

Michigan v. Bryant: The Ghost of Roberts and the Return of Reliability

Jason Widdison*

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I. INTRODUCTION

In *Crawford v. Washington*,¹ the United States Supreme Court radically transformed its Sixth Amendment jurisprudence² and overturned the quarter-century-old framework established by *Ohio v. Roberts*.³ The Court,

* Juris Doctor candidate, Gonzaga University School of Law, expected May 2013. First and foremost, I thank my wife, Katie, for her unwavering love, support, and encouragement. In addition, I thank my parents, Kirk and Erica, whose passion for education and learning has brought me so far—¡Les quiero!

1. 541 U.S. 36 (2004).

2. Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 4, 5.

3. 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36.

in a unanimous decision, held that the Sixth Amendment's Confrontation Clause⁴ barred the admission of out-of-court "testimonial statements" where the declarant is unavailable at trial and the defendant had no prior opportunity for cross-examination.⁵ *Crawford* divorced the Confrontation Clause from the exception ridden hearsay rule and restored it to preeminence among the rights of the accused.⁶

While some described the *Crawford* decision as "revolutionary,"⁷ the Court's opinion left open the meaning of testimonial⁸ and consequentially created uncertainty and confusion in the criminal justice community.⁹ Accordingly, the Supreme Court's Confrontation Clause cases since *Crawford* have had the narrow focus of attempting to define the term "testimonial."¹⁰ The most recent of these cases, *Michigan v. Bryant*,¹¹ marked a retreat from *Crawford*'s testimonial approach, and reintroduced the *Roberts* era preoccupation with reliability.¹²

In *Bryant*, police officers responded to a report of a shooting.¹³ Upon arriving at the scene, the police found Anthony Covington lying next to his car in the parking lot of a gas station.¹⁴ Covington was bleeding from a gunshot wound in his abdomen and appeared to be in serious pain.¹⁵ The police officers asked him "what had happened, who had shot him, and where the shooting had occurred."¹⁶ Covington, speaking with difficulty, told police that "Rick [Bryant]" had shot him in the backyard of Bryant's

4. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

5. *Crawford*, 541 U.S. at 54.

6. See Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C.L. REV. 185 (2004) (discussing the ineffective marriage of the Confrontation Clause and hearsay rules).

7. Won Shin, *Crawford v. Washington: Confrontation Clause Forbids Admission of Testimonial out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 HARV. C.R.-C.L.L. REV. 223 (2005).

8. *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

9. See *id.* at 75 (Rehnquist, C.J., concurring in the judgment) (objecting to the majority's decision to postpone giving "a comprehensive definition of 'testimonial'" and admonishing the Court for leaving prosecutors in the dark by declining answers on what *Crawford* was meant to cover).

10. See *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Davis v. Washington*, 547 U.S. 813 (2006).

11. 131 S. Ct. 1143.

12. See *id.* at 1175-76 (Scalia, J., dissenting) ("The Court attempts to fit its resurrected interest in reliability into the *Crawford* framework, but the result is incoherent.").

13. *Id.* at 1150.

14. *Id.*

15. *Id.*

16. *Id.* (quoting *People v. Bryant*, 768 N.W.2d 65, 71 (2009)).

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house.¹⁷ Although he had not seen Bryant, Covington claimed he had conversed with him through Bryant's back door.¹⁸ "Covington explained that when he turned to leave, he was shot through the door," causing him to flee in his vehicle and pull over at the gas station.¹⁹ Covington's conversation with police lasted only a few minutes before paramedics arrived and transported him to the hospital, where he died a few hours later.²⁰

At Bryant's trial, the police officers testified to the statements made by Covington at the gas station.²¹ The jury found Bryant guilty and convicted him of second-degree murder.²² Bryant appealed his conviction, arguing that the trial court violated his Sixth Amendment right to confrontation in admitting Covington's statements to police.²³ The Michigan Court of Appeals affirmed the conviction and Bryant renewed his arguments to the Michigan Supreme Court.²⁴ That court remanded the case for reconsideration consistent with the U.S. Supreme Court's decision in *Davis v. Washington*.²⁵ On remand, the Court of Appeals affirmed, holding that Covington's statements were not testimonial and therefore properly admitted.²⁶ After another appeal, the Michigan Supreme Court reversed the lower courts, holding that Covington's statements to police were "inadmissible testimonial hearsay."²⁷

The U.S. Supreme Court granted certiorari to "determine whether the Confrontation Clause barred admission of Covington's statements."²⁸ In a 6-2²⁹ decision authored by Justice Sonia Sotomayor, the Court held that the primary purpose of Covington's interrogation³⁰ was to allow officers to

17. *Id.* (quoting *Bryant*, 768 N.W.2d at 67 & n. 1).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* (citing *People v. Bryant*, No. 247039, 2004 WL 1882661 (Mich. Ct. App. Aug. 24, 2004)).

25. *Id.* at 1151.

26. *Id.* (citing *People v. Bryant*, No. 247039, 2007 WL 675471 (Mich. Ct. App. Mar. 6, 2007)).

27. *Id.* at 1150 (citing *People v. Bryant*, 768 N.W.2d. 65, 79 (2009)).

28. *Id.* at 1152.

29. *Id.* at 1167. Justice Kagan did not participate in deciding the case. *Id.*

30. *See Bryant*, 131 S. Ct. at 1153 n.2 (stating that, in its Confrontation Clause opinions, the Supreme Court has consistently "'use[d] the term 'interrogation' in its colloquial, rather than any technical legal, sense'" (quoting *Crawford*, 541 U.S. at 53 n.4)).

meet an ongoing emergency.³¹ Covington, therefore, did not bear testimony against Bryant when speaking to the police, and the admission of his statements did not violate the Confrontation Clause.³²

This comment contends that the *Bryant* decision contradicts and undermines recent Confrontation Clause jurisprudence in two ways. First, it shifts the focus of the *Davis* “primary purpose”³³ inquiry to the situation, the interrogators, and the reliability of statements expressed during emergencies, rather than focusing on the purpose of the declarant.³⁴ Underlying this shift is the Court’s presumption that statements made during an “ongoing emergency” are inherently reliable and need not “be subject to the crucible of cross-examination.”³⁵ This implicit addition of the excited-utterances hearsay rule into the Constitution³⁶ creates a vast exception to the confrontation right for statements made to police during emergencies. Second, the majority’s decision requires highly subjective, “context-dependent inquir[ies]” into the circumstances of each particular case when determining whether an “ongoing emergency” was present.³⁷ The *Bryant* Court’s unpredictable and complicated “emergency” framework sets a perilous standard for the prosecution of allegedly violent criminals, allowing too much deference to the judiciary and creating perverse incentives for police investigating violent crimes.³⁸

In Part I, this comment will trace the modern changes in Confrontation Clause jurisprudence by giving a brief overview of three landmark decisions: *Ohio v. Roberts*,³⁹ *Crawford v. Washington*,⁴⁰ and *Davis v. Indiana*.⁴¹ Part II of this comment will analyze how the *Bryant* court has returned, in part, to the convoluted reasoning of *Roberts* and will examine the negative consequences likely to follow. Part III will explore the recent

31. *Id.* at 1166-67.

