

SCOTUS Opinion: Statements by a mortally wounded victim made for the primary purpose of enabling police to address an ongoing emergency are not testimonial under the Confrontation Clause

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In *Michigan v. Bryant*, No. 09-150, the U.S. Supreme Court reversed the decision of the Michigan Supreme Court and held that statements that a mortally wounded gunshot victim made to police officers were not testimonial—and therefore were admissible evidence under the Confrontation Clause—because the circumstances objectively indicated that the primary purpose of the questioning was to enable the police to address an ongoing emergency, not to gather evidence of a past crime.

The case arose out of the Michigan trial court's decision to admit statements made by Anthony Covington to police officers who found him mortally wounded in a gas-station parking lot. Covington had a gunshot wound to his abdomen, appeared to be in great pain, and spoke with difficulty. When the police asked him "what happened, who had shot him, and where the shooting had occurred," he told them that "Rick" had shot him through the back door of Rick Bryant's house and that he (Covington) had then driven to the gas station. After being transported to the hospital, Covington died within hours. When the case reached the Michigan Supreme Court, Justice Markman, writing for Justices Kelly, Cavanagh, and Hathaway, held that the statements were testimonial and therefore inadmissible, over a dissent by Justice Weaver and a separate dissent by Justice Corrigan (who was joined by Justice Young).

The U.S. Supreme Court, in an opinion written by Justice Sotomayor and joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito, reversed. The Court recounted that its decision in *Crawford v. Washington*, 541 U.S. 36 (2004), shifted the focus of Confrontation Clause jurisprudence away from evaluating whether the statements in question bore adequate indicia of reliability and instead onto examining whether the statements were "testimonial." After *Crawford*, the Supreme Court further explained in *Davis v. Washington*, 547 U.S. 36 (2006), that "[s]tatements 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." *Id.* at 822. Applying this primary-purpose test, the Court noted that it is an objective test that looks at all of the circumstances of the encounter and concluded that the circumstances—that "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington"—showed that the statements were not testimonial. The presence of a gun and an unknown shooter created an emergency situation that threatened the responding police and the public, and under those circumstances the primary purpose of the interrogation was to protect public safety, not to gather evidence for trial. The statements were therefore not testimonial and not barred by the Confrontation Clause's requirement that an accused "be confronted with the witnesses against him."

Justice Thomas concurred in the judgment, but focused on the informality of the police questioning. He concluded that the questioning lacked sufficient formality and solemnity to qualify as testimonial, and he also criticized the context-specific nature of the majority’s test because of the uncertainty it would create for law enforcement and lower courts.

Justice Scalia, who authored the Court’s path-breaking decision in *Crawford*, dissented, arguing that the decision was “a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence,” when *Crawford* had recognized that “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” In his view, the Court’s approach of looking not just at the declarant’s purpose but also at the purpose of the police questioner ignores that “[f]or an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark” and that the declarant “must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused.” Looking at the statements solely from Covington’s perspective, Justice Scalia would have concluded that the gunshot victim’s primary purpose for informing the police was to aid in arresting and prosecuting the shooter, as Covington, by then surrounded by five armed police officers, was no longer in an emergency situation and, based on what he knew about the shooter, would not have expected there to be a threat to the general public or to those at the gas station. In sum, Justice Scalia lamented that the decision took significant steps back from *Crawford* by focusing again on reliability and by imposing an open-ended balancing test that was highly context specific.

Justice Ginsburg dissented separately. She agreed with Justice Scalia that the statements were testimonial and that the decision “confounds our recent Confrontation Clause jurisprudence,” which “made it plain that reliability tells us nothing about whether a statement is testimonial.” She also noted that while the issue was not preserved in this case, she would take up in a future case the question whether the exception for dying declarations survives that recent jurisprudence.

Justice Kagan took no part in the decision.