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Michigan v. Bryant: Returning to an Open-Ended Confrontation Clause Analysis

Shari H. Silver

Notes

MICHIGAN v. BRYANT: RETURNING TO AN OPEN-ENDED CONFRONTATION CLAUSE ANALYSIS

SHARI H. SILVER*

In *Michigan v. Bryant*,[1] the United States Supreme Court considered whether a victim's statements to police—made shortly after the officers found the victim with a mortal gunshot wound—were admissible under the Confrontation Clause[2] of the Sixth Amendment.[3] The Court held that the primary purpose of the police interrogation of the victim was to respond to an ongoing emergency in which an armed shooter was at large.[4] Based on this determination, the Court concluded that the victim's statements to the police were nontestimonial[5] and, therefore, did not implicate the Confrontation Clause.[6]

The Court's combined focus on the intent of the declarant and the motives of the police to categorize the victim's statements as nontestimonial was a predictable result of the incomplete and contradictory directives provided by *Crawford v. Washington*[7] and *Davis v. Washington*.[8] Despite an earlier rejection of open-ended Confrontation Clause analysis, the Court's combined focus on the declarant and the

* J.D. Candidate, 2013, University of Maryland Francis King Carey School of Law; B.A. 2010, Vassar College. The author expresses special gratitude to Judge Paul W. Grimm and Molly K. Madden, Notes and Comments Editor, for their invaluable advice throughout the development of this Note. She would also like to thank Abigail Baird, an unsurpassed teacher and friend, for her guidance and encouragement. Finally, the author is thankful for her parents, Penny and Jeffrey Silver, who are unfailingly supportive and whose hard work and dedication are a model for all that she does.

1. 131 S. Ct. 1143 (2011).

2. U.S. CONST. amend. VI. The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

3. *Bryant*, 131 S. Ct. at 1150.

4. *Id.* at 1166–67.

5. *See infra* Part II.A.2–3.

6. *Bryant*, 131 S. Ct. at 1167.

7. 541 U.S. 36 (2004).

8. 547 U.S. 813 (2006); *see infra* Part IV.A.

police promotes a discretionary standard that enables virtually any result on a given set of facts and fails to adequately safeguard defendants' rights to confrontation.[9] Rather than develop a combined focus on the declarant and the officers, the Court should have created a declarant-focused approach that limits discretionary analysis and protects defendants' rights to confront the witnesses against them.[10]

I. THE CASE

On April 29, 2001, Michigan police responded to a radio dispatch stating that a man had been shot.[11] Shortly thereafter the police found the victim, Anthony Covington, lying in the parking lot of a gas station and suffering from a fatal gunshot wound to his abdomen.[12] The officers asked Covington "what had happened, who had shot him, and where the shooting had occurred."[13] Covington named "Rick" as the shooter, provided a physical description of him, and identified the rear of Rick's house as the location of the shooting.[14] Covington further explained that he had been shot through the closed back door and that he had escaped by driving himself six blocks to the gas station.[15] Covington died within hours after he was transported to the hospital.[16]

The officers proceeded to Richard "Rick" Bryant's house.[17] The police found Covington's wallet and identification outside of Bryant's house as well as blood on the back porch.[18] In addition, the police discovered a bullet on the rear porch and a bullet hole in the back

9. *See infra* Part IV.B.

10. *See infra* Part IV.C. This Note will refer to the examination of an interrogation's primary purpose from the perspective of the declarant as the "declarant-focused approach."

11. People v. Bryant, 768 N.W.2d 65, 67 (Mich. 2009), *vacated*, 131 S. Ct. 1143 (2011).

12. *Id.* The 2009 decision did not use the victim's name, but an earlier decision did. *See* People v. Bryant, No. 247039, 2004 WL 1882661, at *1 (Mich. Ct. App. Aug. 24, 2004) (per curiam), *rev'd*, 768 N.W.2d 65 (Mich. 2009), *vacated*, 131 S. Ct. 1143 (2011).

13. *Bryant*, 768 N.W.2d at 71.

14. *Id.* at 67 & n.1. Covington's brother testified that Rick sold drugs from the back door of Rick's house. *Id.* at 67. The brother also testified that the day before the shooting Covington had told him that he planned to redeem from Rick a coat pawned earlier in exchange for drugs. *Id.*

15. *Id.* Covington asserted that he knew Rick was his attacker even though he did not see Rick shoot him. *Id.* Covington explained that he, prior to the shooting, had a short conversation with Rick through the door and that he recognized Rick by the sound of his voice. *Id.*

16. *Id.* Covington, prior to being taken to the hospital, repeatedly asked the police when emergency medical services would arrive on scene. *Bryant*, 131 S. Ct. at 1165.

17. *Bryant*, 768 N.W.2d at 67.

18. *Id.*

door.[19] Bryant was not at home when the police arrived and was not arrested until one year later.[20]

At Bryant's trial, the Wayne County Circuit Court admitted, as excited utterances,[21] the statements Covington made to the police.[22] The jury was unable to reach a decision.[23] In Bryant's second trial, the jury convicted him of second-degree murder, possession of a firearm by a felon, and possession of a firearm during the commission of a felony.[24]

Bryant appealed to the Michigan Court of Appeals, arguing that the admission of Covington's statements violated his right to confrontation under the Sixth Amendment.[25] The court of appeals affirmed Bryant's convictions on the grounds that Covington's statements were nontestimonial and therefore beyond the scope of the Confrontation Clause.[26] Bryant appealed to the Michigan Supreme Court.[27] As Bryant's appeal before the Michigan Supreme Court was pending,[28] the United States Supreme Court decided *Davis v. Washington*, which provided further guidance on determining statement admissibility under the Confrontation Clause.[29] The Michigan Supreme Court remanded Bryant's case, ordering the court of appeals to reconsider Bryant's claim in light of *Davis*.[30]

The court of appeals decided that the primary purpose of the police interrogation of Covington was to respond to an ongoing emergency.[31] Based on this determination, the court affirmed Bryant's convictions and concluded that Covington's statements to the police were admissible because they were nontestimonial.[32]

19. *Id.*

20. *Id.* Bryant was arrested in California and then extradited to Michigan. *Id.*

21. For an explanation of the excited utterance exception to the rule against hearsay evidence, see *infra* note 56.

22. People v. Bryant, No. 247039, 2004 WL 1882661, at *1 (Mich. Ct. App. Aug. 24, 2004) (per curiam), *rev'd*, 768 N.W.2d 65 (Mich. 2009), *vacated*, 131 S. Ct. 1143 (2011).

23. *Bryant*, 768 N.W.2d at 67.

24. *Bryant*, 2004 WL 1882661, at *1.

25. *Id.*

26. *Id.*

27. People v. Bryant, 722 N.W.2d 797, 797 (Mich. 2006), *remanded to* No. 02-005508, 2007 WL 675471 (Mich. Ct. App. Mar. 6, 2007) (per curiam), *rev'd*, 768 N.W.2d 65 (Mich. 2009), *vacated*, 131 S. Ct. 1143 (2011).

28. *Id.*

29. 547 U.S. 813, 822 (2006).

30. *Bryant*, 722 N.W.2d at 797.

31. *Bryant*, 2007 WL 675471, at *3.

32. *Id.*

Bryant appealed once more to the Michigan Supreme Court, and the court reversed and remanded for a new trial.[33] The Michigan Supreme Court determined that the primary purpose of the police interrogation was to obtain information relevant for a later criminal prosecution.[34] Accordingly, the court concluded that the victim's statements to the police were testimonial and that admitting the statements violated Bryant's right to confrontation.[35] The United States Supreme Court granted certiorari to decide whether Covington's statements were admissible under the Confrontation Clause of the Sixth Amendment.[36]

II. LEGAL BACKGROUND

In recent years, Confrontation Clause jurisprudence has undergone a transformation in which the United States Supreme Court sought to reduce open-ended analysis and guarantee defendants' rights to confront the witnesses against them.[37] Part II.A of this Note discusses how the jurisprudence evolved from a reliance on discretionary evaluations of a statement's reliability to the employment of a categorical approach in deciding whether a statement is admissible at trial. Part II.B explains how, despite the Court's attempts to streamline Confrontation Clause analysis, state and lower federal courts continue to exercise considerable discretion and reach unpredictable decisions regarding the confrontation right.