32. *Id.* at 1167 (reversing and remanding the Michigan Supreme Court on these points).

33. *See* discussion *infra* Part II.C.

34. *Compare Bryant*, 131 S. Ct. at 1160 (citing *Davis* but stating “[i]n addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation”), *with Davis*, 547 U.S. at 823 n.1 (“[I]t is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”).

35. *Bryant*, 131 S. Ct. at 1157.

36. *Id.* at 1174 (Scalia, J., dissenting).

37. *Id.* at 1158 (majority opinion).

38. *See id.* at 1173 (Scalia, J., dissenting) (stating that the Court’s view of emergency “creates an expansive exception . . . for violent crimes”).

39. 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004).

40. 541 U.S. 36.

41. 547 U.S. 813 (2006).

treatment of *Bryant* among the lower courts and suggest an alternative based on state constitutional grounds.

II. HISTORICAL BACKGROUND

The Sixth Amendment of the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”⁴² Although the origin of this right “dates back to Roman times,”⁴³ the Founding Fathers’ conception of the right comes from English common law.⁴⁴ Indeed, the most infamous example of the necessity for confrontation is the 1603 treason trial of Sir Walter Raleigh.⁴⁵ Raleigh’s alleged accomplice, Lord Cobham, implicated Raleigh in written testimony and during pretrial examinations.⁴⁶ Over Raleigh’s objections, Lord Cobham’s ex parte statements “were read to the jury” at trial.⁴⁷ Raleigh accused Cobham of lying to save his own life and demanded that he be ordered to appear as a witness.⁴⁸ His pleas, however, were rejected and Raleigh was convicted of treason, sentenced to death, and executed fifteen years later.⁴⁹

English common law would eventually recognize the right to face one’s accuser.⁵⁰ The British, nonetheless, routinely abused this privilege through ex parte prosecutions of American colonists.⁵¹ As a result, many early American court decisions construed the Sixth Amendment’s Confrontation Clause quite liberally.⁵² Up until the twentieth century, federal courts

42. U.S. CONST. amend. VI.

43. *Crawford*, 541 U.S. at 43 (citing *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988)).

44. *Id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (Oxford, Clarendon Press 1768)).

45. See Raleigh’s Case, (1603) 1 Stephen’s State Trials 8 (K.B.) 27-30; 2 Cobbett’s State Trials 1, 13-14 (Eng.); see also *Crawford*, 541 U.S. at 44 (discussing Raleigh’s trial).

46. *Crawford*, 541 U.S. at 44.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 46-47.

51. See *id.* at 45-48. For example, as the *Crawford* Court recounted, A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. Colonial representatives protested that the Act subverted their rights by extending the jurisdiction of the courts of admiralty beyond its ancient limits.

Id. (citations omitted) (internal quotation marks omitted).

52. See *Crawford*, 541 U.S. at 50 (discussing *State v. Atkins*, 1 Tenn. (1 Overt.) 229, 229 (Super. Ct. L. & Eq. 1807) (excluding the prior trial testimony of a witness who had since died, reasoning that even though the testimony was previously open to cross-examination, admitting it in

largely upheld the right to confront, through cross examination, any person testifying against the accused, whether in or out of court.⁵³ In 1965, this right was held applicable to the states under the Fourteenth Amendment.⁵⁴

A. *Ohio v. Roberts: Vitiating the Confrontation Clause—the Reliability Approach*

In 1980, the Supreme Court merged its Confrontation Clause jurisprudence with hearsay law in *Ohio v. Roberts*.⁵⁵ In *Roberts*, the defendant, Herschel Roberts, was charged with check forgery and possession of stolen credit cards belonging to Bernard Isaacs.⁵⁶ Roberts denied these charges, asserting that Isaacs's daughter, Anita, had given him permission to use the credit cards and checkbook.⁵⁷ At a preliminary hearing, Anita Isaacs denied ever granting Roberts permission to use the checks and credit cards.⁵⁸ By the time of Robert's trial, Anita Isaacs was no longer residing in the state and could not be located to offer testimony.⁵⁹ In lieu of her appearance, the prosecution introduced the record of her preliminary hearing statements under an Ohio hearsay statute.⁶⁰ Following his conviction, Roberts appealed, alleging that the introduction of these statements violated his right to confrontation.⁶¹

The U.S. Supreme Court upheld the admission of the transcripts, reasoning that the purpose of the Confrontation Clause, like hearsay law, is

the later case would risk overthrowing the Confrontation Clause); *Finn v. Commonwealth*, 26 Va. (5 Rand.) 701, 708 (1827) (excluding on re-trial the previously cross-examined testimony of a witness who had since left the jurisdiction, reasoning that the Confrontation Clause prohibited extending the rule in civil cases to the criminal context); *see also id.* at 49-50 (discussing *State v. Webb*, 2 N.C. (1 Hayw.) 103, 103 (Super. Ct. L. & Eq. 1794) (holding on state law grounds that a deposition may be admitted into evidence only if conducted in the defendant's presence, reasoning that "natural justice" requires a chance to cross-examine); *State v. Campbell*, 30 S.C.L. (1 Rich.) 124, 125 (Ct. App. Law 1844) (declaring that the state constitution rendered an *ex parte* deposition as "utterly incompetent" evidence even where the witness had since died, reasoning that the opportunity to cross-examine is an "indispensable condition[] of . . . due course of law").

53. *See Crawford*, 541 U.S. at 50.

