the circuit court had erred such that Beauchamp was entitled to a new trial. Nor can we determine that counsel's failure to object prejudiced Beauchamp and that he is consequently entitled to a remand for a *Machner* hearing to pursue a new trial via an ineffective assistance of counsel claim. We note that the standard of review governing this issue in this case sets the bar high. We are satisfied that Beauchamp was not prejudiced by his counsel's failure to seek to bar the admission of the statements on the basis of a standard not employed in Wisconsin law. Counsel was not required to urge the circuit court to apply the law of another jurisdiction when Wisconsin had its own test. In light of this standard of review, we agree with the court of appeals that Beauchamp's

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that corresponded to the facts as presented in the women's prior statements, not least of which were the statements of the murder victim himself. Even the fourth factor, that the declarant admitted making the statement, favors admissibility in this case; although each claimed that the statements were coerced by the police, there were substantial parts of the prior statements that the women themselves did not disavow. The fact that the application of the *Vogel* test would not necessarily change the ultimate admissibility of the statements further undermines Beauchamp's claims of error by the circuit court and trial counsel in regard to their admission at trial.

claims regarding the prior inconsistent statements' admission are without merit. Where a legal standard has been set forth in another jurisdiction, counsel is free to make an argument setting forth the other jurisdiction's practice as persuasive authority, but it simply cannot be said here either that Beauchamp was prejudiced by counsel's failure to object or that the circuit court erred in permitting the admission of the evidence.

CONCLUSION

¶45 We hold that the admission of the dying declaration statement violates neither Beauchamp's Sixth Amendment right to confront witnesses nor his corresponding right under the Wisconsin Constitution. As the court of appeals noted, "the Sixth Amendment's guarantee of the confrontation right does not apply 'where an exception to the confrontation right was recognized at the time of the founding.'"[37] Beauchamp concedes that the dying declaration exception was an established hearsay exception at common law. The *Crawford* Court acknowledged the dying declaration hearsay exception and indicated that the exception might be an exception that survives a Confrontation Clause challenge.[38] Without a direct answer from *Crawford* on this point, we are given the task of resolving this question by applying the principles set forth in *Crawford* and a related case, *Giles*,[39] which bases its holding on an analysis of what specific hearsay

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[37] *Beauchamp*, 324 Wis. 2d 162, ¶11 (citing *Giles*, 128 S. Ct. at 2682).

[38] *Crawford*, 541 U.S. at 56 n.6.

[39] *Giles v. California*, 128 S.Ct. 2678 (2008).

exceptions were permitted at common law at the time of the ratification of the Sixth Amendment and were therefore incorporated into its confrontation right. Those principles compel the conclusion that allowing this hearsay exception comports with the protections of the Confrontation Clause. While the United States Supreme Court has yet to give its explicit blessing to the dying declaration exception, it has given us no reason to abandon a principle that is so deeply rooted in the common law. Nor does Beauchamp. The fairest way to resolve the tension between the State's interest in presenting a dying declaration and a defendant's concerns about its potential unreliability is not to prohibit such evidence, but to continue to freely permit, as the law does, the aggressive impeachment of a dying declaration on any grounds that may be relevant in a particular case. In other words, if there is evidence the declarant had a motive to accuse falsely, introduce it. If there is evidence that the declarant was cognitively impaired and incapable of perceiving events accurately, introduce it. Such facts may, in particular cases, justifiably undermine the reliability of a dying declaration. The reliability of evidence is an issue for the trier of fact, and the assertion that some dying declarations may be unreliable can not justify the per se exclusion of such potentially valuable evidence.

¶46 We are likewise unpersuaded by Beauchamp's argument that the failure to exclude the prior inconsistent statements of recanting witnesses here violated due process rights and, as he argued before the court of appeals, constituted either plain error by the circuit court or prejudicial error by counsel necessitating remand for a *Machner* hearing, when the grounds for the claim is that a test

different from Wisconsin's should have been applied and, if applied, would have barred the statements from evidence. The statements in question were admitted without objection and consistent with controlling Wisconsin law. Beauchamp was not prejudiced by his counsel's failure to urge the court to apply the law of another jurisdiction, nor can the circuit court be said to have committed plain error when it applied what was then the controlling law in Wisconsin. There was no violation of Beauchamp's right to due process here.

¶47 We therefore affirm the court of appeals.

By the Court.—Affirmed.

¶48 SHIRLEY S. ABRAHAMSON, C.J. *(concurring).* The majority opinion unnecessarily creates an exception to an accused's Sixth Amendment right to confrontation——an exception not yet recognized by the United States Supreme Court. The present case can be decided upon existing law. I therefore do not join the majority in reaching out to create new constitutional law.

¶49 I conclude that the victim's comments to the emergency medical technician were not testimonial. The technician's testimony relating to the victim's comments is therefore not barred by the Confrontation Clause and is admissible under the dying declaration exception to the hearsay rule.

¶50 I need not determine whether the victim's comments to the police officer were testimonial, a closer call. As I see it, if admitting the police officer's testimony was an error, it was harmless.

¶51 For the reasons set forth, I concur.

I

¶52 I first address the issue of testimonial and non-testimonial statements raised in *Crawford v. Washington*, 541 U.S. 36 (2004).