A. The United States Supreme Court Attempted to Abandon Its Discretionary Approach to Confrontation Clause Analysis by Creating a Categorical Standard

The Court has long emphasized the importance of the rights afforded by the Confrontation Clause, while still recognizing that certain situations justify dispensing with these rights.[38] Initially, the Court employed hearsay rules and broad determinations of reliability to decide admissibility of statements made by witnesses who were un-

33. People v. Bryant, 768 N.W.2d 65, 67 (Mich. 2009), *vacated*, 131 S. Ct. 1143 (2011).

34. *Id.* at 73.

35. *Id.* at 79. This conclusion was reached over two dissenting opinions that determined the primary purpose of the police interrogation of Covington was to meet an ongoing emergency. *See id.* (Weaver, J., dissenting); *see also id.* (Corrigan, J., dissenting).

36. *Bryant*, 131 S. Ct. at 1152.

37. *See infra* Part II.A.

38. Mattox v. United States, 156 U.S. 237, 242–43 (1895).

available for trial.[39] The Court later criticized this approach as discretionary and without adequate protection for defendants' confrontation rights and developed a categorical approach in which courts are to classify statements as either testimonial or nontestimonial.[40] The Court provided conflicting messages, however, on whether, when applying the categorical analysis, the declarant's perspective controls, thereby undermining the Court's efforts to reduce inconsistency in Confrontation Clause jurisprudence.[41]

1. *The United States Supreme Court Initially Utilized Open-Ended Tests to Determine Whether a Statement Was Reliable and Therefore Admissible Under the Confrontation Clause*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[42] Three cases illustrate the evolution of the Supreme Court's early understanding of this language: *Mattox v. United States*,[43] *Dutton v. Evans*,[44] and *Ohio v. Roberts*.[45] In *Mattox*, the Court explained the importance of the confrontation right, yet stated that, under certain situations, this right should yield to considerations of public policy.[46] The *Mattox* Court suggested that statements falling within the hearsay exception of dying declarations may be admissible in the absence of confrontation.[47] Then, in *Dutton*, the Court demonstrated how the right to confrontation may also be dispensed with when statements bear sufficient "indicia of reliability."[48] Finally, in *Roberts*, the Court consolidated the reasoning of the above two cases by articulating a reliability test for statement admissibility under the Confrontation Clause.[49]

39. *See infra* Part II.A.1. For a definition of hearsay rules, see note 56. For a description of when a witness is unavailable, see note 67.

40. *See infra* Part II.A.2.

41. *See infra* Part II.A.3.

42. U.S. CONST. amend. VI. The Sixth Amendment is made binding on the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965).

43. 156 U.S. 237 (1895).

44. 400 U.S. 74 (1970).

45. 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

46. *Mattox*, 156 U.S. at 242–43.

47. *Id.* at 243–44.

48. *Dutton*, 400 U.S. at 89.

49. *Roberts*, 448 U.S. at 66.

Mattox was the first case in which the Court highlighted the significance of the Confrontation Clause.[50] The Court explained that the Confrontation Clause was intended to prevent the use of *ex parte* examinations of witnesses as evidence against the defendant and to protect the defendant's opportunity for cross-examination.[51] The procedural guarantees provided by the Sixth Amendment ensure not only that the defendant has the opportunity "of testing the recollection and sifting the conscience of the witness," but also that the witness is "compell[ed] . . . to stand face to face with the jury in order that they may . . . judge . . . whether he is worthy of belief."[52]

Despite the importance of the rights afforded by the Confrontation Clause, the *Mattox* Court acknowledged that public policy considerations might justify dispensing with these rights.[53] The Court recognized that chief among these public policy considerations was fairness.[54] The Court reasoned that there were situations where it would not be just for a defendant to "go scot free" merely because a witness was not available for trial.[55]

Seeking to accommodate this public policy interest, the *Mattox* Court implied that certain hearsay exceptions[56] were admissible under the Confrontation Clause.[57] For instance, in the Court's view, the admission of dying declarations aided in the administration of justice by ensuring that a defendant did not avoid conviction simply because a witness had died and could not provide testimony at trial.[58] Acknowledging that dying declarations are typically made outside the

50. *Mattox*, 156 U.S. at 242–43 ("There is doubtless reason for saying that the accused should never lose the benefit of any of [the] safeguards [provided by the Confrontation Clause] . . . .").

51. *Id.* at 242.

52. *Id.* at 242–43.

53. *See id.* at 243 (stating that the right to confrontation "must occasionally give way to considerations of public policy").

54. *See id.* at 243–44 (asserting that exceptions should be made to the constitutional requirement of confrontation "to prevent a manifest failure of justice").

55. *Id.* at 243.

56. Hearsay refers to "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED R. EVID. 801(c). Generally, hearsay is not admissible at trial. FED. R. EVID. 802. However, as the Court has noted, hearsay law is "riddled with exceptions." Ohio v. Roberts, 448 U.S. 56, 62 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004). *See, e.g.*, FED. R. EVID. 803(2) (stating that "excited utterances," or "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event of condition," are admissible despite the general ban against hearsay evidence).

57. *See Mattox*, 156 U.S. at 243–44 (arguing that the admission of evidence under the dying declarations hearsay exception comported with the Confrontation Clause).

58. *Id.* at 243.

defendant's presence and do not offer an opportunity for cross-examination, the Court nevertheless asserted that these statements may be deemed truthful even without the scrutiny of confrontation.[59] The Court reasoned that a witness's "impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath."[60] Thus, in the Court's view, confrontation was unnecessary to ensure that a dying witness provided honest statements, and the Court concluded that dying declarations may be admitted at trial.[61]

Similarly, in *Dutton v. Evans*, the Court suggested that admitting statements within the coconspirator hearsay exception[62] furthered the administration of justice by ensuring the admission of truthful statements.[63] The Court explained that because the coconspirator's statements were made spontaneously and were against the coconspirator's interests, they bore "indicia of reliability."[64] Implying that confrontation was therefore unnecessary to ensure the witness's honesty, the Court concluded that the coconspirator's statements were admissible at trial.[65]

In *Ohio v. Roberts*, the Court consolidated the reasoning of *Mattox* and *Dutton* by developing a reliability test for statement admissibility under the Confrontation Clause.[66] The *Roberts* Court explained that statements made by witnesses not present at trial are admissible under two conditions: (1) when the witnesses are unavailable[67] and (2) when the statements are reliable.[68] The Court further elaborated that a

59. *Id.* at 243–44.

60. *Id.*

61. *Id.*

62. The coconspirator hearsay exception refers to out-of-court statements made by a defendant's fellow conspirator while "in the course of and in furtherance of the conspiracy." Dutton v. Evans, 400 U.S. 74, 81 (1970). In *Dutton*, the state evidentiary rule at issue included within this exception statements made by the coconspirator during a period of concealing the criminal activity. *Id.*

63. *See id.* at 89 (asserting that the coconspirator's statements should be admitted because there was no reason to suspect that the coconspirator had lied).

64. *Id.* The defendant's coconspirator was a man who, along with the defendant and one other man, attacked and murdered three police officers. *Id.* at 76–77. The statements at issue were made by the coconspirator to a fellow prisoner. *Id.* at 77.

65. *See id.* at 89 (stating that the objective of the Confrontation Clause is to guarantee the truthfulness of witnesses' statements and that this objective was accomplished in the case at bar by the demonstration of certain "indicia of reliability").

66. 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

67. A witness is unavailable when, despite good faith efforts made by the prosecution, the witness cannot be made to appear at trial. *Id.* at 74 (citing Barber v. Page, 390 U.S. 719, 724–25 (1968)).