54. *Pointer v. Texas*, 380 U.S. 400, 403, 406 (1965).

55. 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36.

56. *Id.* at 58.

57. *Id.*

58. *Id.*

59. *Id.* at 59.

60. *Id.* The statute permitted "the use of preliminary examination testimony of a witness who 'cannot for any reason be produced at the trial'" *Id.* (quoting OHIO REV. CODE ANN. § 2945.49(A)(2) (Page 1975)).

61. *See Roberts*, 448 U.S. at 59-60.

to ensure the reliability of evidence offered at trial.⁶² Finding that hearsay rules and the Confrontation Clause “protect[ed] similar values,” the court merged both areas of law, virtually collapsing any distinctions between the two.⁶³ In-court confrontation and cross-examination, the Court said, was merely the preferred form of ensuring reliability of testimony.⁶⁴ Where the unavailability of a declarant was shown, the rules of hearsay provided enough “trustworthiness that ‘there [would be] no material departure from the reason of the general rule.’”⁶⁵ Put differently, so long as the offered evidence bore an “adequate indicia of reliability” it could be admitted without violating the defendant’s right to confrontation.⁶⁶

The Court held that statements falling within a “firmly rooted hearsay exception” met this reliability standard.⁶⁷ Further, even in the absence of a hearsay exception, evidence exhibiting “particularized guarantees of trustworthiness” could still be admissible.⁶⁸ *Roberts* therefore empowered judges to decide admissibility under the Confrontation Clause using the same *reliability* assessment employed under the rules of hearsay.⁶⁹ In so doing, the *Roberts* Court virtually wrote the Confrontation Clause out of the Constitution.⁷⁰

62. *See id.* at 65-66, 77.

63. *Id.* at 66 (quoting *California v. Green*, 399 U.S. 149, 155 (1970)) (“The Court has applied this ‘indicia of reliability’ requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’” (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895))).

64. *See id.* at 65.

65. *Id.* at 65-66 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

66. *Id.*

67. *Id.*

68. *Id.* (“The focus of the Court’s concern has been to insure that there are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant . . .” (internal quotation marks omitted)).

69. Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 575 (1988) (criticizing *Roberts* for establishing “a reliability test that cedes superiority to hearsay doctrine”).

70. *Id.* (lamenting that *Roberts* left the Confrontation Clause “nearly useless” as “a mere vestigial appendix of hearsay doctrine”). Professor Douglass cogently explained how *Roberts* impacted the legal landscape:

In *Dutton v. Evans*, the first case in this century in which the Court seized upon “reliability” as the standard for admitting or excluding prosecution hearsay, Justice Marshall wrote in dissent, “If ‘indicia of reliability’ are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all.” Almost thirty years later, that question looks prophetic. The “general approach” of *Roberts* has evolved into an exclusionary rule that excludes very little.

B. *Crawford v. Washington: Restoring the Confrontation Clause—
the Testimonial Approach*

Nearly a quarter-century later, the Supreme Court unanimously rejected⁷¹ *Roberts* and created a new framework for employing the Confrontation Clause. In *Crawford v. Washington*, the defendant, Michael Crawford, was charged with assault and attempted murder for stabbing a man.⁷² Crawford claimed he acted in self-defense.⁷³ To support its case at trial, the prosecution attempted to call Crawford's wife as a witness against him.⁷⁴ She refused to testify, however, invoking the state marital privilege doctrine.⁷⁵ The prosecution therefore sought to introduce tape-recorded statements made by the wife to police in which she contradicted her husband's self-defense claim.⁷⁶ Despite Crawford's objection that such admission violated his Sixth Amendment right to confrontation, the evidence was allowed under *Roberts* as sufficiently reliable.⁷⁷ Crawford was subsequently convicted of first-degree assault with a deadly weapon.⁷⁸

The U.S. Supreme Court reversed Crawford's conviction,⁷⁹ relying primarily on a historical interpretation of the Confrontation Clause.⁸⁰ The Court completely abandoned the *Roberts* reliability framework, declaring it "so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations," and in its place, adopted a "testimonial" approach.⁸¹ Writing for the majority, Justice Scalia explained, "the principal evil at which the Confrontation Clause was directed was the

John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 206 (1999) (footnote omitted) (quoting *Dutton v. Evans*, 400 U.S. 74, 110 (1970) (Marshall, J., dissenting)).

71. *Crawford*, 541 U.S. at 38, 69 (Justice Scalia delivered the opinion of the court, in which six other justices joined. Chief Justice Rehnquist concurred in the judgment with Justice O'Connor joining in his opinion).

72. *Id.* at 38, 40.

73. *Id.* at 40.

74. *Id.*

75. *Id.* ("[T]he state marital privilege . . . generally bars a spouse from testifying without the other spouse's consent." (citing WASH. REV. CODE § 5.60.060(1) (1994))).

76. *Id.*

77. *See id.* (finding Mrs. Crawford's statements reliable and therefore admissible because her statements were simply corroborating Mr. Crawford's story).

78. *Id.* at 41.

79. *See id.* at 69 (reversing and remanding the Washington State Supreme Court).

80. *See id.* at 43-51 (providing a lengthy and detailed historical exegesis of the common law and American confrontation right).

81. *Id.* at 63.

civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”⁸²

The Court interpreted the word “witnesses” in the Sixth Amendment to mean “those who ‘bear testimony.’”⁸³ Hence, “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”⁸⁴ The Court concluded that the Confrontation Clause “reflects an especially acute concern with” all testimonial statements.⁸⁵ Accordingly, the defendant has the right to bar any testimonial statements made against him by an unavailable declarant at trial absent “a prior opportunity for cross-examination.”⁸⁶ Justice Scalia emphatically avowed, “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”⁸⁷

Many heralded Justice Scalia’s historiographic opinion in *Crawford* as a constitutional triumph.⁸⁸ However, *Crawford* contained a major deficiency, it explicitly eschewed defining the central component of its new approach: testimonial statements.⁸⁹ Nevertheless, the Court’s opinion did outline a “core class” of testimonial statements⁹⁰: *ex parte* in-court testimony,⁹¹

82. *Id.* at 50.

83. *Id.* at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (N.Y.C., S. Conserve 1828)). The dictionary further defines “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” WEBSTER, *supra*.

84. *Crawford*, 541 U.S. at 51.

85. *Id.*

86. *Id.* at 53-54.