¶53 The majority opinion suggests that the "fairest way" to resolve the tension between the State's interests in presenting unconfronted testimonial dying declarations and a defendant's concern about unreliability is to "continue to freely permit . . . the aggressive impeachment of a dying declaration . . . ." Majority op., ¶5. Yet *Crawford v. Washington* is rather explicit in stating that for testimonial evidence the Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61 (2004).

¶54 The Court in *Crawford* elucidated two inferences from its historical review of the Sixth Amendment. First, not all hearsay implicates the core concerns of the Sixth Amendment's confrontation clause. Instead, the confrontation clause focuses on "testimonial statements." Second, "the 'right . . . to be confronted with the witnesses against him,' 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."[40]

¶55 *Crawford* held that for testimonial evidence to be admissible absent confrontation, the Sixth Amendment "demands what the common law

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[40] *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (internal citations omitted).

required: unavailability and a prior opportunity for cross-examination."[41] I acknowledge that the Court left open the possibility that there may be historical exceptions to this discrete and clearly defined right.[42] However, Justice Scalia, writing for the majority of the Court in *Crawford*, explicitly refrained from determining whether historical exceptions, and specifically dying declarations, "must be accepted."[43] Justice Scalia's language is significantly less than a resounding endorsement, nor is it a strong portent of the Supreme Court establishing dying declarations as a historical exception to the *Crawford* rule.

¶56 The Supreme Court has not subsequently determined whether a historical exception to the right of confrontation for testimonial dying declarations "must be accepted." Instead the focus of the Supreme Court's recent Sixth Amendment jurisprudence has been on developing the law surrounding the first inference of *Crawford*,

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41 *Id.* at 68.

42 *Id.* at 56 n.6. Similarly, the Supreme Court acknowledged this possibility in *Giles v. California*, 554 U.S. 353, 358 (2008) ("We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted. The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying" (internal citations omitted).).

43 *Crawford*, 541 U.S. at 56 n.6 ("Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. 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*" (internal citations omitted).).

differentiating between testimonial and non-testimonial statements.

II

¶57 I now turn to *Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143 (2011), which was decided after oral argument in the instant case. Both the State and the defendant submitted letter briefs to the court discussing the effect of *Bryant* on the present case.

¶58 In *Bryant*, to the dismay of Justice Scalia (the author of *Crawford*),[44] the Supreme Court clarified the distinction between testimonial and non-testimonial statements made to emergency personnel in a fact situation similar to the case before us. Relying upon the Supreme Court's analysis in *Bryant*, I conclude that the challenged statements made to Coleman, the emergency medical technician in the present case, identifying and describing the shooter, were non-testimonial statements.

¶59 Because I conclude that the victim's statements to Coleman were not testimonial under *Bryant*, I do not join the majority opinion in creating an exception to the Confrontation Clause for testimonial dying declarations. Under the facts of the instant case, it is unnecessary to create a

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[44] *See Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143, 1168, 1170 (2011) (Scalia, J., dissenting) ("Instead of clarifying the law, the Court makes itself the obfuscator of last resort"; "The only virtue of the Court's approach (if it can be misnamed a virtue) is that it leaves judges free to reach the 'fairest' result under the totality of circumstances"; "Unfortunately, under this malleable approach 'the guarantee of confrontation is no guarantee at all.'").

historical exception for testimonial dying declarations, as the majority does today. Under the Sixth Amendment jurisprudence, the statements of the victim to Coleman in the present case are admissible because they are non-testimonial statements and are admissible under Wisconsin's hearsay rules.[45]

¶60 In *Bryant*, the Supreme Court determined whether statements of a mortally wounded victim made to responding police officers were admissible hearsay statements at trial.[46] The facts of *Bryant* are similar to those in the present case.

¶61 In *Bryant*, police officers responded to an emergency: a man had been shot and was lying on the ground, bleeding, next to his car in a gas station parking lot. A number of police officers arrived on the scene, and asked the victim "what had happened, who had shot him, and where the shooting had occurred."[47] The victim responded with truncated answers, indicating "Rick" shot him, and that the shooting had occurred at the back door of Bryant's ("Rick's") house. Emergency medical services arrived within 5 to 10 minutes of the police officers' arrival. The victim's conversation with the police officers ended as he was treated and transported to the hospital, where he died within the hour.

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45 The admissibility of non-testimonial hearsay statements is governed by the rules of evidence.
In the present case, the circuit court concluded that the challenged statements were testimonial under *Crawford* and fell within the dying declaration exception to *Crawford* and the hearsay rule, Wis. Stat. § 908.045(3).

46 *Bryant*, 131 S. Ct. at 1150.

47 *Id.* Various officers arriving on the scene asked the victim variants on these three basic questions.

¶62 Based on the information police obtained from the victim, they left the gas station, called for backup, and traveled to Bryant's house. When they arrived at the house, Bryant was not there; however, the officers found blood, a bullet on the back porch, a hole in the back door, and the victim's wallet and identification outside the house. Bryant was eventually arrested nearly a year later.