68. *Id.* at 66.

statement is reliable when it falls within a "firmly rooted hearsay exception," such as dying declarations, or is supported by "particularized guarantees of trustworthiness," such as statements by a coconspirator.[69] The Court reasoned that its earlier cases reflect the view that, so long as statements made by unavailable witnesses are reliable, they need not be subject to confrontation.[70] The Court therefore developed an open-ended standard of Confrontation Clause analysis in which courts are to determine statement reliability.

2. The United States Supreme Court Later Rejected the Reliability Test and Developed a Categorical Standard of Confrontation Clause Analysis

Twenty-five years after *Roberts*, in *Crawford v. Washington*, the Court criticized the reliability test as "replacing categorical constitutional guarantees with open-ended balancing tests."[71] In doing so, the *Crawford* Court identified major issues related to the reliability test of *Roberts*. First, the Court argued that basing statement admissibility on hearsay rules led to abuse of defendants' rights because, as the rules of evidence change over time, so does the admissibility of statements under the Confrontation Clause.[72] Second, the Court asserted that, by allowing courts wide discretion to decide the reliability of evidence, a defendant's right to confrontation was vulnerable to judicial override.[73] In the Court's belief, the "[v]ague standards" provided by the reliability test were "manipulable" and left the enforcement of defendants' confrontation rights to the whims of courts.[74]

Seeking to address the issues of the reliability test, the Court developed a categorical approach by basing the admissibility of statements on whether they are testimonial or nontestimonial.[75] The Court explained that testimonial statements made by a witness who did not testify at trial are admissible under the Confrontation Clause only when (1) the witness is unavailable for trial and (2) the defen-

69. *Id.*

70. *Id.*

71. *Crawford*, 541 U.S. at 67–68. Justice Scalia wrote for the Court in this pioneering decision. *Id.* at 38.

72. *Id.* at 50–51 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.").

73. *Id.* at 67–68.

74. *Id.* at 68.

75. *Id.*

dant had a prior opportunity for cross-examination.[76] By contrast, nontestimonial statements made by a witness who did not testify at trial are admissible when states allow this evidence under their hearsay law.[77]

The Court's focus on whether statements are testimonial stemmed from the text of the Confrontation Clause, which speaks of "witnesses" against the accused.[78] Witnesses, according to the Court, are "those who 'bear testimony.'"[79] Although it defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," the Court declined to provide a comprehensive definition of the term "testimonial."[80] Instead, the Court merely stated that, "at a minimum," the term "testimonial" includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial[,] and [statements made during] police interrogations."[81]

Applying the new categorical approach, the Court concluded that the witness's statements in *Crawford* were inadmissible under the Confrontation Clause.[82] The Court explained that the witness, Sylvia Crawford, was read her *Miranda* warnings and then interrogated twice by law enforcement about the involvement of her husband, Michael Crawford, in a stabbing.[83] Furthermore, Sylvia was unavailable for trial because of the state marital privilege.[84] Based on these facts, the Court determined that Sylvia's statements were testimonial and that Michael was denied an opportunity to cross-examine her.[85] Without any additional discussion on what other kinds of situations produce testimonial statements, the Court concluded that the admission of Sylvia's statements violated Michael's right to confrontation.[86] Con-

76. *Id.*; *cf. supra* text accompanying notes 67–70 (describing the two-pronged reliability test of *Roberts*).

77. *Crawford*, 541 U.S. at 68.

78. U.S. CONST. amend. VI.

79. *Crawford*, 541 U.S. at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

80. *Id.* at 51, 68 ("We leave for another day any effort to spell out a comprehensive definition of the term 'testimonial.'").

81. *Id.* at 68. The Court indicated that it "use[d] the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Id.* at 53 n.4.

82. *Id.* at 68.

83. *Id.* at 38. According to Michael, he and Sylvia went in search of the victim because Michael was upset about an earlier incident in which the victim had attempted to rape Sylvia. *Id.* A fight ensued when Michael and Sylvia found the victim in his apartment, and the victim was stabbed in the torso. *Id.*

84. *Id.* at 40. Generally, under the state marital privilege, a spouse is barred from testifying about the other spouse without that person's consent. *Id.*

85. *Id.* at 68.

86. *Id.*

sequently, the *Crawford* Court moved away from the open-ended reliability standard of *Roberts*, but did not provide a comprehensive definition of the term underlying its new categorical standard of Confrontation Clause analysis.

3. The United States Supreme Court Provided Further Guidance on the Categorical Standard of Confrontation Clause Analysis but Failed to Make Clear Whether It Was Crafting a Declarant-Focused Approach

The Court provided further direction on what statements are testimonial in *Davis v. Washington*, and thereby refined the categorical approach developed in *Crawford*.[87] The *Davis* Court directed courts to identify the primary purpose of a police interrogation in deciding whether the declarant's statements are testimonial or nontestimonial.[88] In applying the primary purpose analysis to the two cases analyzed in *Davis*, however, the Court did not make clear whether its analysis focused on the declarant, the interrogator, or both.[89]

In elaborating on the categorical standard established in *Crawford*, the *Davis* Court explained that statements made during police interrogations are nontestimonial when the "circumstances objectively indicat[e] that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency."[90] By contrast, statements made during police interrogations 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."[91]

The Court attempted to elucidate the primary purpose inquiry by identifying the following factors as useful to the analysis: (1) whether the declarant is describing events as they are happening; (2) whether there is an ongoing emergency; (3) the nature of what is asked by law enforcement and answered by the declarant; and (4) the interroga-

87. 547 U.S. 813, 822 (2006). The Court decided two separate cases in *Davis*: *State v. Davis*, 111 P.3d 844 (Wash. 2005) (en banc) and *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005). *Davis*, 547 U.S. at 817–21. The *Davis* Court's opinion was written by Justice Scalia. *Id.* at 817.

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

89. *Compare id.* at 823 n.1 (indicating a declarant-focused approach to the primary purpose analysis), *with id.* at 827 (suggesting a combined focus on both the declarant and the officers in determining the primary purpose of a police interrogation).

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

91. *Id.* (emphasis added).

tion's level of formality.[92] This type of primary purpose analysis, the Court indicated in dicta, should be conducted from the perspective of the declarant, and not the perspective of law enforcement.[93] Later in the opinion, however, the Court noted that in examining the nature of the questions asked and answered, it considered the interrogators' motives.[94]

Still, applying the primary purpose analysis to the two consolidated cases in *Davis*, the Court suggested that both the declarant's intent and the interrogators' motives are relevant considerations in determining statement admissibility under the Confrontation Clause. In *Davis* itself, the Court decided that statements made during a 911 call were nontestimonial.[95] The Court explained that the declarant, Michelle McCottry, made statements to a 911 emergency operator indicating that she was being assaulted by her former boyfriend, Adrian Davis.[96] The Court applied the aforementioned factors and decided that: (1) McCottry was describing events that were currently happening; (2) she was facing an ongoing emergency; (3) the nature of what was asked and answered was necessary to respond to the ongoing emergency; and (4) the interrogation was informal.[97] In applying the third factor, the Court emphasized how the operator's questions aimed to resolve the ongoing emergency.[98] Consequently, despite suggesting that the declarant's intent should form the focus of its analysis, the Court took the motives of law enforcement into account when determining that the primary purpose of the police interrogation was to respond to an emergency and that the statements at issue were nontestimonial.[99]

92. *Id.* at 827.

93. *See id.* at 823 n.1 ("And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.").

94. *See id.* at 827 (implying that questions asked by an interrogator may be considered in deciding the primary purpose of an encounter).

95. *Id.* at 828–29.

96. *Id.* at 817. The Court stated that the actions of 911 emergency operators may be considered actions by law enforcement for the purposes of Confrontation Clause analysis. *Id.* at 823 n.2. Therefore, the Court labeled the conversation between McCottry and the 911 emergency operator an interrogation by law enforcement. *Id.* at 826.

97. *Id.* at 827.