87. *Id.* at 68-69.

88. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 183-84 (2005) (“*Crawford* succeeded because it cleared away muddled case law, laid a strong foundation in the historical record, and erected a simple, solid, workable rule.” (emphasis omitted)).

89. *Crawford*, 541 U.S. at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”). Chief Justice Rehnquist aptly noted the predicament created by the majority’s indecision:

The Court grandly declares that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimonial” the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

Id. at 75-76 (Rehnquist, C.J., concurring in the judgment) (citations omitted).

90. *Crawford*, 541 U.S. at 51.

91. *Id.* (explaining that testimonial statements include “‘*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony

extrajudicial statements,⁹² and statements made for use at a later trial.⁹³ The majority further noted that testimonial “applies at a *minimum* to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”⁹⁴

C. *Davis v. Washington: Shaping a Definition of Testimonial—“Primary Purpose”*

Just two years after *Crawford*, the Supreme Court attempted to clarify the meaning of testimonial in *Davis v. Washington* and its companion case, *Hammon v. Indiana*.⁹⁵ *Davis* and *Hammon* were factually similar domestic violence cases. In *Davis*, Michelle McCottry made statements to a 911 operator during a domestic disturbance with her former boyfriend, Adrian Davis.⁹⁶ McCottry told the 911 operator, “[h]e’s here jumpin’ on me again,” and “[h]e’s usin’ his fists.”⁹⁷ When the 911 operator asked McCottry for her attacker’s full name,⁹⁸ Davis fled, ending the incident before the police arrived.⁹⁹ At Davis’s trial, McCottry failed to appear and testify.¹⁰⁰ In place of her testimony, the prosecution sought to admit the 911 recording of McCottry identifying her attacker as the accused.¹⁰¹ Despite Davis’s Confrontation Clause objection, the evidence was admitted and Davis was convicted.¹⁰²

Separately, in *Hammon*, police officers responded to a domestic dispute at the residence of Amy Hammon.¹⁰³ At the insistence of the police, Amy Hammon filled out and signed an affidavit stating that her husband, Herschel, had physically assaulted her.¹⁰⁴ At Herschel Hammon’s trial,

that the defendant was unable to cross examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially” (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21939940, at *23)).

92. *Id.* at 51-52 (explaining that testimonial statements include “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions” (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment))).

93. *Id.* at 52.

94. *Id.* (emphasis added).

95. 547 U.S. 813 (2006).

96. *Id.* at 817-18.

97. *Id.* at 817 (internal quotation marks omitted).

98. *Id.* at 818.

99. *Id.*

100. *Id.* at 819.

101. *Id.*

102. *Id.*

103. *Id.* at 819-20.

104. *Id.* at 820.

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Amy Hammon failed to appear and testify against her husband.¹⁰⁵ The prosecution thus sought to admit the affidavit of Amy Hammon from the night of the incident and the testimony of the responding officers.¹⁰⁶ In the face of Herschel Hammon's Confrontation Clause objections, the affidavit and police testimony were admitted, resulting in Hammon's conviction.¹⁰⁷

Upon review, the Supreme Court specifically addressed the testimonial nature of statements produced through interrogation:

Statements 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. 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.¹⁰⁸

In light of this reasoning, the statements in *Davis* were ruled nontestimonial and admissible because McCottry was speaking about events "*as they were actually happening*, rather than 'describ[ing] past events'"¹⁰⁹ for the purpose of obtaining police assistance.¹¹⁰ Contrarily, the statements in *Hammon* were ruled testimonial and inadmissible because the circumstances indicated that "the interrogation was part of an investigation into possibly criminal past conduct"¹¹¹ and an attempt to gather information for criminal prosecution.¹¹²

Davis thus contributed the "primary purpose" inquiry to help distinguish between testimonial and nontestimonial statements. By examining the "primary purpose" of an interrogation, a fact finder can more easily discern whether a declarant was acting as a "*witness*" or not.¹¹³ Justice Scalia, again writing for the majority, carefully added that although the primary purpose analysis is an objective inquiry, it is the "declarant's statements, not the interrogator's questions, that the Confrontation Clause requires [the court] to evaluate."¹¹⁴ Nonetheless, Scalia's majority opinion

105. *Id.*

106. *Id.* at 820-21.

107. *Id.*

108. *Id.* at 822.

109. *Id.* at 827 (quoting *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion)).

110. *Id.* at 822 (emphasis added).

111. *Id.* at 829.

112. *Id.* at 822.

113. *Id.* at 828 (emphasis added).

114. *Id.* at 823 n.1.

again declined to “produce an exhaustive classification” of testimonial statements.¹¹⁵ Still his primary purpose analysis set the stage for *Michigan v. Bryant*.

III. ANALYSIS

A. *The Ghost of Roberts: The Reintroduction of Reliability and the Revision of the Primary Purpose Inquiry*

Michigan v. Bryant revised the “primary purpose” inquiry established in *Davis* by reintroducing reliability to the Court’s Sixth Amendment analysis.¹¹⁶ The primary purpose test was intended to help determine whether a declarant’s statements were testimonial, not whether her statements were reliable.¹¹⁷ Nonetheless, the *Bryant* majority reasoned that “the prospect of fabrication” for statements obtained during an ongoing emergency is “significantly diminished,” and thus, such statements need not be subject to the demands of confrontation.¹¹⁸

The *Bryant* Court stopped short of completely resurrecting *Roberts* and realigning the Confrontation Clause with hearsay law. Still, it complicated the confrontation analysis when it expressly likened the excited utterance hearsay rule to the confrontation right—noting their mutual effect of allowing evidence that is “considered reliable.”¹¹⁹ The majority thus significantly undermined its holding from *Crawford*, only seven years prior.

Further, the *Bryant* opinion appeared to misconstrue the primary purpose analysis when categorizing Covington’s statements to police. For example, the *Davis* majority explained that a declarant’s statements are nontestimonial when they involve “a cry for help [or] the provision of information enabling officers *immediately* to end a threatening situation”¹²⁰ Covington’s statements, however, did not cause police to draw their weapons, ask where the shooter was, or secure the scene.¹²¹ Moreover, all five officers asked Covington the same questions—indicating

115. *Id.* at 822.

116. *Michigan v. Bryant*, 131 S. Ct. 1143, 1174 (2011) (Scalia, J., dissenting).