¶63 At trial the police officers who responded to the scene testified about the statements the victim made regarding "what had happened, who had shot him, and where the shooting had occurred."[48] The Supreme Court determined that the testimony was admissible and did not violate the defendant's right to confrontation under the Sixth Amendment because the statements were non-testimonial. The Supreme Court determined that the "primary purpose of" the interrogation was to enable the police officers to meet an ongoing emergency. The primary purpose is illustrated, according to the Supreme Court, by an objective analysis of the informality of the encounter and the questions and answers of the parties. This primary purpose led the Court to conclude that the statements were non-testimonial.

¶64 The Supreme Court concluded that the analysis in determining whether a hearsay statement is testimonial or non-testimonial is an objective analysis of the "primary purpose" of the questioning and the answering.[49] This analysis "requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation

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[48] *Id.*

[49] *Id.* at 1160-62.

will be most accurately ascertained by looking to the contents of both the questions and the answers. . . . The combined approach also ameliorates problems that could arise from looking solely to one participant."[50] To determine the "primary purpose" of an encounter, a court must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties."[51]

¶65 When an encounter is between an individual and the police, the existence of an "ongoing emergency" is among the most important circumstances informing the primary purpose of the encounter.[52] The existence, the scope, and the duration of an emergency is dependent upon the type and scope of the danger posed "to the victim, the police, and the public."[53]

¶66 The existence of an "ongoing emergency" is, however, not the only factor that informs the determination of the primary purpose of an encounter.

¶67 The severity of the victim's medical condition also plays an objective role in evaluating the primary purpose, as it "sheds light on the ability of the victim to have any purpose at all in responding to police questions . . . ."[54]

¶68 Another factor is the formality (or lack thereof) of the encounter. While informality does not necessarily indicate a lack of testimonial purpose, it

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[50] *Id.* at 1160-61.
[51] *Id.* at 1156.
[52] *Id.* at 1157.
[53] *Id.* at 1162.
[54] *Id.* at 1159.

is an important factor in determining the primary purpose of the encounter.[55]

¶69 The Supreme Court examined the encounter presented by the facts in *Bryant* objectively, analyzing the circumstances of the encounter and the statements and actions of the declarant and the interrogator, to determine the primary purpose and to determine whether the victim's statements were testimonial or non-testimonial.[56]

¶70 The *Bryant* Court determined that the police officers were responding to an ongoing emergency. The police did not know whether the threat was limited to the victim, whether the threat to the victim was over, or whether a threat to the public existed because a gun was used. "At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]."[57]

¶71 The Supreme Court then went on to consider how the victim's condition affected the analysis of the "primary purpose" of the statements that he made. Based upon the victim's condition, lying on the ground of a gas station bleeding from a mortal gunshot wound, and upon the victim's short, truncated responses due in part to difficulty breathing, the Supreme Court determined that a person in the victim's condition cannot be said to have a "primary purpose" of establishing or proving

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[55] *Id.* at 1160.
[56] *Id.* at 1160-62.
[57] *Id.* at 1164.

past events potentially relevant to a later prosecution.[58]

¶72 Similarly, the Supreme Court evaluated the statements and actions of the police officers. The officers were responding to an emergency call. "[T]hey did not know why, where, or when the shooting had occurred."[59] The questions they asked were questions necessary to assess the situation, the threat to the victim and themselves, and the potential for an ongoing threat to the public. The questions the officers asked were initial inquiries of the type that often produces non-testimonial statements.[60]

¶73 Lastly, the Supreme Court examined the informality of the encounter in determining the "primary purpose" of the statements. The Court evaluated the statements in the case within a spectrum of informality bounded by a harried 911 call and a formal station-house interview.

¶74 The statements in *Bryant* fell nearer to the harried 911 call in *Davis v. Washington*[61] than to the formal station-house interview in *Crawford*.[62] In *Bryant*, the Supreme Court determined that the officers and the victim were in a fluid emergency situation; there was little to no structure in the questions asked, and the victim's responses were truncated and punctuated with his questions regarding when emergency medical aid would arrive. Ultimately the *Bryant* Court concluded, "the circumstances lacked any formality that would have

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58 *Id.* at 1165.
59 *Id.*
60 *Id.* at 1166.
61 *Davis v. Washington*, 547 U.S. 813 (2004).
62 *Crawford v. Washington*, 541 U.S. 36 (2004).

alerted [the victim] to or focused him on the possible future prosecutorial use of his statements."[63]

¶75 Based on an objective evaluation of the circumstances in which the encounter occurred and the statements and actions of both of the parties, the Supreme Court concluded that the "primary purpose" of the victim's statements in *Bryant* was to enable police to respond to an ongoing emergency. Accordingly, the Supreme Court concluded that the statements in *Bryant* were non-testimonial and were properly admitted at trial.

¶76 *Bryant* is informative for the present case. In the present case, emergency medical services and the police responded to a call reporting a shooting. Upon arriving on the scene, they found a man who had been shot numerous times, lying next to his car and bleeding.

¶77 Marvin Coleman, a heavy equipment operator and trained emergency medical technician with the Milwaukee Fire Department, responded to the scene. Coleman testified that upon arriving at the scene he recognized the car near where the victim lay as belonging to an acquaintance. When he approached the victim he recognized him as that acquaintance. According to Coleman's testimony, the victim recognized him and implored, "Please don't let me die, please don't let me down." Coleman testified that in response he stated, "We're not going to let you go, we'll do our best," and that he asked the victim, "Who did this?"