98. *Id.* For example, the Court explained that the operator asked about who was attacking McCottry, so that the police would know whether they were pursuing a "violent felon." *Id.*

99. *Id.* at 827–28.

Conversely, in *Davis*'s companion case,[100] the Court held that the statements made when police responded to a domestic violence disturbance were testimonial.[101] The Court explained that when the police arrived, declarant Amy Hammon was sitting by herself on the porch, and her husband, Hershel, was inside the house.[102] The police kept Amy and Hershel apart while they questioned Amy about what had happened.[103] Amy eventually told the police that Hershel had attacked her and her daughter.[104]

The Court reasoned that the primary purpose of the police interrogation was to investigate a crime because: (1) Amy told the police what had happened, as opposed to what was happening; (2) there was no ongoing emergency; (3) the officer's questions sought to investigate a past crime; and (4) the interrogation was formal.[105] The Court focused again on the motives of law enforcement when it determined that the officer questioned Amy "not seeking to determine . . . 'what is happening,' but rather 'what happened.'"[106] Relying once more on both the declarant's intent and the officers' motives, the Court concluded that Amy's statements were testimonial and inadmissible under the Confrontation Clause.[107] Taken together, the two consolidated cases in *Davis* indicate a focus on the declarant's intent, but in fact take into account the officers' motives.

B. State and Lower Federal Courts Continue to Exercise Considerable Discretion as They Decide Whose Perspective Controls the Categorical Approach to Confrontation Clause Analysis

Following *Crawford* and *Davis*, state and lower federal courts are to apply the categorical approach to Confrontation Clause analysis,

100. Hammon v. State, 829 N.E.2d 444 (Ind. 2005).

101. *Davis*, 547 U.S. at 829–30.

102. *Id.* at 819.

103. *Id.* at 819–20.

104. *Id.* at 820. Amy filled out a "battery affidavit," stating that Hershel "[b]roke our [f]urnace &shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps &phone. Tore up my van where I couldn't leave the house. Attacked my daughter." *Id.*

105. *Id.* at 829–30.

106. *Id.* at 830.

107. *Id.* Although the Court appeared to draw a firm line when it stated that testimonial statements are inadmissible absent unavailability and a prior opportunity for cross-examination, it retained an exception to this rule. *See id.* at 833–34 (discussing the doctrine of forfeiture by wrongdoing). In *Giles v. California*, the Court explained that the defendant forfeits the right to confrontation when she has engaged in wrongful acts aimed at preventing a witness from testifying at trial. 554 U.S. 353, 359–60 (2008) (plurality opinion).

under which admissibility is based on whether statements are testimonial or nontestimonial.[108] Although the Court intended to reduce open-ended analysis by developing this categorical approach, state and lower federal courts continue to exercise considerable discretion and reach divergent results as they decide how to classify statements.[109] Relying on incomplete and conflicting directives from the Court in *Crawford* and *Davis*, state and lower federal courts alternate between declarant-focused approaches[110] and approaches that consider both the declarant's intent and the officers' motives.[111]

1. Declarant-Focused Approaches

Some state and lower federal courts apply a declarant-focused approach in deciding whether statements are testimonial.[112] For example, in *Raile v. People*,[113] the Colorado Supreme Court explained that, in deciding whether statements are admissible under the Confrontation Clause, courts must assume the perspective of a "reasonable declarant."[114] In considering whether the declarant's statements to the police were admissible,[115] the court reasoned that, when the declarant made her statements, there was no ongoing emergency because the declarant (1) was in police protection, (2) was not in danger, and (3) was not asking for help.[116] The court determined that the declarant's statements indicated a primary purpose of providing information for a later criminal prosecution, were testimonial, and their admission violated the defendant's right to confrontation.[117]

108. *See supra* text accompanying notes 75–77.

109. *See, e.g.*, State v. Lucas, 407 Md. 307, 308–09, 965 A.2d 75, 76–77 (2009) (concluding that the victim's statements to the police, made after the officers responded to a domestic disturbance and at the scene of the crime, were testimonial); State v. Shea, 965 A.2d 504, 505 (Vt. 2008) (facing similar facts as those encountered in *Lucas*, but deciding that the declarant's statements were nontestimonial).

110. *See infra* Part II.B.1.

111. *See infra* Part II.B.2.

112. *See, e.g.*, United States v. Saget, 377 F.3d 223, 229 (2d Cir. 2004) (endorsing a declarant-focused approach); United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) (same); Cuyuch v. State, 667 S.E.2d 85, 89 (Ga. 2008) (same); State v. Camarena, 176 P.3d 380, 387 (Or. 2008) (en banc) (same).

113. 148 P.3d 126 (Colo. 2006) (en banc).

114. *Id.* at 133.

115. *Id.* at 128.

116. *Id.* at 133.

117. *Id.* Despite the court's conclusion that the defendant's right to confrontation was violated, the court did not reverse the defendant's conviction. *Id.* at 136. The court decided that the admission of the statements was harmless error because it had a negligible impact on the defense. *Id.*

Similarly, in *United States v. Hinton*,[118] the United States Court of Appeals for the Third Circuit suggested that the defendant's reasonable expectations control whether his statements are testimonial.[119] The declarant in *Hinton*, Thomas Mack, first made statements to the police in a 911 call and later in person when the police arrived at the scene of the crime.[120] In the 911 call, Mack reported that an unknown individual had threatened him with a gun.[121] When the police responded to the call, Mack rode with the officers in their cruiser and eventually identified the defendant, Thomas Hinton, as his assailant.[122] Reasoning that Mack was seeking the help of the police in ending a harrowing experience when he called 911, the court decided that Mack's statements were nontestimonial and admissible.[123] By contrast, the court determined that, when Mack identified Hinton while riding in the police cruiser, Mack was seeking to facilitate the officers' investigation of a crime.[124] His identification of Hinton was accordingly categorized as inadmissible, testimonial evidence.[125]

2. Combined Declarant- and Interrogator-Focused Approaches

A number of state and lower federal courts take both the declarant's intent and the officers' motives into account when classifying statements as testimonial or nontestimonial.[126] For instance, in *Wright v. State*,[127] the Indiana Court of Appeals considered both the declarant's statements and the officers' questions, and thereby deemed both the declarant and the police relevant to Confrontation Clause analysis.[128] When the police discovered the declarant, R.A., he was bleeding profusely from multiple stab wounds.[129] In response to an officer's question of who had stabbed him, R.A. identified Sean

118. 423 F.3d 355 (3d Cir. 2005).

119. *Id.* at 360.

120. *Id.* at 356–57.

121. *Id.*

122. *Id.* at 357. From the police cruiser, Mack pointed to two individuals and stated, "There you go." *Id.*

123. *Id.* at 361–62.

124. *Id.* at 361.

125. *Id.*

126. *See, e.g.*, United States v. Udeozor, 515 F.3d 260, 270 (4th Cir. 2008) (considering the perspectives of both the declarant and law enforcement); Belton v. Blaisdell, 559 F. Supp. 2d 128, 157 (D.N.H. 2008) (same); State v. Scacchetti, 711 N.W.2d 508, 513 (Minn. 2008) (same); State v. Franklin, S.W.3d 799, 817–18 (Tenn. 2010) (same).

127. 916 N.E.2d 269 (Ind. App. 2009).

128. *Id.* at 276–77.

129. *Id.* at 272–73.