117. *Davis*, 547 U.S. at 822.

118. *Bryant*, 131 S. Ct. at 1157.

119. *Id.* (“Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination. This logic is not unlike that justifying the excited utterance exception in hearsay law.”).

120. *Davis*, 547 U.S. at 832 (emphasis added).

121. *Bryant*, 131 U.S. at 1171 (Scalia, J., dissenting) (“None—absolutely none—of [the officers’] actions indicated that they perceived an imminent threat. They did not draw their weapons, and indeed did not immediately search the gas station for potential shooters.”).

a lack of urgency.¹²² It seems evident that as Covington laid in the parking lot bleeding, he spoke to police not as “a cry for help,” nor to enable the officers to immediately end a threat, but rather to describe a past event and who had shot him so the police could locate, arrest, and prosecute the alleged shooter.¹²³

Admittedly, *Davis* did not explicitly state whose perspective was most important when administering the “primary purpose” analysis. Still, it did provide that it is the “declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires [the court] to evaluate.”¹²⁴ The *Bryant* majority disagreed, holding that “*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator.”¹²⁵ Furthermore, the majority’s analysis appears to “give controlling weight” to the intentions of police rather than those of the declarant.¹²⁶ Covington’s statements, after all, had little to do with his current situation.¹²⁷ Bryant was not pursuing Covington and posed no threat to the police.¹²⁸ Finally, Covington knew Bryant was “not a spree killer” and gave no information to police suggesting otherwise.¹²⁹ Provided these facts, the *Bryant* majority simply deferred¹³⁰ to law enforcement’s assessment that there was a potential threat to the public and thus an “ongoing emergency.”¹³¹ The result effectively transformed Covington’s words from testimonial to nontestimonial.

Rather than clarify and build upon *Crawford*, the Supreme Court’s decision in *Bryant* complicates the Confrontation Clause analysis. Even accomplished jurists are experiencing difficulty making sense of the Court’s

122. *Id.* at 1172. The apparent reliability of Covington’s statements played a significant role in Bryant’s trial. *Id.* As Justice Scalia noted, “[h]aving the testimony of five officers to recount Covington’s consistent story undoubtedly helped obtain Bryant’s conviction.” *Id.*

123. *Bryant*, 131 S. Ct. at 1171 (Scalia, J., dissenting) (“The five officers interrogated Covington primarily to investigate past criminal events.”).

124. *Davis*, 547 U.S. at 823 n.1; *see also Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting) (“*Crawford* and *Davis* did not address whose perspective matters—the declarant’s, the interrogator’s, or both—when assessing the primary purpose of [an] interrogation.” (alteration in original) (internal quotation marks omitted)).

125. *Bryant*, 131 S. Ct. at 1160.

126. *Id.* at 1162 (rebutting *id.* at 1170 (Scalia, J., dissenting)).

127. *Id.* (Scalia, J., dissenting) (“From Covington’s perspective, his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant.”).

128. *Id.* (“Even if Bryant had pursued him (unlikely), and after seeing that Covington had ended up at the gas station was unable to confront him there before the police arrived (doubly unlikely), it was entirely beyond imagination that Bryant would again open fire while Covington was surrounded by five armed police officers.”).

129. *Id.*

130. *Id.* at 1161-62 (majority opinion).

131. *Id.* at 1166.

“tortuous jurisprudence.”¹³² For instance, the Michigan Supreme Court has expressed concern and disapproval over the U.S. Supreme Court’s recent Confrontation Clause decisions stating:

These decisions seem not entirely consistent, they employ varying constitutional tests and formulations for discerning Confrontation Clause violations, they are lengthy and susceptible to having their language taken out of context, and the justices are sharply divided in these decisions, making it sometimes difficult to know which propositions of constitutional law have garnered the support of a majority of the Court.¹³³

The Court’s opinion in *Bryant* sends mixed signals to lower courts about proper Confrontation Clause analysis. For example, in a recent post-*Bryant* case, the Virginia Court of Appeals used a reliability test on the basis that “*Bryant* arguably resurrects some semblance of a reliability analysis even in Sixth Amendment confrontation cases.”¹³⁴ Thus, *Bryant* is already producing dissonance and unpredictability in Confrontation Clause cases.¹³⁵

An analysis focused on the primary purpose of the declarant’s statements would have been more consistent with the Court’s opinion in *Davis*.¹³⁶ The only relevance of the actions and statements of the interrogators is that they “shape the declarant’s perception of why his audience is listening and therefore influence *his purpose* in making the declaration.”¹³⁷ As one author has noted, “[a] test based on the purpose of the questioner would be historically inaccurate, would not fit a coherent or complete theory of the confrontation right, and would be verily easily subject to manipulation.”¹³⁸ Consequently, the primary purpose analysis should be focused on the perspective of the declarant,¹³⁹ and any statement

132. *People v. Fackelman*, 802 N.W.2d 552, 555 (Mich. 2011) (attributing a split decision over forceful dissent to an “attempt to synthesize several very-difficult-to-synthesize Confrontation Clause decisions of the Supreme Court”).

133. *Id.* at 561-62.

134. *Henderson v. Commonwealth*, 710 S.E.2d 482, 496 n.12 (Va. Ct. App. 2011), *reh’g en banc granted*, 712 S.E.2d 52.

135. *See Fackelman*, 802 N.W.2d at 561-62.

136. *See Davis v. Washington*, 547 U.S. 813, 821 (2006).

137. *Michigan v. Bryant*, 131 S. Ct. 1143, 1169 (Scalia, J., dissenting).

138. Brief of Richard D. Friedman, as Amicus Curiae in Support of Respondent at 3, *Bryant*, 131 S. Ct. 1143 (No. 09-150), 2010 WL 2565284, at *3.