¶78 Coleman testified that the following brief exchange occurred in response to that question. The victim responded, "Marvin." Marvin Coleman

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[63] *Bryant*, 131 S. Ct. at 1166.

responded, "Who, me?" and the victim responded, "No, Big Headed Marvin."

¶79 Coleman then asked the victim what had happened. Coleman testified that the victim responded he "was in the house arguing with some woman and he felt like he was lured outside and that's where [the shooting] happened."

¶80 Applying the analysis used by the Supreme Court in *Michigan v. Bryant*, I conclude that the victim's statements made to Coleman were non-testimonial.

¶81 The circumstances in which the encounter between the victim and Coleman took place are substantially similar to the circumstances in *Bryant*. The victim was lying next to his car, bleeding from a mortal gunshot wound. The distinctions in the circumstances of this case are that Coleman is an EMT, not a police officer, and Coleman was acquainted with the victim.

¶82 These distinctions further support the conclusion that under an objective analysis, the primary purpose of the statements to Coleman was not to establish or prove past events potentially relevant to a later prosecution.

¶83 That Coleman was an emergency medical technician, not a police officer, and was acquainted with the victim objectively increases the informality of the situation.

¶84 Emergency medical technicians play a distinct role from police officers in responding to an ongoing emergency. However, these emergency service people (similar to police officers upon arriving at the scene of an emergency) must ensure that the scene is secure for the victim, for themselves, and for the public. While emergency medical service people may not play the primary role in ensuring public

safety in an ongoing emergency in which the situation is fluid and somewhat confused, emergency responders play a role in ensuring the safety of all those involved.

¶85 The statements and actions of the declarant and interrogator in this encounter are also substantially similar to the statements evaluated by the Supreme Court in *Bryant*. Coleman asked, "Who did this?" and "What happened?" The answers were "Marvin," "Big Headed Marvin," and that he was arguing with some woman, was lured outside, and that's when he was shot.

¶86 Coleman's questions were similar to the initial inquires in *Bryant*, and under an objective evaluation of the "primary purpose" of the statements made by the victim, similarly result in a conclusion that they are non-testimonial statements.

¶87 I conclude that the admission of Coleman's testimony in the present case did not violate the Sixth Amendment Confrontation Clause; the victim's statements were non-testimonial and fall within the hearsay exception.

¶88 I turn now to the testimony of police officer Wayne Young. Officer Young testified that he and his partner responded to the scene of the shooting. When they arrived, Officer Young's primary responsibility was to get observers out of the street, clearing the area around the emergency. At the scene Officer Young did not approach the victim while he was lying on the ground.

¶89 Officer Young was instructed to ride along with the victim to the hospital with the emergency medical unit. Officer Young accompanied the victim into the hospital emergency department.

¶90 Officer Young testified that while he was standing by in the emergency department, a

doctor notified him that if he had any questions for the victim he should ask them now because the doctor's opinion was that the victim was not going to survive the gunshot injuries.

¶91 Officer Young testified that he spoke with the victim, asking him if he had "any information about who may have shot him." Officer Young testified that the victim responded "Marvin" and gave a brief description of "dark complected, bald headed guy with a big forehead."

¶92 Officer Young testified that the victim then lost consciousness and was taken to surgery, where he ultimately succumbed to the gunshot injuries.

¶93 The statements and actions of Officer Young and the victim did not go beyond the initial inquiry of who may have shot the victim.

¶94 The informalities of the situation suggest that the primary purpose of the interrogator was not focused on possible future prosecutorial use of the statements. The questions and answers were given in a harried, informal way. There was no structure to the questions asked. Officer Young asked an open-ended initial inquiry question and the statements in response gave little detail or information. These informalities suggest a purpose of meeting the ongoing emergency, that is, a shooter at large, potentially not satisfied that the victim was not yet dead, and potentially a danger to the public or hospital staff. The informalities of the encounter suggest the primary purpose was not prosecutorial.

¶95 An emergency response to a potentially mortal shooting is a fluid environment of competing priorities. Objectively, prosecution of the killer may also have been an ancillary factor to Officer Young's questioning. The encounter between the victim and

Officer Young occurred at the hospital and not at the scene of the shooting, after significant time had lapsed. Officer Young asked questions knowing that the victim was likely to die. An objective analysis might lead one to conclude that the primary purpose of the questions and answers in the hospital just prior to the victim's undergoing surgery was not to meet an "ongoing emergency" and instead was testimonial, focused on prosecution.

¶96 The distinctions between the circumstances surrounding the encounter between Officer Young and the victim in this case and the encounter analyzed in *Bryant* are that Officer Young's encounter with the victim did not occur upon arrival at the scene of an ongoing emergency, but rather after significant time had passed, and that the encounter occurred within a hospital emergency department removed from the crime scene.

¶97 In *Bryant*, the Supreme Court did not have to determine when the "ongoing emergency" ended; statements made within the first few minutes of the arrival of emergency services, near the location of the shooting, and well before the scene of the shooting was secure fell well within the bounds of an "ongoing emergency."[64] In the present case, statements made to Coleman, the EMT, upon his arrival at the scene of the shooting similarly fall within the bounds of an "ongoing emergency." Statements made to Officer Young are more difficult to categorize.

