Michigan v. Bryant, Part III

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In my first two posts, I explored the *Bryant* opinions. Today I'll discuss what the case means for confrontation clause analysis going forward.

1. Although *Crawford* is intact, the Court may be creeping back towards the old *Ohio v. Roberts* reliability test. Slip op. at 14; *id.* at 15 n.9; Op. of Scalia, J. dissenting at 12. In fact, in Scalia's view, *Bryant* "recedes from *Crawford."* Op. of Scalia, J, dissenting at 15. This is good news for the State and bad news for defendants.

2. The two-pronged *Davis* inquiry for determining the testimonial nature of statements made during police interrogations also remains intact, but with a modification expanding the scope of potentially non-testimonial statements. The *Bryant* Court stated: "[T]here may be *other* circumstances, aside from ongoing emergency, when a statement is not procured with a primary purposes of creating an out-of-court substitute for trial testimony . . . . Where no such primary purpose exists, [the statements are non-testimonial]." Slip op. at 11-12. After *Davis* we wondered how to categorize statements for which the primary purpose was something other than meeting an emergency or establishing past facts. *Bryant* suggests that if the primary purpose is *anything* other than establishing past facts for a prosecution, the statement is non-testimonial. Again, good news for the State; bad news for defendants.

3. The Court continues to use the term police interrogation in its colloquial sense. Slip op. at 8 n.2.

4. *Bryant* emphasizes that the ultimate question when determining whether a statement is non-testimonial or not is: What was the primary purpose of the interrogation? In assessing the primary purpose of the statement, the following principles apply.

- The test is an objective one. Slip op. at 23.
- Whether an ongoing emergency exists is one of the most important factors to consider. *Id.*
- The statements and actions of *both* the interrogators and the declarant are relevant. *Id.* at 20.
- The relative formality or informality of the statement also is relevant. *Id.* at 19-20.

5. The "ongoing emergency" determination remains a "highly context-dependent inquiry" *Id.* at 16.

6. The "ongoing emergency" net is broader than some had realized. *Id.* at 16. In Scalia' view, it is so broad that it carves out an "expansive" confrontation clause exception for violent crime. Op. of Scalia, J., dissenting at 10.

7. In a paper published here, I suggested factors relevant to the determination of whether or not an ongoing emergency existed. Specifically, I suggested that the following factors supported the conclusion that an ongoing emergency existed:

- The perpetrator remains at the scene and is not in law enforcement custody.
- The perpetrator is at large and presents a present or continuing threat.
- Physical violence is occurring.
- The location is disorderly.

- The location is unsecure.
- Medical attention is needed or the need for it has not been determined.
- The victim or others are in danger.
- The questioning occurs close in time to the event.
- The victim or others call for assistance.
- The victim or others are agitated.
- No officers are at the scene.
- The declarant is speaking about the events as they are occurring.

I suggested that the following factors indicate that an emergency has ended or did not exist:

- The perpetrator has fled and is unlikely to return.
- The perpetrator is in law enforcement custody.
- No physical violence is occurring.
- The location is not disorderly.
- The location is secure.
- No medical attention is needed.
- The victim and others are safe.
- There is a significant lapse of time between the event and the questioning.
- No call for assistance is made.
- The victim or others are calm.
- Officers are at the scene.
- The relevant event is complete.

Bryant validates the relevancy of many of these factors and suggests that the following questions also are relevant:

- What type of weapon was involved? Slip op at 17 & 27. *Bryant* noted that when the weapon consists of the defendant's fists, the threat may be neutralized – and the emergency ended – simply by removing the defendant from the room. However, when the weapon is a gun, this may not suffice. *Id.* at 17. Also, when a gun is involved, the nature of the weapon may extend the emergency beyond the initial violent act (the shooting). *Id.* at 27.
- Had the threat been neutralized? If yes, this suggest that the emergency has ended. Slip op. at 16.
- Is the perpetrator known? If not, this may suggest that an emergency is continuing. *Id.*
- Did the dispute occur in a public or private location? Slip op at 12. *Bryant* suggests that when a dispute occurs in public, the emergency may be extended by creating a danger to responding officers and the public. By contrast, a dispute that occurs in private—such as in a home—limits the potential danger to others, and thus the scope of the emergency.

8. The Court continues to indicate that statements can begin as non-testimonial but become testimonial. Slip op. at 18.

9. Because there was no dispute in *Bryant* about Covington's unavailability or whether there was a prior opportunity to cross-examine, *Bryant* doesn't add to our knowledge on those issues.

10. Because *Bryant* involved statements to the police, the Court did not address whether and when statements made to non-police actors are testimonial. Slip op. at 10 n.3; *see also* Op. of Scalia, J., dissenting at 3 n.1.

11. Because the issue was not before the Court, it did not decide whether dying declarations are excepted from *Crawford*. Slip op. at 4 n.1; Op. of Ginsburg, J., dissenting at 1-2.

12. The line-up of Justices on confrontation clause analysis has shifted significantly, with Scalia moving from opinion author to dissenter. Given that the important *Bullcoming* substitute analyst case (discussed here) is still pending before the Court, we are certain to get some interesting opinions.

13. Finally, *Bryant* twice mentioned due process as potentially limiting admissibility. Slip op. at 4 & 24 n.13. Thus, if *Crawford* falls, this may be the next battlefield over admission of hearsay statements.