Wright.[130] To decide whether R.A.'s identification of Wright was admissible under the Confrontation Clause, the court examined how R.A.'s statements referenced his current injuries and suggested that there was an ongoing emergency.[131] The court also evaluated the purpose of the officers' questions and determined that their inquiries were necessary for resolving the emergency.[132] Based on both R.A.'s intent and the officers' motives, the court decided that Wright's right to confrontation was not violated by admitting R.A.'s statements because the statements were nontestimonial.[133]

Likewise, in *United States v. Arnold*,[134] the United States Court of Appeals for the Sixth Circuit considered the perspectives of both the declarant and the police in determining whether the declarant's statements to the officers were admissible.[135] The declarant, Tamica Gordon, called 911 and stated that her mother's boyfriend, Joseph Arnold, had pointed a gun at her.[136] The police arrived on the scene shortly thereafter, and Gordon, visibly upset, told them that Arnold was trying to kill her.[137] Arnold subsequently returned to the scene and, upon his arrival, Gordon identified him as the man who had threatened her.[138] In examining whether each of Gordon's statements was admissible, the court considered what Gordon and the officers knew during their encounter.[139] The court reasoned that neither Gordon nor the officers knew whether Arnold posed a continued threat.[140] The court further determined that reasonable officers in this situation would perceive an emergency because an armed person was at large.[141] The court concluded that all of Gordon's statements were nontestimonial and that their admission did not violate Arnold's right to confrontation.[142]

130. *Id.*

131. *Id.* at 276.

132. *Id.* at 276–77.

133. *Id.*

134. 486 F.3d 177 (6th Cir. 2007).

135. *Id.* at 190.

136. *Id.* at 179. In addition, Gordon stated that Arnold was a convicted murderer and that he had recently been released from prison. *Id.*

137. *Id.* at 179–80. Gordon also described Arnold's gun as a "black handgun." *Id.* at 180.

138. *Id.*

139. *Id.* at 189–91.

140. *Id.* at 190.

141. *Id.* ("No reasonable officer could arrive at a scene while the victim was still 'screaming' and 'crying' about a recent threat to her life by an individual who had a gun and who was likely still in the vicinity without perceiving that an emergency still existed.").

142. *Id.* at 193.

As these recent Confrontation Clause cases demonstrate, the Supreme Court sought to minimize discretionary evaluations of statements' reliability by introducing a categorical approach in deciding whether statements are testimonial or nontestimonial. The Court failed, however, to give clear guidance on whether courts need to consider the declarant's intent, the officers' motives, or both in making this determination. As a result, state and lower federal courts' decisions regarding statement admissibility under the Confrontation Clause continue to be unpredictable.

III. THE COURT'S REASONING

In *Michigan v. Bryant*, the United States Supreme Court vacated the judgment of the Michigan Supreme Court, holding that the primary purpose of the police interrogation of Covington was to respond to an ongoing emergency.[143] In so holding, the Court concluded that Covington's statements were nontestimonial and that their admission did not violate the Confrontation Clause of the Sixth Amendment.[144]

According to the majority, in order to determine whether Covington's statements were testimonial and thus subject to the Confrontation Clause, the Court had to assess the primary purpose of the interrogation by conducting an objective evaluation of the interrogation's circumstances as well as the parties' statements and actions.[145] This objective evaluation consisted of a number of factors, including the existence of an ongoing emergency,[146] the type and scope of the emergency,[147] the victim's medical condition,[148] and the level of for-

143. 131 S. Ct. 1143, 1166–67 (2011).

144. *Id.* at 1167.

145. *Id.* at 1156. Justice Sotomayor delivered the opinion of the Court. *Id.* at 1149. According to the Court, the circumstances of an interrogation are "matters of objective fact." *Id.* at 1156. To objectively evaluate the parties' statements and actions, a court must determine the purpose that reasonable individuals would have had in that particular encounter. *Id.*

146. *Id.* at 1157. The Court reasoned that the existence of an ongoing emergency "focus[es] an individual's attention on responding to the emergency," thereby limiting the possibility that the individual is fabricating statements and eliminating the need to subject statements made during the emergency to cross-examination. *Id.*

147. *Id.* at 1158. The Court explained that the type and scope of an emergency may depend on what kind of weapon is involved. *Id.* For example, when the weapon involved is a gun, the emergency may not end when the victim escapes from his assailant because the general public continues to face a threat. *Id.* at 1158–59.

148. *Id.* at 1159. The Court stated that the victim's medical condition is important to the primary purpose analysis because "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." *Id.*

mality of the situation.[149] The Court also explained that, in examining the statements and actions of the parties, both the declarant's statements and the interrogators' questions should be considered.[150]

In deciding the case, the Court first examined the circumstances of the police interrogation of Covington.[151] When the police responded to the radio dispatch, they lacked important information, including who the victim and his attacker were and whether the attacker posed a continued threat to the victim or public.[152] In addition, Covington's interrogation did not reveal the shooter's current location, whether the shooting reflected a private dispute, or whether the danger had ended.[153] In the Court's opinion, the threat did not end when Covington fled Bryant's house because the case involved a gun.[154] Based on the above circumstances, the Court concluded that there was an ongoing emergency because an armed shooter was at large, and it was unclear whether the shooter would attack again and, if so, who was at risk.[155]

Next, the Court examined Covington's and the officers' statements and actions to determine whether the primary purpose of the police interrogation was to respond to the ongoing emergency.[156] Noting that Covington was in pain and that he repeatedly asked the police when emergency medical services would arrive, the Court concluded that a reasonable person in Covington's situation would not have had a primary purpose to provide testimony necessary for a later criminal prosecution.[157] In turn, in examining the statements and actions of the police, the Court focused on the officers' questions,

149. *Id.* at 1160. The Court explained that, when an interrogation is formal, the implication is that there is no ongoing emergency. *Id.* However, the fact that an interrogation is informal does not necessarily imply that there is an ongoing emergency. *Id.*

150. *Id.* The Court referred to its focus on both the declarant and the interrogator as a "combined approach." *Id.* at 1161. The Court rejected the argument that *Davis v. Washington* demands a declarant-focused approach, stating that "[t]he language in the footnote [in *Davis*] was not meant to determine *how* the courts are to assess the nature of the declarant's purpose, but merely to remind readers that it is the statements, and not the questions, that must be evaluated under the Sixth Amendment." *Id.* at 1160–61 n.11. In addition, the Court believed that a combined approach would resolve the ambiguities that arise from only considering one party's perspective. *Id.* at 1161.

151. *Id.* at 1163.

152. *Id.*

153. *Id.* at 1163–64.

154. *Id.* at 1164.

155. *Id.* The Court stated that the emergency did not continue until Bryant was arrested a year later, but declined to identify exactly when the emergency terminated. *Id.* at 1164–65.

156. *Id.* at 1165–66.

157. *Id.* at 1165.

which assessed the nature of the threat.[158] Given the evaluative nature of the questions, the Court determined that the police sought the information necessary for the ongoing emergency response.[159]

Finally, the Court considered the informality of Covington's interrogation, which was conducted in a public place and concluded with the arrival of emergency medical services.[160] The Court reasoned that the informal nature of the interrogation implied that its primary purpose was to cope with the ongoing emergency.[161] Based on an examination of the interrogation's circumstances as well as the parties' statements and actions, the Court concluded that Covington's statements to the police were nontestimonial and that the admission of these statements did not violate Bryant's right to confrontation.[162]

In a concurring opinion, Justice Thomas agreed that the admission of Covington's statements to the police did not violate the Confrontation Clause, yet he criticized the majority's primary purpose analysis.[163] Justice Thomas argued that the primary purpose analysis creates uncertainty for law enforcement and lower courts and results in unpredictable decisions.[164] He contended that the better approach would be to analyze the extent to which an interrogation resembles practices that the Confrontation Clause historically sought to eliminate.[165] Consequently, because the police interrogation of Covington was highly informal, Justice Thomas found that the interrogation did not represent the kind of practice that the Confrontation Clause historically addressed, and Covington's statements were admissible at trial.[166]

In dissent, Justice Scalia argued that Covington's statements were testimonial and that the majority distorted Confrontation Clause jurisprudence by deciding otherwise.[167] First, he criticized the majority's focus on the declarant's intent and the interrogators' motives and as-

158. *Id.* at 1165–66. The Court insisted that it did not attach "controlling weight" to the officers' motives in an interrogation. *Id.* at 1162. Instead, "the declarant's statements, not the interrogator's questions . . . must . . . pass the Sixth Amendment test." *Id.* The Court asserted, however, that in deciding whether statements are testimonial, "courts should look to all of the relevant circumstances," and the interrogator constitutes such a relevant consideration. *Id.*

159. *Id.* at 1166.

