

Supreme Court Clarifies the “Ongoing Emergency” in *Michigan v. Bryant*

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On February 28, 2011, the United States Supreme Court decided *Michigan v. Bryant*, 562 U.S. ___, 131 S.Ct. 1143 (2011), a case involving a dying declaration by a murder victim and an analysis of an accused’s Sixth Amendment right to confront the witness against him. Given the context surrounding the statements made to police by the dying man, the Court held that these statements were made to meet an ongoing emergency and were therefore non-testimonial (not subject to the confrontation clause) and admissible. In this case, the Court further clarified the test articulated in *Crawford v. Washington*¹ and explained in *Davis v. Washington*² to determine the admissibility of testimonial statements at trial. In *Crawford*, the Court held that testimonial statements are subject to the confrontation clause, and, therefore, the witness must appear in court and testify or the defendant must have had a prior opportunity to confront and cross-examine the witness. Non-testimonial statements are not subject to the confrontation clause; witness’ statements are admissible without producing the witness if they fall within an exception to the hearsay rules.

THE FACTS

On April 29, 2001, Detroit police officers responded to a radio dispatch that a man had been shot. At the scene, they found the victim, Anthony Covington, with a gunshot wound to his abdomen. He was in great pain, had difficulty speaking, and was lying on the ground next to his car in a gas station parking lot. The police asked him what happened, who shot him, and where the shooting occurred. Covington stated that “Rick” (defendant Bryant) shot him at approximately 3:00 a.m. He also indicated that he had had a conversation with Bryant, whom he recognized by his voice, through the back door of the defendant’s house. Covington explained that when he turned to leave, he was shot through the door, and then he drove to the gas station where police found him. Covington’s conversation with the police lasted approximately 5 to 10 minutes and ended upon the arrival of an ambulance. Covington died at the hospital within hours. Police responded to Bryant’s house and found blood, a bullet, and a bullet hole in the back door, as well as Covington’s wallet and identification. Bryant, who was not home, was apprehended later.

The trial court permitted the police officers to testify regarding Covington’s statements, and Bryant was convicted of second degree murder among other charges. Bryant appealed his conviction, arguing that Covington’s statements to the police were testimonial and inadmissible. The Michigan Court of Appeals upheld the conviction and held that Covington’s statements to the police were non-testimonial. The Michigan Supreme Court then remanded the case back to the Court of Appeals for reconsideration in light of the U.S. Supreme Court’s rulings in *Davis v. Washington* and *Hammon v. Indiana*, which the Court decided while the defendant’s case was on appeal.³ The Court of Appeals again held that the statements were non-testimonial and admissible. The Michigan Supreme Court disagreed and reversed the conviction, holding that the statements were testimonial and thus subject to the confrontation clause of the Sixth Amendment to the United States Constitution.

THE DECISION

In reinstating Bryant’s conviction, the United States Supreme Court: (1) reaffirmed the “primary purpose” test from *Davis*; (2) directed the use of an objective evaluation of the case circumstances to determine the primary purpose of the statement; (3) clarified that the existence of an ongoing emergency is among the most important factors to consider, but not the only factor; and (4) explained that the statements and actions of both the declarant and the interrogators provide objective evidence of the primary purpose of the interrogation.

Primary purpose. First, the Court made clear that the “primary purpose” test from *Davis* remains intact. It reiterated its holding in *Davis*:

“Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”⁴

While stating that its analysis in *Davis* remains essentially the same, the Court further clarified the standard that should be used to determine the primary purpose of a statement. The Court noted the importance of looking at all of the circumstances of each police encounter to determine the primary purpose of the police questioning. The definition of interrogation is broad, and could include any police-witness interaction (at any time or place, whether formal or informal) based on the circumstances surrounding the communication. The formality of the interview is one factor to consider in making this determination, but it is not the only factor or the controlling factor. It is *the primary purpose of the statement* that determines whether it will be subject to the confrontation clause. If the primary purpose of the interrogation is to meet an ongoing emergency, then any statements that result will be considered non-testimonial and thus not subject to the confrontation clause.