¶98 I refrain, however, from determining whether the victim's statements to Officer Young were testimonial or non-testimonial, a closer call. And I refrain from determining whether testimonial

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[64] *Bryant*, 131 S. Ct. at 1165.

dying declarations are a historical exception to the guarantee of the Confrontation Clause. These determinations are not necessary to decide the present case. Officer Young's testimony was repetitive of Coleman's testimony. Even if the victim's statements to Officer Young were testimonial hearsay and even if the dying declaration exception is not recognized, the admission of Young's testimony was harmless error.

¶99 For these reasons, I do not join the majority in creating an exception to the Sixth Amendment guarantee of confrontation, an exception not yet recognized by the United States Supreme Court, and I concur.

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You are hereby notified that the Court has entered the following order:

2009AP806-CR State of Wisconsin v. Marvin L. Beauchamp (L.C. #2006CF3184)

Before Curley, P.J., Fine and Kessler, JJ.

Marvin L. Beauchamp moves for reconsideration of our decision of February 2, 2010. After reviewing the motion, we conclude that reconsideration is not warranted.

IT IS ORDERED that the motion for reconsideration is denied.

David R. Schanker
Clerk of Court of Appeals

COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP806-CR Cir. Ct. No. 2006CF3184

STATE OF WISCONSIN : IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

MARVIN L. BEAUCHAMP,
DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Marvin L. Beauchamp appeals the judgment entered after a jury found him guilty of first-degree intentional homicide while armed. *See* WIS. STAT. §§ 940.01(1)(a) & 939.63. He also appeals the trial court's order denying his

motion for postconviction relief. He claims that the trial court erroneously admitted as dying declarations the victim's assertions that Beauchamp shot him, and that his due-process rights were violated because the trial court received as substantive evidence prior inconsistent statements by two of the State's witnesses. We affirm and discuss these contentions in turn.

I. Dying Declarations.

¶2 Beauchamp was convicted of shooting Bryon T. Somerville to death. According to the testimony of the assistant medical examiner who performed the autopsy, Somerville "had five gunshot wounds." Two persons testified that after he was shot, Somerville told them that Beauchamp did it—Marvin Coleman, an emergency medical technician with the Milwaukee Fire Department, and Wayne Young, a Milwaukee police officer. The trial court held that Somerville's assertions that Beauchamp shot him were admissible under WIS. STAT. RULE 908.045(3) as Somerville's dying declarations, and were not barred by Beauchamp's right to confront witnesses testifying against him.

A. *The Testimony.*

¶3 Coleman, who had known Somerville before he was sent to the shooting scene as part of his duties with the fire department, told the trial court that he went over to where Somerville was lying on the street and asked him who had shot him. Somerville replied "Big Head Marvin." No one on this appeal disputes that this was a reference to Beauchamp. Somerville also beseeched Coleman

"three or four times," "Marv, please don't let me die." Coleman responded by telling Somerville "we're going to do the best we can. We are not going to let you die." Based on his sixteen-year career and having responded to between thirty and forty shootings, Coleman said he believed that Somerville's condition was "grave" when he saw him on the ground.

¶4 Coleman drove Somerville in an ambulance to Froedtert hospital, where he died. On the way to the hospital, two other paramedics worked on Somerville trying to save his life. Coleman told the trial court that Somerville was upset when they passed St. Joseph's hospital on the way to Froedtert: "He wanted to -- he was just saying why are we not going to St. Joe's." Young was also in the back of the ambulance with Somerville while the paramedics worked on him.

¶5 Young testified that Somerville was in pain during the ambulance ride and said that "he couldn't breathe." He also testified that Somerville kept repeating "that a guy named Marvin shot him," and that these assertions were not in response to any questions. Young explained that although he wanted to ask Somerville questions in the ambulance on the ride to the hospital, "the ambulance person was trying to work on him while he was saying all this" and that Young "didn't get a chance to talk to [Somerville] until we got to the hospital itself."

¶6 Once they got to the hospital, Young asked Somerville "a couple of questions" and Somerville, still "complaining of pain," again indicated that the person, whom everyone on this appeal agrees is Beauchamp, shot him. Coleman also related what happened at the hospital. He testified that while they were in Somerville's hospital

room, one of the doctors who were trying to save Somerville's life got the results of an analysis of Somerville's blood and said, so that, according to Coleman, Somerville could probably hear, "this is not good, this is not good," telling Coleman that "[Somerville's] blood is poisoned." Coleman testified that the doctor then said to Young, "if you have any questions to ask him, you need to ask him now because he's not going to make it." At some point, although the Record is not clear when, Young asked Somerville at the hospital who had shot him and Somerville again said that it was "a guy named Marvin." The medical personnel intubated Somerville to help him breathe, and Somerville then "lost consciousness." Although he was revived, he did not survive surgery. At no point, either in the ambulance or at the hospital, did Somerville ever say that he believed that he was going to die as a result of his wounds, and no one told him that, other than, perhaps, his ability to hear what the doctor said when he saw the results of Somerville's blood analysis.