160. *Id.* at 1160, 1166.

161. *Id.* at 1166.

162. *Id.* at 1166–67.

163. *Id.* at 1167 (Thomas, J., concurring).

164. *Id.*

165. *Id.*

166. *Id.* at 1167–68.

167. *Id.* at 1168 (Scalia, J., dissenting).

serted that the declarant's intent is what matters.[168] Examining the interrogation from Covington's perspective, Justice Scalia concluded that Covington knew there was no ongoing threat from his attacker and that he intended to provide the police with statements necessary for Bryant's eventual prosecution.[169]

Second, Justice Scalia claimed the majority erred by concluding that there was an ongoing emergency when the police questioned Covington.[170] In Justice Scalia's view, because most murders involve only one victim, it was unlikely that Covington's attacker posed a continued threat to the police or public.[171] Finally, Justice Scalia argued that the majority returned to discredited standards of Confrontation Clause analysis by requiring judges to conduct open-ended evaluations of the totality of the circumstances and to consider the reliability of a declarant's statements to determine their admissibility at trial.[172]

Justice Ginsburg also dissented, arguing that Covington's statements to the police were testimonial.[173] Agreeing with Justice Scalia, Justice Ginsburg asserted that the declarant's intent should govern the analysis, and not the interrogators' motives.[174] In addition, Justice Ginsburg briefly noted that, if the issue had been presented in this case, she would have addressed the question of whether dying declarations are subject to the Confrontation Clause.[175]

168. *Id.* at 1168–69. In Justice Scalia's view, for a statement to be deemed testimonial, "the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused." *Id.* The interrogators' motives do not indicate how the declarant thought his words would be used. *Id.* at 1169.

169. *Id.* at 1170. Justice Scalia also contended that, even considering the officers' motives, "this is an absurdly easy case." *Id.* at 1171. The Justice explained that the officers' actions at the gas station indicated that they did not perceive a threat from Covington's attacker: they neither drew their weapons nor searched the premises for the shooter. *Id.*

170. *Id.* at 1172.

171. *Id.* at 1172–73.

172. *Id.* at 1175. Justice Scalia noted that "[t]he only virtue of the Court's approach (if it can be misnamed a virtue) is that it leaves judges free to reach the 'fairest' result under the totality of the circumstances." *Id.* at 1170. Justice Scalia criticized this outcome, arguing that, under the majority's approach, a defendant's right to confrontation is vulnerable to being ignored. *Id.*

173. *Id.* at 1176 (Ginsburg, J., dissenting).

174. *Id.* Justice Ginsburg further agreed with Justice Scalia that the majority's decision created confusion in Confrontation Clause jurisprudence. *Id.* at 1176–77.

175. *Id.* at 1177.

IV. ANALYSIS

In *Michigan v. Bryant*, the United States Supreme Court held that the primary purpose of the police interrogation of Covington was to respond to an ongoing emergency.[176] Based on this determination, the Court concluded that Covington's statements were nontestimonial and that their admission did not violate Bryant's right to confrontation.[177] The Court's combined focus on the declarant's intent and the officers' motives was a likely result of the incomplete and contradictory directives of *Crawford* and *Davis*.[178] The Court erred by focusing on both the declarant and the police because this standard promotes a discretionary analysis that leaves defendants' rights to confrontation insufficiently protected.[179] Instead of examining both the declarant's intent and the officers' motives, the Court should have developed a declarant-focused approach, and thereby secured defendants' rights to confront the witnesses against them.[180]

A. The Bryant *Court's Combined Focus Was a Likely Result of the Incomplete and Contradictory Directives of* Crawford *and* Davis

The Court's combined focus on the declarant's intent and the officers' motives was a predictable result of the incomplete and contradictory directives given in *Crawford* and *Davis*. As the Court laid down a new standard of Confrontation Clause analysis in *Crawford*, it mistakenly failed to provide an adequately thorough definition of its key term, "testimonial."[181] Just two years later, in *Davis*, the Court offered additional guidance on defining "testimonial," yet still left ambiguity in the application of the categorical standard.[182] The *Bryant* Court, forced to maneuver the gaps and ambiguities established by *Crawford* and *Davis*, responded with a combined focus on the declarant and the

176. *Id.* at 1166–67 (majority opinion).

177. *Id.* at 1167.

178. *See infra* Part.IV.A.

179. *See infra* Part IV.B.

180. *See infra* Part IV.C.

181. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) (declining to define the term "testimonial").

182. *Compare* Davis v. Washington, 547 U.S. 813, 822 (2006) (explaining that whether statements are testimonial depends on the primary purpose of the police-citizen encounter without indicating whose perspective should dictate the primary purpose of the interrogation), *with id.* at 823 n.1 (stating that "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate").

officers that reasonably followed from precedent[183] but was unforeseen by Justice Scalia,[184] the author of those earlier opinions.[185]

The *Bryant* Court applied a categorical standard that lacked a clear definition of the term "testimonial." Although legal scholars considered *Crawford* a major shift in Confrontation Clause jurisprudence,[186] the Court's refusal to provide a comprehensive definition of "testimonial" resulted in uncertainty.[187] Equipped only with the few core examples of testimonial statements identified in *Crawford*,[188] state and lower federal courts confronted situations that did not fit into any of *Crawford*'s limited practices.[189] As a result, many courts reached divergent conclusions as they grappled with these unusual situations.[190]

The Court's failure to provide a more complete definition of "testimonial" not only led to confusion among other courts, but also opened the door for a later Court to significantly alter how the term would be understood.[191] Indeed, in an effort to offer additional guidance on defining "testimonial," the Court in *Davis* developed an en-

183. *See id.* at 827 (suggesting that both the declarant's intent and the interrogators' motives are relevant considerations in determining the primary purpose of an interrogation); *Crawford*, 541 U.S. at 68 (declining to define the term "testimonial," and thereby leaving ambiguity in Confrontation Clause analysis).

184. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1174 (2011) (Scalia, J., dissenting) ("[The Court's decision in *Bryant*] is a gross distortion of the law . . . .").

185. *Davis*, 547 U.S. at 817; *Crawford*, 541 U.S. at 38.

186. *See, e.g.*, Paul W. Grimm, Jerome E. Deise & John R. Grimm, *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial?*, 40 U. BALT. L.F. 155, 157 (2010) (explaining that "*Crawford* shifted the touchstone of admissibility from a statement's reliability to its testimonial nature"); Fred O. Smith, Jr., Note, Crawford*'s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1498 (2008) ("Courts have called the decision a 'bombshell,' a 'renaissance,' and the dawning of a 'new day' in the Sixth Amendment's Confrontation Clause jurisprudence.").

187. *See, e.g.*, United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004) (describing how, because the *Crawford* Court did not provide a comprehensive definition of "testimonial," it is unclear what are the "determinative" characteristics of testimonial statements).

188. The *Crawford* Court stated that, "at a minimum," testimonial evidence includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial[,] and [statements made during] police interrogations." *Crawford*, 541 U.S. at 68.

189. *See, e.g.*, *Saget*, 377 F.3d at 228–29 (finding that a declarant's statements to an informant, whose identity is unknown to the declarant, are testimonial under *Crawford* even though these circumstances were not identified in that case). *But see* United States v. Hinton, 423 F.3d 355, 362 (3d Cir. 2005) (explaining that some of the statements at issue were nontestimonial because they did not fit into any of the categories articulated by *Crawford*).

190. *See supra* Part II.B.