139. *See* Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 259 (2005) (suggesting that viewing the event from the declarant’s perspective is the most accurate and effective way to determine the “primary purpose” of his or her statements, and providing a comprehensive methodology for defining testimonial statements under that approach).

he makes “in a situation warranting a reasonable anticipation of prosecutorial use” should be deemed testimonial.¹⁴⁰

B. *[Ongoing] Emergency!: Judicial Manipulation and Police Misconduct*

The *Bryant* majority outlined an expansive definition of emergency that is unpredictable, convoluted, and easily manipulated. For this, one could arguably fault *Davis*'s failure to provide a clear definition of “ongoing emergency.” *Davis* did distinguish, however, between statements *made* during an emergency and those that were not.¹⁴¹ For example, the statements at issue in *Davis* were “about events *as they were actually happening*,”¹⁴² while the statements in *Hammon* were about events that had already occurred.¹⁴³ Thus, once the statements were no longer describing ongoing events, any further statements were deemed testimonial because the emergency ceased to exist.¹⁴⁴

Applying this test to the facts in *Bryant* indicates that Covington's statements should have been considered testimonial because they were about *past* events. Moreover, since Bryant and Covington had already fled the scene of the crime, the information provided by Covington was unnecessary for “address[ing] the exigency of the moment.”¹⁴⁵ But the *Bryant* majority retreated from *Davis*'s characterization of emergencies, finding it “too narrow[.]” and stating that emergencies can extend far beyond the violent act.¹⁴⁶

Instead, the *Bryant* Court developed a “highly context-dependent inquiry” for its “ongoing emergency” analysis, holding that the totality of circumstances relative to the declarant and the interrogator must be considered.¹⁴⁷ The Court listed the following factors as relevant: the type of weapon used by the defendant,¹⁴⁸ the type of crime committed by the defendant,¹⁴⁹ the declarant's medical condition,¹⁵⁰ the presence of

140. *Id.* at 266.

141. *See Davis*, 547 U.S. at 827-30.

142. *Id.* at 827.

143. *See id.* at 829-30.

144. *Id.* at 827-30.

145. *Id.* at 828.

146. *Michigan v. Bryant*, 131 S. Ct. 1143, 1164 (2011). The Court seemed to backtrack from its decision in *Davis* by stating that, where weapons are involved, it is implausible to construe an emergency as lasting only so long as the violence is occurring, even though some have construed *Davis* to hold just that. *Id.*

147. *Bryant*, 131 S. Ct. at 1158.

148. *Id.* at 1158-59.

149. *Id.* at 1156, 1158-59, 1164.

150. *Id.* at 1158-59.

paramedics at the scene,¹⁵¹ whether the defendant remains at large,¹⁵² whether the event occurs in an “exposed, public area,”¹⁵³ whether the scene appears disorganized,¹⁵⁴ and whether law enforcement has secured the scene.¹⁵⁵ This tangled analysis is so nebulous that it risks becoming entirely subjective.¹⁵⁶ Thus, the determination of whether witness statements were gathered for the purpose of resolving an emergency or to assist in criminal prosecution will largely be left to the sole discretion of judges and their individual biases.¹⁵⁷ This unpredictability threatens the equal and uniform protection of the confrontation right, at least for violent crimes.

Moreover, the Court’s open-ended ongoing emergency test allows police to tamper with the scope and duration of emergencies in order to gather inculpatory nontestimonial evidence under the guise of resolving “ongoing emergencies.” As one author notes, “police officers will quickly learn that they can get statements characterized as non-testimonial if they testify, in effect, ‘I came up to the scene and didn’t know what was happening. My principal concern was securing the public safety. What this person told me was very important for that purpose.’”¹⁵⁸ This is precisely the opposite of the Court’s intention in *Davis*, where it stated, “[p]olice saying that an emergency exists cannot make it . . . so.”¹⁵⁹ The majority’s opinion in *Bryant*, therefore, suggests that as long as police can claim there was a potential threat to the public,¹⁶⁰ a defendant may be unable to invoke his constitutional right to confrontation.¹⁶¹

151. *See id.* at 1160.

152. *Id.* at 1164.

153. *Id.* at 1160.

154. *See id.*

155. *See id.* at 1163-65.

156. *Id.* at 1175-76 (Scalia, J., dissenting).

157. *Id.* at 1170. In his dissent, Justice Scalia expressed this criticism as follows:

The only virtue of the Court’s approach (if it can be misnamed [sic] a virtue) is that it leaves judges free to reach the “fairest” result under the totality of the circumstances. If the dastardly police trick a declarant into giving an incriminating statement against a sympathetic defendant, a court can focus on the police’s intent and declare the statement testimonial. If the defendant “deserves” to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial. And when all else fails, a court can mix-and-match perspectives to reach its desired outcome. Unfortunately, under this malleable approach “the guarantee of confrontation is no guarantee at all.”

Id. (quoting *Giles v. California*, 554 U.S. 353, 375 (2008) (plurality opinion)).

158. Richard D. Friedman, *Preliminary Thoughts on the Bryant Decision*, THE CONFRONTATION BLOG (Mar. 2, 2011, 12:42 AM), <http://confrontationright.blogspot.com/2011/03/preliminary-thoughts-on-bryant-decision.html>.

159. *Davis v. Washington*, 547 U.S. 813, 832 n.6 (2006) (emphasis added).

160. *Bryant*, 131 S. Ct. at 1172 (Scalia, J., dissenting) (accusing the majority of entertaining

Finally, the most frightening implication of *Bryant* is its potential to alter police behavior and the danger posed to public safety by the possible distortion of law enforcement's policing function. Police in dangerous situations now have an incentive to delay the resolution of emergencies in the pursuit of usable testimony against criminal defendants.¹⁶² However sinister the proposition, the potential for such unthinkable outcomes now exists in the wake of *Michigan v. Bryant*.

IV. CONFRONTING *BRYANT*'S EFFECTS

A. *Real World Ramifications of Michigan v. Bryant: Post-Bryant Case Illustrations*

Some might argue that the holding in *Bryant* is not as broad as it appears or that the Court simply misapplied its rule to the facts at hand. Unfortunately, the adverse effects of *Bryant* are already materializing among the lower courts.¹⁶³ The following two cases, in particular, illustrate how the *Bryant* decision has broadened the "ongoing emergency" exception to the detriment of criminal defendants.

In *State v. Manigo*, police responded to a radio dispatch reporting an ongoing crime.¹⁶⁴ Upon arrival, the two detectives found the victim, Jason Zabolinsky, in his vehicle with a severe laceration across his throat.¹⁶⁵ Zabolinsky told police he had just been robbed and pointed in the direction his assailants had fled.¹⁶⁶ According to one detective, Zabolinsky stated

an "active imagination" that "invents" a dramatic scene, then "worries that a shooter could leave the scene armed" and thereafter "roam the streets leaving a trail of bodies behind.").