¶7 As we have seen, the trial court ruled that Somerville's assertions about who shot him were admissible as dying declarations and were not barred by Beauchamp's right to confrontation. Our standard of review is mixed. Whether an assertion qualifies as a dying declaration, that is, whether it is admissible under the evidentiary rule, is within the trial court's discretion; whether dying declarations pass constitutional muster is a matter of law that we assess *de novo*. *See State v. Jensen*, 2007 WI 26, ¶12, 299 Wis. 2d 267, 277, 727 N.W.2d 518, 523; *State v. Manuel*, 2005 WI 75, ¶3, 281 Wis. 2d 554, 562, 697 N.W.2d 811, 815 (whether an assertion is within an exception to the rule against hearsay is a

matter within the trial court's discretion) ("recent perception"). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *State v. Sullivan*, 216 Wis. 2d 768, 780–781, 576 N.W.2d 30, 36 (1998).

B. *The Rule.*

¶8 Ordinarily, of course, out-of-court assertions may not be used for their truth at a trial by virtue of the rule against hearsay. WIS. STAT. RULES 908.01 & 908.02. One exception to the rule against the admission of hearsay is the dying declaration, codified in WISCONSIN STAT. RULE 908.045(3): "A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death." Under established law, a person whose assertion is sought to be used at trial need not specifically say that death is imminent. Rather, "belief of impending death may be inferred from the fact of death and circumstances such as the nature of the wound." Judicial Council Committee Note, 1974, WIS. STAT. RULE 908.045(3), 59 Wis. 2d R1, R317 (1973); *see also Oehler v. State*, 202 Wis. 530, 534, 232 N.W. 866, 868 (1930), cited by the note, and *Richards v. State*, 82 Wis. 172, 179, 51 N.W. 652, 653 (1892) (knowledge of impending death permissibly inferred when declarant *in extremis* and was aware of that) (apparently no specific statement acknowledging impending death). The law elsewhere is the same. Belief of impending death "may be made

to appear from what the injured person said; *or* from the nature and extent of the wounds inflicted being obviously such that he must have felt or known that he could not survive." *Mattox v. United States*, 146 U.S. 140, 151 (1892) (emphasis added); *United States v. Mobley*, 421 F.2d 345, 347–348 (5th Cir. 1970) (declarant need not say that he or she is aware of impending death when circumstances permit that inference) (following *Mattox*); *United States v. Peppers*, 302 F.3d 120, 137–138 (3rd Cir. 2002) (following *Mattox*).

¶9 As noted, the determination of whether evidence should be admitted under a particular rule is vested in the trial court's discretion. In light of the circumstances surrounding Somerville's injuries, his frantic concern that he not die as expressed to Coleman, his being upset when the ambulance passed one hospital on its way to another, and his significant pain and breathing difficulties, coupled with his spontaneous repeated assertions as to who shot him, the trial court did not erroneously exercise its discretion in ruling that Somerville's fingerings of Beauchamp as his shooter were dying declarations under WIS. STAT. RULE 908.045(3) irrespective of whether Somerville implicated Beauchamp before or after he may have heard the physician's assessment of the blood analysis. Indeed, Beauchamp's trial lawyer conceded that it was "clear that he [Somerville] could have believed he was going to die." We now turn to whether receipt of those dying declarations violated Beauchamp's right to confrontation.

C. *Confrontation.*

¶10 "The Confrontation Clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them." *Jensen*, 2007 WI 26, ¶13, 299 Wis. 2d at 277, 727 N.W.2d at 523 (internal quotes and quoted sources omitted). "We generally apply United States Supreme Court precedents when interpreting these clauses." *Id.*, 2007 WI 26, ¶13, 299 Wis. 2d at 278, 727 N.W.2d at 523–524. The confrontation right applies to statements that are "testimonial," *Davis v. Washington*, 547 U.S. 813, 821 (2006), and we assume, as do the parties, that Somerville's dying declarations are "testimonial" within the ambit of a defendant's right of confrontation.

¶11 Not every testimonial out-of-court assertion, however, is barred by the right to confrontation. Thus, the Sixth Amendment's guarantee of the confrontation right does not apply "where an exception to the confrontation right was recognized at the time of the founding." *Giles v. California*, 554 U.S. ___, ___, 128 S. Ct. 2678, 2682 (2008). Accordingly, if dying declarations were recognized as an exception to the confrontation right at the founding of our Republic, Beauchamp's constitutional right to confrontation was not trampled by the admission of Somerville's dying declarations implicating him as the shooter. *See ibid.* Dying declarations were so recognized:

> We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted. *See* [*Crawford v. Washington*, 541 U.S. 36] at 56, n. 6, 62 [(2004)]. The first of these were

> declarations made by a speaker who was both on the brink of death and aware that he was dying. *See*, *e.g.*, *King v. Woodcock,* 1 Leach 500, 501–504, 168 Eng. Rep. 352, 353-354 (1789); *State v. Moody*, 3 N.C. 31 (Super. L. & Eq. 1798); United *States v. Veitch*, 28 F. Cas. 367, 367–368 (No. 16,614) (CC DC 1803); *King v. Commonwealth*, 4 Va. 78, 80–81 (Gen. Ct. 1817).

