The Supreme Court Clarifies the Primary Purpose Test


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The existence of an emergency or the parties’ perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirements of confrontation.

In *Michigan v. Bryant*, the United States Supreme Court held that a dying man’s statements to police identifying his shooter along with the location of the attack were not testimonial hearsay and, as such, the Confrontation Clause did not bar their admission at trial.

During the early morning hours of April 29, 2001, Detroit police officers responded to a gas station parking lot where they found Anthony Covington lying on the ground next to his car with a gunshot wound to his abdomen. The police asked Covington “what had happened, who had shot him, and where the shooting had occurred.” Covington responded that “Rick” (Respondent, Richard Perry Bryant) shot him approximately twenty-five minutes before, following a conversation he had with the Respondent through the back door of the Respondent’s house. The police’s interaction with Covington lasted no more than ten minutes and ended when emergency medical services arrived to transport Covington to the hospital, where he died a few hours later. The police found blood and a bullet on the back porch of the Respondent’s house, a bullet hole through the back door, as well as Covington’s wallet and identification.

At the Respondent’s trial, Covington’s statements were admitted through police testimony. The Respondent was convicted of second degree murder weapons possession charges. The Michigan Court of Appeals affirmed the conviction, holding Covington’s statements to the police were non-testimonial.

The Michigan Supreme Court, however, citing the U.S. Supreme Court’s decisions in *Crawford v. Washington* and *Davis v. Washington*, reversed the court of appeals, finding Covington’s statements were testimonial hearsay and, as such, were barred by the Confrontation Clause. Specifically, the Michigan Supreme Court relied on the primary purpose test established in *Davis* finding that the circumstances surrounding Covington’s statements to the police, ‘clearly indicate that the ‘primary purpose’ of the questioning was to establish the facts of an event that had already occurred; the ‘primary purpose’ was not to enable police to meet an ongoing emergency.’ On February 28, 2011, in a 6-2 decision (Justice Kagan recused herself...
from the case) the United States Supreme Court determined that the Confrontation Clause did not bar admission of Covington's statements.

Justice Sotomayor, writing for the majority, reiterated the Davis decisions’ primary purpose test. In Davis, the Court held that “[s]tatesments are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency” (emphasis added). The Court, clarifying this test, stated that “[a]n objective analysis of an encounter and the statements and actions of the parties to it is the most accurate assessment of the ‘primary purpose of the interrogation.”

The Court indicated that the Michigan Supreme Court, incorrectly applied a narrow definition of “ongoing emergency” to the facts of the case. The Court noted that the type of weapon used in an incident is one factor to consider when determining whether an emergency is ongoing, suggesting that an unknown gunman, still at large, poses a threat to the general public, prolonging the emergency situation. The Court also indicated that the severity of a victim's injuries are relevant to any Davis inquiry providing “important context” to questioners assessing “the existence and magnitude of a continuing threat to the victim, themselves and the public” and to determining the purpose of the victim’s statements to the police. The Court further emphasized the importance of the informal nature of a meeting between a victim and the police and the “statements and actions of both the declarant and interrogators” to determine the primary purpose of an interview.

Applying this analysis to the facts presented, the Court found the existence of an ongoing emergency: a man had been mortally wounded by an unknown gunman for unknown reasons whose whereabouts were unknown, shortly before the police located the victim in a gas station parking lot near a public street. Additionally, the facts revealed that Covington's responses to a police officer's first question “what happened” were that he had been shot and the identity of the shooter. Responding to further questions, Covington, who was in apparent pain, gave the location of the shooting and the description of his assailant, at the same time asking when medical assistance would arrive. Based upon this, the Court found that a person in Covington's condition would not have offered his responses with the “primary purpose to establish or prove past events potentially relevant to later criminal prosecution.” Also, the Court found that the questions asked by the police during their ten minute interview of Covington were the types of questions used to solicit “information necessary to enable them to ‘meet an ongoing emergency.” Finally, explaining the informal nature of Covington's interview, the Court noted that the police did not conduct a “structured interrogation” which would have provided Covington with a reason to believe that his statements would be used in a future criminal prosecution. In short, the lack of formality suggested the primary purpose of questioning Covington was to “simply to address what [police] perceived to be an ongoing emergency. . . .”

Justice Scalia, the author of the Court's majority opinions in Crawford and Davis, issued a scathing dissent writing, “today’s opinion distorts our Confrontation Clause jurisprudence and leaves it in shambles. . . Instead of clarifying the law, the Court makes itself the obfuscator of last resort.” Scalia argued that, contrary to the majority, the questions to Covington were not about his injuries and that none of the officers at the scene assessed his medical condition or tried to offer first aid. Scalia offered that “[p]olice, paramedics and doctors do not need to know the address where a shooting took place, the name of the shooter, or the shooter's height and weight to provide proper medical care.” Scalia argued that the Bryant decision improperly creates an “expansive exception” to the Confrontation Clause.

Only time will tell if the Bryant decision, the first such decision with Justice Sotomayor, a former prosecutor, will make it easier to admit out of court statements when the victim is unavailable. This decision provides prosecutors with concrete factors and scenarios to use that will aid the practitioner in determining the testimonial nature of statements under certain circumstances. In contrast to the Court's three previous Confrontation Clause opinions, Bryant provides professionals who work on cases with reluctant witnesses the framework from which they can effectively prosecute those challenging cases that revolve around the admissibility of statements from unavailable and/or reluctant witnesses.

1 Rami Badawy is a Senior Attorney and Chief of Publications for the National Center for Prosecution of Child Abuse, a program of the National District Attorneys Association.
3 Id.
4 Id.
5 Id.
6 Id.
7 Id. at *3.
10 Bryant, 562 at *3 (quoting People v. Bryant, 483 Mich. 132, 142 (2009)).
11 Id. at *9 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).
12 Id. at *13.
13 Id. at *16.
14 Id. at *17.
15 Id. at *18.
16 Id. at *19-20.
17 Id. at *27.
18 Id. at *28.
19 Id. at *29.
20 Id.
21 Id. at *30.
22 Id. at *31.
23 Id.
24 Id. at *1 (Scalia, J., dissenting).
25 Id. at *7.
26 Id. at *10.