Objective test. Second, the Court emphasized the importance of applying an objective test when determining whether a statement is testimonial. It stressed the objectivity of the inquiry, citing *Davis*:

“... [t]o determine whether the ‘primary purpose’ of an interrogation is ‘to enable police assistance to meet an ongoing emergency,’ *Davis*, 547 U. S., at 822, which would render the resulting statements non-testimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.”⁵

The Court noted that the circumstances in which an encounter occurs (*e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency, or afterward) are clearly matters of objective fact. The Court also stressed that the statements and actions of the parties to the statement must also be objectively evaluated. “That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter; but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.”⁶

The Court explained that the Michigan Supreme Court’s primary error was in its interpretation of what constitutes an “ongoing emergency.” Specifically, the Court held that the state court misread the *Davis* decision as defining the outer limits of an ongoing emergency to be statements made while a crime was actually in progress. In doing so, it stated that the Michigan court failed to recognize that whether an emergency exists is highly context dependent, and in the context of the shooting in *Bryant*, there was an ongoing threat to the public and police even though the initial threat to Covington may have abated. In reaching that conclusion, the Court relied in part on the nature of the weapon involved, noting that a firearm necessarily presents a much greater threat to the public and police than does a fist, which the defendants used in *Davis* and *Hammon*. The Court distinguished the facts of *Hammon*, in which it determined that the emergency was resolved when the victim and her assailant were in separate parts of the house, and the assailant used a fist instead of a gun. The Court contrasted *Hammon* with one in which an assailant used a gun, explaining that being separated by a household wall may not be sufficient to resolve the emergency. Of course, the presence of a weapon is only one factor to consider in determining whether an ongoing emergency exists and may or may not be the controlling factor. These cases are fact driven.

Ongoing emergency. Third, the Court stressed that while the existence of an ongoing emergency is among the most important factors to consider, it is not the sole factor. The Court explained how the circumstances can indicate the parties’ intent or purpose in making statements as well as reveal the nature of the situation.

“The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim’s medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.”⁷

The Court also analyzed the degree of formality or informality of the statement, concluding that the more the context of the interrogation resembles the “stationhouse interview” at issue in *Crawford*, the more likely it is that the primary purpose will be to “prove past events,” thus leading to testimonial statements. On the other hand, the more the context resembles the harried 911 call at issue in *Davis*, the more likely it is that the interrogation will lead to non-testimonial statements. Real world situations will fall all across the spectrum between the “station house” interrogation and the crime in progress. Therefore, the testimonial or non-testimonial nature of the statements will be based on the objective facts in each case, which should be thoroughly documented. This documentation can also be used to demonstrate the objective facts surrounding the police questioning, the existence of an emergency (if any), and the determination of whether any such emergency was ongoing at the time the statement was made.

Examining both parties. Finally, the Court stated, “[T]he statements and actions of both the declarant and the interrogators provide objective evidence of the primary purpose of the interrogation.”⁸ In its opinion, the Court stressed the need to determine the primary purposes of both the declarant and the interrogator, as evidenced by objective circumstances. The Court acknowledged that both witnesses and police might have mixed motives, but stated that this does not relieve the courts of their duty to consider all of the objective facts, including the statements and actions of both witnesses and police. Indeed, the Court emphasized that the objective nature of the inquiry is not diminished by examining the parties’ motives, stating: “The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim....”⁹

CONCLUSION

Bryant is an important case primarily because it gives criminal justice practitioners expanded guidance on what constitutes an ongoing emergency as originally set forth in *Davis*. It is also important because it reinforces the concept that the existence of an emergency is not the sole dispositive factor in determining whether a statement is testimonial. Other circumstances, like the formality of the interrogation and the statements and actions of all parties, are important as well. Additionally, a police-witness encounter might begin with the primary purpose of meeting an ongoing emergency (and thus be non-testimonial) but then transform into an encounter, where the primary purpose is to establish past events (and thus become testimonial). Because admissibility is controlled by the existence of the ongoing emergency, along with traditional hearsay exceptions, these factors take on heightened importance. In many domestic violence and sexual assault cases, there are often no firearms involved, and the determination of whether or not an emergency is ongoing will greatly impact the prosecution’s ability to prove a case when the victim is not available to testify. All of the community professionals involved with investigations – whether police, emergency medical personnel, sexual assault nurse examiners (SANEs) or others – should carefully and fully document all of the circumstances involved so that an appropriate determination about ongoing emergencies can be made.

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ENDNOTES

¹ 541 U.S. 36 (2004).

² 547 U.S. 813 (2006).

³ *Id.*

⁴ *Id.* at 822.

⁵ 131 S.Ct. at 1156.

⁶ *Id.*

⁷ *Id.* at 1559.

⁸ *Id.* at 1160.

⁹ *Id.* at 1161.

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