Giles, 554 U.S. at ___, 128 S. Ct. at 2682–2683. *Crawford*, of course, was the watershed decision rejecting the balancing approach of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), in favor of a flat-out application of the Sixth Amendment's guarantee of the confrontation right for testimonial assertions. *Crawford*, 541 U.S. at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

¶12 Although the *Giles* analysis we have quoted could be viewed as *dictum*, it was a deliberate recognition of the Sixth Amendment's reach, given *Giles*'s further analysis of the pre-founding cases it cited, *see id.*, 554 U.S. at ___, 128 S. Ct. at 2684–2686, and because *Crawford* had previously left the matter open, *Crawford*, 541 U.S. at 56 n.6. Thus, we view *Giles*'s pronouncement as to whether the confrontation clause governs dying declarations as binding. *See State v. Holt*, 128 Wis. 2d 110, 123, 382 N.W.2d 679, 686 (Ct. App. 1985) ("When an appellate court intentionally takes up, discusses and decides a question germane to a controversy, such a decision is

not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision."). Indeed, we are unaware of any post-*Crawford* court rejecting what *Giles* recognized as the dying-declaration exception to the confrontation clause. *See, e.g.*, *State v. Lewis*, 235 S.W.3d 136, 148 (Tenn. 2007) ("Since *Crawford*, we found no jurisdiction that has excluded a testimonial dying declaration."). Receipt into evidence of Somerville's dying declarations did not violate Beauchamp's right to confrontation.[1]

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[1] The rationale for receipt of the dying declaration as an exception to the rule against hearsay is that it is assumed that no person will leave life with a lie on the lips. *See Idaho v. Wright*, 497 U.S. 805, 820 (1990). Beauchamp argues, however, that whatever validity that assumption might have had in the era when the dying-declaration rule was first adopted, it has lost much of its vitality today. Thus, Beauchamp contends that the "rationale ignores other motivations that might be just as powerful, such as bias or the desire for revenge, and the organic changes attendant to traumatic injuries that can affect the brain and the victim's abilities to accurately perceive, recall, and recount what has occurred." This contention, however, ignores two things. First, the dying-declaration exception to the rule against hearsay is specifically recognized by WIS. STAT. RULE 908.045(3), and, as we explain in the main body of this opinion, the dying declaration is an exception to the right of confrontation. Second, a defendant who contends that the infirmities to which Beauchamp refers affect a dying-declaration's credibility may have the factfinder make that assessment by virtue of WIS. STAT. RULE 908.06, which provides:

> When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the

II. Prior inconsistent statements.

¶13 Beauchamp claims that he was denied due process by the receipt, as substantive evidence, of statements given to the police by two persons who were present at Somerville's murder that were inconsistent with their trial testimony, even though they were cross-examined by Beauchamp at the trial. Under WIS. STAT. RULE 908.01(4)(a)1, a statement by a witness that is inconsistent with that witness's trial testimony is not hearsay so long as the witness "is subject to cross-examination concerning the statement."[2] All of the statements were given to the police either on the day Somerville was shot or on the next day. Both witnesses acknowledged not only that they told the police what was received into

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> declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Further, WIS. STAT. RULE 904.03 permits the trial court to exclude a dying declaration under the balancing permitted by that rule: "Although relevant, 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[2] As material, WIS. STAT. RULE 908.01(4) provides: "A statement is not hearsay if: (a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: 1. Inconsistent with the declarant's testimony." (Formatting altered.)

evidence as their prior inconsistent statements but also affirmed that they had signed written reifications of those statements. The witnesses' trial testimony tended to exculpate Beauchamp, while some of what they told the police tended to inculpate him as the person who shot Somerville. The jury, of course, was able to assess the witnesses' trial testimony and what they had previously told the police, and presumptively did so in reaching its verdict.

¶14 Apparently recognizing both that prior inconsistent statements of witnesses who are subject to cross-examination are admissible as non-hearsay under WIS. STAT. RULE 908.01(4)(a)1 and that receipt of such statements does not violate a criminal defendant's right to confrontation, *see State v. Nelis*, 2007 WI 58, ¶¶41–46, 300 Wis. 2d 415, 431–434, 733 N.W.2d 619, 627–628 (post- *Crawford*); *State v. Rockette*, 2006 WI App 103, ¶¶18–27, 294 Wis. 2d 611, 623–628, 718 N.W.2d 269, 275–277 (post-*Crawford*), Beauchamp argues that his due-process rights were violated under the guidelines adopted by *Vogel v. Percy*, 691 F.2d 843, 846–848 (7th Cir. 1982). The *Vogel* guidelines require the consideration of the following circumstances in assessing whether the receipt of a witness's prior inconsistent statements as substantive evidence violates the due-process rights of a defendant in a criminal case:

> (1) the declarant was available for cross-examination; (2) the statement was made shortly after the events related and was transcribed promptly; (3) the declarant knowingly and voluntarily waived the right to remain silent; (4) the

> declarant admitted making the statement; and (5) there was some corroboration of the statement's reliability.