161. *Id.* at 1173. Justice Scalia's dissent discussed this practical problem as follows:

Many individuals who testify against a defendant at trial first offer their accounts to police in the hours after a violent act. If the police can plausibly claim that a "potential threat to . . . the public" persisted through those first few hours, (and if the claim is plausible here it is always plausible) a defendant will have no constitutionally protected right to exclude the uncross-examined testimony of such witnesses. His conviction could rest (as perhaps it did here) solely on the officers' recollection at trial of the witnesses' accusations.

Id. (omission in original) (quoting *id.* at 1156 (majority opinion)).

162. Friedman, *supra* note 158.

163. See *United States v. Watson*, No. 05-80025, 2011 WL 1884624, at *2 (E.D. Mich. May 18, 2011); *Nesbitt v. St. Amand*, No. 09-10615-DPW, 2011 WL 1232376, at *8-12 (D. Mass. Mar. 30, 2011); *Guevara v. Adams*, No. CV 08-0907-JFW (RCF), 2011 WL 1790605, at *4-5 (C.D. Cal. Mar. 25, 2011); *Commonwealth v. Smith*, 951 N.E.2d 674, 680-85 (Mass. 2011).

164. *State v. Manigo*, No. 06-03-0355, 2011 WL 3241488, at *3 (N.J. Super. Ct. App. Div. Aug. 1, 2011).

165. *Id.* at *3.

166. *Id.*

that “‘three individuals’ had robbed him.”¹⁶⁷ The other detective, however, said Zabolinsky did not specify “the number of attackers.”¹⁶⁸ Regardless, police located and arrested three men about one block from Zabolinsky’s location.¹⁶⁹ William Manigo, one of the men apprehended, had “no money or evidence” found on his person but was convicted of second-degree robbery.¹⁷⁰ Because Zabolinsky died of unrelated causes prior to Manigo’s trial, one of the responding officers testified to Zabolinsky’s statements at the scene.¹⁷¹ Manigo appealed his conviction, contending that Zabolinsky’s statements to the police were testimonial and their admission violated his right to confrontation.¹⁷² On appeal, the court relied heavily on *Bryant* in affirming Manigo’s conviction and rejecting his Confrontation Clause objections.¹⁷³

The appellate court analogized the facts of *Manigo* to the facts of *Bryant*, reasoning, “the detectives did not know why or how Zabolinsky’s throat had been slashed, by whom, where the assailant or assailants were, or the specific location where the crime had occurred.”¹⁷⁴ This apparent uncertainty combined with the detective’s opinion that the situation was “volatile” and “potentially violent” was enough to find an ongoing emergency existed.¹⁷⁵ The suspects had already fled, however, and likely posed no further danger to the victim or the police. Moreover, the situation did not involve an armed shooter at large, as in *Bryant*, but rather “*potentially* violent criminals.”¹⁷⁶ There is no doubt that Zabolinsky’s statements were made to assist police in arresting and prosecuting his attackers, but because one of the individuals used a knife, Zabolinsky’s statements were deemed nontestimonial under *Bryant*’s ongoing emergency analysis.¹⁷⁷

In *Philpot v. State*,¹⁷⁸ police responded to a report of a home intruder. Upon arrival, the *unharmed* victim described the intruder to police.¹⁷⁹ Law enforcement searched the house but found no one inside and no property

167. *Id.*

168. *Id.*

169. *Id.* at *4.

170. *Id.* at *1-4.

171. *See id.* at *1-2.

172. *Id.* at *5.

173. *See id.* at *1-18.

174. *Id.* at *10.

175. *Id.* at *10-11.

176. *Id.* at *11 (emphasis added).

177. *Id.*

178. *Philpot v. State*, 709 S.E.2d 831, 833 (Ga. Ct. App. 2011).

179. *Id.*

missing.¹⁸⁰ As part of their investigation, the police spoke to a neighbor, who told the officers that she had seen a man run through her backyard “from the direction of the victim’s house.”¹⁸¹ The woman recognized the man as another neighbor, Joshua Philpot.¹⁸² Upon investigation, Philpot admitted to entering the home but contended it was to inform the victim that her garage door had been left open.¹⁸³ Philpot was arrested and charged with “two counts of burglary, one count of being a ‘Peeping Tom,’ one count of entering an automobile, one count of simple assault, and two counts of criminal trespass.”¹⁸⁴

At trial, the State introduced officer testimony from an incident several years earlier in which Philpot pleaded guilty to a burglary charge.¹⁸⁵ Specifically, the officer testified that during his investigation of the prior incident, the victim told him she had seen Philpot enter her kitchen window holding a knife.¹⁸⁶ Without an opportunity to cross-examine the declarant—i.e., the victim from the former crime—Philpot was convicted of, among other things, being a “Peeping Tom.” Philpot appealed, arguing that admission of the investigating officer’s testimony regarding the previous victim’s statements from a past crime was a violation of his right to confrontation.¹⁸⁷

The court of appeals reviewed the testimony given by the officer to determine whether its admission violated the Confrontation Clause. It reasoned that, “while the prior victim was no longer being *immediately* threatened, similar to the situation in *Bryant*, the armed perpetrator was still on the loose, and thus continued to pose a serious potential threat to the prior victim and her neighbors.”¹⁸⁸ Remarkably, in the previous incident, Philpot had neither used the knife nor threatened the victim with it. Further, no one was injured in the incident, Philpot was eventually apprehended, and the confrontation was resolved non-violently.¹⁸⁹ Despite the obvious lack of factual similarities between *Bryant* and *Philpot*, the court used *Bryant*’s broad language to justify the admission of testimonial hearsay obtained during an “ongoing emergency.”

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 833-34.

184. *Id.* at 833.

185. *Id.* at 833-34.

186. *Id.* at 838.

187. *Id.* at 833-34.

188. *Id.* at 839.

189. *See id.* at 834.

As these cases illustrate, *Bryant* is currently being used among lower courts to admit uncrossed testimony and secure convictions where evidence against the accused is lacking. There seems to be little that the courts will not classify as an emergency, including the existence of a neighborhood “Peeping Tom.” Consequently, *Bryant*’s “expansive exception to the Confrontation Clause for violent crimes”¹⁹⁰ impairs the rights of defendants and lessens the burden of prosecutors.

