Michigan v. Bryant, Part II

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In my last post, I looked at the majority opinion in *Bryant.* Today, I'll discuss the other opinions, focusing on Scalia's dissent. In my final post on this issue, I'll wrap up with a discussion of what the case means for evolving confrontation clause law.

As noted in my last post, Justice Sotomayor wrote the majority opinion, holding that the victim's statements to the responding officers were non-testimonial. Justice Kagan took no part in the consideration or decision of the case. Justice Thomas concurred, agreeing that the statements were non-testimonial but arriving at that conclusion because he believed they lacked sufficient formality, not because there was an ongoing emergency. Thomas, as he has done before, criticized the majority's primary purpose test as creating uncertainty for the police and for the lower courts. Opinion of Thomas, J., concurring at 1. In his opinion, the majority's test is an "exercise in fiction," that "yields no predictable results." *Id.* According to Thomas, a better approach is to consider the extent to which the interrogation resembles those historical practices that the confrontation clause was meant to address. *Id.* at 1-2. In his view, assessing the formality of the statement does just that.

Scalia bitterly dissented in *Bryant.* The first paragraph to his dissent sets his tone:

Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford* v. *Washington*, 541 U. S. 36 (2004), I dissent.

Op. of Scalia, J., dissenting at 1.

As a preliminary matter, Scalia disagreed with the majority's focus on the intent of the declarant and the interrogator. According to Scalia, when assessing the primary purpose of the interrogation, only the declarant's intent matters. *Id.* at 2. Looking at Covington's purpose, he found the case "absurdly easy." *Id.* at 5. Scalia noted that upon arriving at the scene, five different officers questioned Covington about the shooting, with each asking: what happened, who did it, and where did it occur. They also asked follow-up questions about the perpetrator's description and the exact address and description of the home where the shooting occurred. From Covington's perspective, Scalia argued, his statements had little value except to ensure Bryant's arrest and prosecution. When Covington made his statements, he knew the emergency had ended when he fled Bryant's house and that it was entirely "beyond imagination," *id.* at 6, that Bryant would again open fire while Covington was surrounded by five armed officers. Scalia believed that rather than suggesting an ongoing emergency, Covington's medical situation actually reinforced the testimonial character of his statements. According to Scalia, Covington understood the police were focused on investigating a past crime, not his medical needs. The officers did not ask him how he was doing or meaningfully attempt to assess his wounds or administer aid. Instead, they asked questions having no relevance to his dire situation. Underscoring that Covington

understood the officers' investigative role, he interrupted their questions to ask when medical help would arrive. Or, as Scalia out it, "When, in other words, would the focus shift to his medical needs rather than Bryant's crime?" *Id.* at 7. Scalia concluded: "*Ex parte* examinations raise the same constitutional concerns whether they take place in a gas-station parking lot or in a police interrogation room." *Id.* at 8.

Scalia further criticized the majority opinion, arguing that even if the officers' perspectives were relevant, the primary purpose was still clear: to establish past facts relevant to a prosecution. He noted that none of the officers' actions suggested that they perceived an imminent threat. They did not draw their weapons; they did not immediately search the gas station for potential shooters; and none asked the question that would have been critical had they truly feared for their safety: Where is the shooter? In Scalia's view, the majority opinion's application of the law to the facts "creates an expansive exception to the Confrontation Clause for violent crimes." *Id.* at 10.

Finding the majority's decision to be a "gross distortion of the facts," Scalia further criticized it as a "gross distortion of the law." *Id.* at 12. In his view, the majority opinion, improperly brought the reliability standard back into confrontation clause analysis. He further criticized the majority opinion for "reced[ing] from *Crawford*" in another way: by requiring judges to conduct "open-ended balancing tests" and "amorphous, if not entirely subjective," inquiries into the totality of the circumstances bearing upon reliability. *Id.* at 15. In Scalia's view, such rules do violence to the Framers' design. *Id.* at 16.

Justice Ginsburg also dissented, agreeing with Scalia that Covington's statements were testimonial and that it was the declarant's intent that matters. Op. of Ginsburg, J., dissenting at 1.

In my next post, I'll explore what *Byrant* means for confrontation clause analysis.