Id., 691 F.2d at 846–847. Beauchamp's trial lawyer, however, never objected to the receipt of the witnesses' prior inconsistent statements on *Vogel* grounds, and, accordingly, Beauchamp's contention that his due-process rights were violated are assessed by us in the context of whether Beauchamp was denied effective assistance of trial counsel. *See Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension); *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42 (in the absence of an objection we address issues under the ineffective-assistance-of-counsel rubric); *State v. Ellington*, 2005 WI App 243, ¶14, 288 Wis. 2d 264, 278, 707 N.W.2d 907, 913–914 (confrontation).

¶15 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." *Id.*, 466 U.S. at 690. Further, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam); *see also id.*, 540 U.S. at 11 (lawyer need not be a "Clarence Darrow" to survive an ineffectiveness contention).

¶16 To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Strickland*, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the *Strickland* analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694. We need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one. *Id.*, 466 U.S. at 697. Beauchamp has not shown that his trial lawyer gave him deficient representation by not asserting the federal *Vogel* decision as a potential bar to the receipt into evidence of the witnesses' prior inconsistent statements.

¶17 On federal questions, Wisconsin courts are bound only by the decisions of the United States Supreme Court. *State v. Moss*, 2003 WI App 239, ¶20, 267 Wis. 2d 772, 781, 672 N.W.2d 125, 130; *McKnight v. General Motors Corp.*, 157 Wis. 2d 250, 257, 458 N.W.2d 841, 844 (Ct. App. 1990) (decisions of the Seventh Circuit are not precedent in Wisconsin state courts). We have found no published Wisconsin appellate decision that even cites *Vogel*, no less adopts its five guideline factors. Thus, the trial court was not bound by the *Vogel* guidelines, and, of course, neither are we.[3]

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[3] *People v. Govea*, 701 N.E.2d 76, 83 (Ill. App. Ct. 1998), also declined to apply the guidelines adopted by *Vogel v. Percy*, 691 F.2d 843, 846–848 (7th Cir. 1982), because those guidelines conflicted with Illinois law that allowed, *inter alia*, the admission of a witness's prior inconsistent statements if:

¶18 Under Wisconsin law as it existed during Beauchamp's trial in October of 2006, and as it exists today, the prior inconsistent statements of a witness in a criminal case were and are admissible so long as the witness was subject to cross-examination on the matter. *See Rockette*, 2006 WI App 103, ¶¶18–27, 294 Wis. 2d at 623–628, 718 N.W.2d at 275–277 (decided May 31, 2006); *Nelis*, 2007 WI 58, ¶¶41–46, 300 Wis. 2d at 431–434, 733 N.W.2d at 627–628. Beauchamp's trial lawyer had no *Strickland* responsibility to either seek a change in Wisconsin law or lay a fact-predicate to try to precipitate that change. *See State v. Maloney*, 2005 WI 74, ¶¶28–30, 281 Wis. 2d 595, 609–611, 698 N.W.2d 583, 591; *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621, 628 (Ct. App. 1994) ("We think ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue."). Beauchamp's trial lawyer did not give him ineffective representation during his trial by not seeking to have the trial court adopt the *Vogel* guidelines.

¶19 Beauchamp also contends that the trial court's failure to consider and apply the *Vogel* guidelines was "plain error." Invocation of the "plain error" doctrine to permit the review of unobjected-to matters is, however, reserved for those rare situations where the error is "'obvious and substantial.'" *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 154, 754 N.W.2d 77, 85 (quoted

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(1) "the witness is subject to cross-examination concerning the statement"; and (2) "narrates, describes, or explains an event or condition of which the witness had personal knowledge, and (A) the statement is proved to have been written or signed by the witness." *See* 725 ILCS 5/115-10.1.

source omitted). Given that no published Wisconsin appellate decision has even cited the *Vogel* guidelines and that, as seen in footnote 3, an Illinois appellate court did not adopt those guidelines when to do so would modify Illinois law whose protections for the defendant essentially mirrored those given to Beauchamp here, Beauchamp's contention that the trial court committed "plain error" is without merit.

¶20 We affirm.

By the Court.—Judgment and order affirmed.

STATE OF WISCONSIN
CIRCUIT COURT, Branch 38
MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 06CF003184

MARVIN BEAUCHAMP,

Defendant.

DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

On December 22, 2008, the defendant by his attorney filed a motion for postconviction relief claiming that the court erroneously allowed the State to present the victim's dying declaration and that the State's reliance on prior inconsistent statements of two of its witnesses violated his right to due process. The court set a briefing schedule, to which the parties have responded. The court concurs with the State's analysis of the issues, and accordingly, denies the motion.

The record shall stand with regard to the court's ruling on the first issue, as the court does not believe it erroneously permitted the victim's dying declaration as evidence. Further, the court cannot find that the defendant's right to due process was

denied based on the testimony of Shainya Brookshire and Dominique Brown. Under the circumstances, defendant's claim that trial counsel was ineffective for failing to object to their testimony on constitutional grounds would not have been successful and is reject.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for a new trial is **DENIED.**

Dated this 6th day of March, 2009 at Milwaukee, Wisconsin.

(Circuit Court Milwaukee Co. Wisconsin SEALs)

BY THE COURT:

s/
Jeffrey A. Wagner
Circuit Court Judge