191. At oral argument in *Bryant*, Justice Breyer, who joined the Court's opinion in *Crawford*, 541 U.S. at 37, admitted that he "did not foresee the scope of *Crawford*." Transcript of Oral Argument at 54, Michigan v. Bryant, 131 S. Ct. 1143 (2011) (No. 09-150), 2010 WL 3907894.

tirely new test to categorize statements made in response to a police interrogation.[192] The *Davis* Court explained that the primary purpose of a police interrogation may dictate whether statements are testimonial.[193] While the primary purpose test was a helpful expansion of the *Crawford* Court's minimal construction of "testimonial" and fit easily into the categorical framework, it demonstrated the open-endedness of the categorical standard and its ability to be easily manipulated.[194]

Additionally, the *Davis* Court did little to rectify the ambiguity of the categorical standard established in *Crawford*. In elaborating on the categorical standard, the *Davis* Court provided conflicting instructions on the perspective from which the primary purpose test should be conducted. In footnote 1 of *Davis*, the Court indicated that the declarant's intent—and not the interrogators' motives—is what matters when determining the primary purpose of an interrogation and, accordingly, statement admissibility under the Confrontation Clause.[195] While identifying factors to elucidate the primary purpose test, however, the Court opened up the analysis to the kinds of questions asked by law enforcement.[196] By incorporating law enforcement's questions into the primary purpose test, the *Bryant* Court suggested that the interrogators' motives are relevant considerations,[197] and undermined its previous suggestion that the declarant's intent is what matters.

192. *See* Davis v. Washington, 547 U.S. 813, 822 (2006) (determining that statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

193. *Id.* For a detailed discussion of *Davis*'s primary purpose test, see *supra* text accompanying notes 87–91.

194. *See* Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under* Crawford *and* Davis, 75 TENN. L. REV. 753, 765, (2008) (describing *Davis* as providing a "potentially workable framework," despite eventually concluding that it has not lived up to this potential); *id.* at 778 (arguing that *Crawford* and *Davis* created a broad and easily manipulated test for statement admissibility under the Confrontation Clause); Grimm et al., *supra* note 186, at 158 ("*Davis* developed *Crawford*'s inchoate definition of 'testimonial' . . . .").

195. *See 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.").

196. *See id.* at 827 (examining the nature of the interrogators' questions).

197. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1160–61 (2011) (suggesting that, because *Davis* mandates the examination of the nature of interrogators' questions, *Davis* requires consideration of the interrogators' primary purpose).

The *Bryant* Court, acknowledging that *Davis* provided confusing directives on whose perspective controls the categorical analysis,[198] determined that both the declarant's intent and the interrogators' motives are pertinent in determining the primary purpose of an interrogation.[199] Although Justice Scalia disparaged the majority's combined approach as unsupported by precedent,[200] the *Bryant* Court drew on the *Davis* Court's conflicting directives as evidence that both the declarant and the interrogators must be taken into account when deciding statement admissibility.[201] Specifically, the *Bryant* Court focused on *Davis*'s examination of both the declarant's statements and the interrogators' questions and reasoned that *Davis* requires such a combined approach.[202] Having made this determination, the *Bryant* Court then denied that footnote one of *Davis* mandates an exclusively declarant-focused approach.[203] In other words, the *Bryant* Court relied on what the *Davis* Court did, as opposed to what the *Davis* Court said, in concluding that a court must conduct a combined inquiry. Justice Scalia therefore overlooked how *Davis*, an opinion that followed from

198. *See id.* at 1160 n.11 ("Some portions of *Davis* . . . have caused confusion about whether the inquiry [into whether a statement is testimonial] prescribes examination of one participant to the exclusion of the other."). Commentators have come to different conclusions about *Davis*'s instructions for whose perspective should control the primary purpose analysis. *See, e.g.*, Ellen Liang Yee, *Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 787 (2008) (explaining *Davis*'s "objective analysis" of the encounter's primary purpose "from the perspective of a reasonable third party who is unrelated to the incident"); Andrew Dylan, Note, *Working Through the Confrontation Clause After* Davis v. Washington, 76 FORDHAM L. REV. 1905, 1937 (2007) (stating that, after *Davis*, "lower courts should feel free" to consider the perspectives of both the declarant and the police); Thomas M. Forsyth, III, Note, *Just Don't Say You Heard It from Me: Bridging the* Davis v. Washington *Divide of Indistinguishable Primary-Purpose Statements*, 35 HASTINGS CONST. L.Q. 263, 275 (2008) (asserting that "[t]he *Davis* text itself" supports a declarant-focused approach).

199. *Bryant*, 131 S. Ct. at 1160 ("*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator.").

200. *See id.* at 1168 (Scalia, J., dissenting) (stating that *Bryant* "distorts our Confrontation Clause jurisprudence").

201. *See id.* at 1160 (majority opinion) (reasoning that both the declarant and his interrogators are relevant considerations in the primary purpose analysis based on the *Davis* Court's instruction to consider the nature of the declarant's statements and the interrogators' questions).

202. *Id.*

203. *See id.* at 1160–61 n.11 ("The language in the footnote was not meant to determine *how* the courts are to assess the nature of the declarant's purpose, but merely to remind readers that it is the statements, and not the questions, that must be evaluated under the Sixth Amendment.").

the open-ended analysis established in *Crawford*, contributed to the *Bryant* Court's decision to use a combined focus.[204]

B. *The* Bryant *Court Erred by Examining the Intent of the Declarant and the Motives of the Police Because This Standard Establishes a Discretionary Analysis That Provides Insufficient Protection of Defendants' Rights to Confrontation*

The Court erred by considering both the declarant's intent and the officers' motives because this approach facilitates a discretionary standard and thereby offers minimal protection of defendants' rights to confront the witnesses against them. Although the Court stated that it relied on a "combined inquiry,"[205] the Court was unclear whether, depending on the circumstances, one perspective may be weighed more heavily than another.[206] By allowing the categorical analysis to emphasize the perspective of the declarant, the police, or both, the Court ensured a return to a discretionary Confrontation Clause analysis akin to that of the reliability standard under *Ohio v. Roberts*.[207] Similar to the *Roberts* reliability test, the discretionary standard established by *Bryant* creates an unstable framework in which state and lower federal courts may reach virtually any conclusion depending on which perspective they choose to focus.[208]

204. *See id.* at 1168 (Scalia, J., dissenting) (suggesting that the Court's current decision, and not any earlier approach to Confrontation Clause analysis, has muddied the law). Justice Scalia's astonishment over the *Bryant* Court's combined approach is especially surprising given that a number of state and lower federal courts had already come to similar conclusions about how to conduct the primary purpose analysis and, accordingly, categorize statements as either testimonial or nontestimonial. *See, e.g.*, United States v. Arnold, 486 F.3d 117, 190 (6th Cir. 2007) (utilizing a combined inquiry in classifying the declarant's statements); State v. Franklin, 308 S.W.3d 799, 817–18 (Tenn. 2010) (same). *But see* United States v. Hinton, 423 F.3d 355, 360 (3d Cir. 2005) (employing a declarant-focused approach); Cuyuch v. State, 667 S.E.2d 85, 89 (Ga. 2008) (same).

205. *Bryant*, 131 S. Ct. at 1160, 1166–67 (majority opinion).

206. *See id.* at 1158 (explaining that the determination of whether an emergency exists, for the purpose of categorizing statements as either testimonial or nontestimonial, is a "highly context-dependent inquiry").

207. 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004); *see also supra* text accompanying notes 66–70 (discussing the *Roberts* test). The *Crawford* Court explained that "[t]he framework [under *Roberts*] is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Crawford*, 541 U.S. at 62–63.

208. *See Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting) ("The only virtue of the Court's approach (if it can be misnamed 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

A critical flaw of the *Bryant* decision is that the Court did not make clear whether, depending on the circumstances, the declarant's intent may be emphasized over police motives or vice versa. Despite the fact that after *Davis* many state and lower federal courts were already applying the primary purpose test inconsistently by emphasizing one perspective over another,[209] *Bryant* has left the right to confrontation in an even more precarious position than it occupied under *Davis*. Whereas before *Bryant* a combined focus might have been implied from *Davis*'s confusing directives, now it is mandated by the terms of *Bryant*.[210]

The *Bryant* Court expressly stated that Confrontation Clause analysis is "highly context-dependent"[211] and that "courts should look to all of the relevant circumstances" in determining whether a declarant's statements are testimonial.[212] Thus, *Bryant* freed state and lower federal courts to consider anything "relevant" in deciding whether statements are admissible at trial.[213] Under the guise of "relevance," state and lower federal courts may use their discretion to focus the analysis on factors emphasizing the perspective of the declarant, law enforcement, or both.[214]

In allowing courts to continue making discretionary decisions of which perspective matters, the Court guaranteed a return to the unpredictability that characterized the *Roberts* era.[215] The declarant and the officers often have very different perspectives in a police interrogation.[216] As Justice Scalia recognized in *Bryant*, the perspective from which an interrogation is analyzed has a significant impact on wheth-

to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial.").