B. *Avoiding the Pitfalls of Bryant: Greater Protection of Confrontation Through State Constitutions*

Despite the Court’s concerted narrowing of the confrontation right in *Bryant*, criminal defendants may still have recourse for a denial of confrontation rights in state courts under state constitutions. Most state constitutions contain a bill of rights and confrontation clause similar to that set forth in the Sixth Amendment.¹⁹¹ States are free to interpret their own laws so that they provide broader protections than the federally mandated minimum, so long as those rulings rest on “adequate and independent state ground[s].”¹⁹² The Supreme Court has noted that “a State is free *as a matter of its own law* to impose greater restrictions on police activity than those th[e] Court holds to be necessary upon federal constitutional standards.”¹⁹³

While many states have interpreted their constitutions to mirror the federal confrontation right,¹⁹⁴ some states have held their constitutions to afford a more rigorous right to confrontation.¹⁹⁵ Indiana and Massachusetts, for example, require a “face to face” meeting and cross-examination of witnesses in the presence of the defendant and a trier of fact.¹⁹⁶ Thus,

190. *Michigan v. Bryant*, 131 S. Ct. 1143, 1173 (2011) (Scalia, J., dissenting).

191. See Robert Force, *State “Bills of Rights”: A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 app. at 164-82 (1969).

192. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (“Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and independent state ground.”).

193. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (emphasis added) (“[A] State may not impose . . . greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.”).

194. See *State v. Blanchette*, 134 P.3d 19, 30 (Kan. Ct. Ap. 2006); *Commonwealth v. Willis*, 716 S.W.2d 224, 233-34 (Ky. 1986); *State v. Schaal*, 806 S.W.2d 659, 662 (Mo. 1991); *State v. S.B. (In re Interest of S.B.)*, 639 N.W.2d 78, 82 (Neb. 2002); *State v. Self*, 564 N.E.2d 446, 452-53 (Ohio 1990); *State v. Foster*, 957 P.2d 712, 721-22 (Wash. 1998).

195. See *Brady v. State*, 575 N.E.2d 981, 986-88 (Ind. 1991); *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 371 (Mass. 1988); *Commonwealth v. Ludwig*, 594 A.2d 281, 283-84 (Pa. 1991).

196. See *Hart v. State*, 578 N.E.2d 336, 337 (Ind. 1991) (“The face-to-face requirement of our

defendants in these states should bring their confrontation violation claims under their state constitutions, rather than under the Sixth Amendment, to avoid the ongoing emergency exceptions of *Bryant*. More importantly, in states that follow federal confrontation standards, the courts should refuse to follow *Bryant* when interpreting their own constitutions and uphold the more protective standard of *Crawford* and *Davis*. As Justice Brennan admonished:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.¹⁹⁷

V. CONCLUSION

With its decision in *Crawford*, the Supreme Court made a clear determination to protect and enforce the categorical constitutional right of the accused to “be confronted with the witnesses against him”¹⁹⁸ The Court declared that the Confrontation Clause provides a procedural guarantee and “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”¹⁹⁹ Furthermore, the Court explicitly rejected the notion that the Sixth Amendment provides for “any open-ended exceptions” to the confrontation requirement.²⁰⁰ As a result, the testimonial approach established in *Crawford* restored the confrontation right to preeminence among the protections afforded criminal defendants.

state constitution is separate and in addition to the confrontation right afforded by the same provision and by the Sixth Amendment of the United States Constitution.”); *Bergstrom*, 524 N.E.2d at 373 (“Coming again to the accused’s right ‘to meet’ a witness against him ‘face to face,’ we note that we have never interpreted [the Massachusetts Constitution] as permitting introduction of an available witness’s testimony outside a defendant’s presence.”). See generally, Elizabeth O. Brown, Note, *Massachusetts Paves the Way: A Comparison Between the Confrontation Right Guaranteed by the United States and Massachusetts Constitutions in Light of Crawford v. Washington*, 41 SUFFOLK U. L. REV. 63 (2007) (contrasting Massachusetts’ more protective confrontation right with federal confrontation standards).

197. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

198. U.S. CONST. amend. VI.

199. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

200. *Id.* at 54 (“[T]he Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by courts.”).

Davis built on *Crawford* and clarified the meaning of testimonial in the context of interrogations.²⁰¹ Particularly, the Court introduced the “primary purpose” inquiry for determining when interrogations produce testimonial responses.²⁰² The “primary purpose” inquiry accounted for circumstances under which statements were made,²⁰³ but ultimately was intended to analyze the declarant’s statements for purposes of Confrontation Clause analysis.²⁰⁴

Michigan v. Bryant marks an unstable retreat from the Court’s decisions in *Crawford* and *Davis*. It eroded *Crawford*’s testimonial approach and altered the *Davis* primary purpose analysis by shifting the inquiry to the circumstances, the intent of interrogators, and the reliability of statements produced, rather than the testimonial nature of the declarant’s statements.²⁰⁵ The Supreme Court’s unwillingness to apply *Crawford* is not only “unsettling,”²⁰⁶ but poses practical difficulties in criminal proceedings across the country.²⁰⁷ Ultimately, *Bryant*’s decision makes judicial application of the Confrontation Clause subjective and unpredictable, stripping the criminal justice system of one of its essential checks and balances: ascertainment of the truth through cross-examination for serious criminal offenses.

201. *Davis v. Washington*, 547 U.S. 813, 822 & n.1 (2006).

202. *Id.* at 822 n.1.

203. *Id.* at 830.

204. *Id.* at 822 n.1, 827-30.

205. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1168-76 (2011) (Scalia, J., dissenting).

206. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2725-26 (2011) (Kennedy, J., dissenting) (identifying that the Court “is not committed in equal shares to a common set of principles in applying the holding of *Crawford*” and finding it “unsettling” that “the Court in the wake of *Crawford* has had such trouble fashioning a clear vision of that case’s meaning”).

207. *Id.* (arguing that the Court continues to “leave trial judges to ‘guess what future rules this Court will distill from the sparse constitutional text,’ or to struggle to apply an ‘amorphous, if not entirely subjective,’ ‘highly context-dependent inquiry’ involving open-ended balancing.” (citations omitted) (quoting *Bryant*, 131 S. Ct. at 1175-76 (Scalia, J., dissenting); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2544 (2009) (Kennedy, J., dissenting))).