209. *See, e.g.*, *Arnold*, 486 F.3d at 190 (utilizing a combined approach, but emphasizing the officers' motives by examining what the officers knew at various points throughout the police interrogation).

210. *See Bryant*, 131 S. Ct. at 1160 (majority opinion) ("*Davis requires* a combined inquiry that accounts for both the declarant and the interrogator." (emphasis added)).

211. *Id.* at 1158.

212. *Id.* at 1162.

213. *Id.*; *see also supra* note 208.

214. *See, e.g.*, Cuyuch v. State, 667 S.E.2d 85, 89 (Ga. 2008) (using a declarant-focused approach). *But see* United States v. Udeozor, 515 F.3d 260, 270 (4th Cir. 2008) (using a combined approach).

215. For a discussion of the flaws of *Roberts,* see *supra* Part II.A.2.

216. *See, e.g.*, United States v. Saget, 377 F.3d 223, 228–29 (2d Cir. 2004) (suggesting that, although the police may have had a primary purpose to investigate a crime, the declarant did not have the same purpose); Raile v. People, 148 P.3d 126, 133 (Colo. 2006) (en banc) (acknowledging that the police officer might have perceived an ongoing emergency, but that, from the perspective of the declarant, there was none).

er the declarant's statements during that interrogation are deemed testimonial or nontestimonial.[217]

By facilitating discretionary determinations of which perspective is controlling, the Court created a standard whereby state and lower federal courts can obtain virtually any result from a set of facts. This discretionary and unpredictable approach to Confrontation Clause analysis, as Justice Scalia recognized, leaves defendants' rights vulnerable to judicial override.[218] Upon a determination that statements are nontestimonial, state and lower federal courts may deprive defendants of the opportunity for cross-examination,[219] which is a critical tool for examining testimony and exposing its faults.[220] In the absence of cross-examination, defendants may be prosecuted or convicted on the basis of evidence that is neither truthful nor accurate.[221] Instead of elevating defendants' confrontation rights from the vulnerable position they held after *Davis*, the *Bryant* Court relegated these rights to the discretion of state and lower federal courts, rendering these rights as easily ignored as they were under the reliability standard of *Roberts*.[222]

217. *Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting); *see also* Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 255 (2005) (implying that the perspective from which an interrogation is considered has an effect on the outcome of the analysis).

218. *Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting).

219. *Cf.* Crawford v. Washington, 541 U.S. 36, 62 (2004) ("The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.").

220. *See* Mattox v. United States, 156 U.S. 237, 242–43 (1895) (explaining that, when the defendant cross-examines a witness, he "has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling [the witness] to stand face to face with the jury in order that they may . . . judge . . . whether he is worthy of belief"); *see also* Scott G. Stewart, Note, *The Right of Confrontation, Ongoing Emergencies, and the Violent-Perpetrator-at-Large Problem*, 61 STAN. L. REV. 751, 762 (2008) (explaining that cross-examination has been described by legal scholars as essential for determining the truthfulness of witnesses' testimony).

221. *See* John R. Grimm, Note, *A Wavering Bright Line: How* Crawford v. Washington *Denies Defendants a Consistent Confrontation Right*, 48 AM. CRIM. L. REV. 185, 209–10 (2011) (highlighting the importance of the truth-seeking function of cross-examination for both testimonial and nontestimonial statements); Smith, *supra* note 186, at 1518–19 (explaining how cross-examination allows the defendant to test the witness's memory and perception as well as her credibility); *see also Crawford*, 541 U.S. at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

222. *See Crawford*, 541 U.S. at 63–64 (explaining that courts under *Roberts* decided the reliability of statements through subjective determinations of what factors are most important and that this discretionary standard led to abuse of defendants' confrontation rights).

C. Rather than Rely on a Combined Focus, the Bryant *Court Should Have Created a Declarant-Focused Approach That More Consistently Safeguards Defendants' Rights to Confront Witnesses*

Instead of employing a combined focus on both the declarant's intent and the officers' motives, the Court should have created a declarant-focused approach that is better equipped to safeguard defendants' confrontation rights. By stipulating what perspective state and lower federal courts should assume in determining whether a declarant's statements are testimonial, the Court would have eliminated much of the discretionary analysis that goes into determining whose perspective controls.[223] The Court also would have reduced the unpredictability caused by attempting to identify the motives of law enforcement.[224] In reducing discretionary decisions and making the analysis more consistent, the Court would have more adequately protected defendants' confrontation rights from judicial override and thereby ensured defendants' opportunity for cross-examination.[225]

If the Court had directed state and lower federal courts to use a declarant-focused approach, it would have prevented discretionary decisions of which perspective determines whether a declarant's statements are testimonial. Limited to the intent of the declarant, courts would be unable to choose the perspective that yields the desired outcome.[226] By preventing courts from reaching any conclusion on a given set of facts, the Court would have guaranteed that defendants' confrontation rights are not overridden at courts' whims and that defendants are not improperly denied the opportunity for cross-examination of witnesses.

In providing state and lower federal courts with a declarant-focused approach, the Court also would have simplified the categorical standard by reducing the uncertainty caused by determining the primary purpose of the police. When the police respond to an emergency, they nearly always have dual motives of investigating a crime and responding to an urgent situation.[227] Justice Thomas noted that

223. *See supra* text accompanying notes 215–217.

224. *See* Davis v. Washington, 547 U.S. 813, 839 (Thomas, J., concurring in the judgment in part and dissenting in part) (referring to the process of discerning the primary motive of the police as "an exercise in fiction").

225. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1176 (2011) (Scalia, J., dissenting) (suggesting that open-ended tests in which judges make subjective determinations of statement admissibility do not adequately protect defendants' confrontation rights).

226. *See id.* at 1170 (explaining that, under the majority's approach, courts can choose the perspective they wish to focus on, and thereby obtain the preferred outcome).

227. *See Davis*, 547 U.S. at 839 (Thomas, J., concurring in the judgment in part and dissenting in part) ("In many, if not most, cases where police respond to a report of a crime,

assigning one of these motives primacy "requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible."[228] By eliminating the perspective of the police as a consideration, the Court would have protected defendants' rights to confrontation—and therefore their opportunities for cross-examination—from inconsistent judgments of officers' motives.

An example of the combined approach in application will demonstrate its decreased ability to protect defendants' confrontation rights, as compared with the proposed declarant-focused inquiry. In *Wright v. State*, the Indiana Court of Appeals used a combined approach to conclude that the declarant's statements were nontestimonial and that their admission did not run afoul of the Confrontation Clause.[229] The court examined the officers' perspective, focusing on how the officers were awaiting the homicide unit when they interrogated the declarant and that they did not know whether the defendant posed a continued danger.[230] By contrast, the court's consideration of the declarant's perspective was limited to the observation of the "immediacy of [his] injuries."[231]

Based on the facts of *Wright*, the court could have just as easily implemented its combined inquiry to reach an entirely different conclusion. Having received a phone call from the declarant's neighbor that someone was outside her front door calling for help, the police were on scene to investigate a potential crime.[232] The police behavior on the scene did not indicate that the officers feared the declarant's attacker would return.[233] The police did not search the area for the assailant, but rather proceeded to question the declarant.[234] From the declarant's perspective, he had fled his attacker and was now in police protection.[235] Taken together, the above considerations suggest—counter to the court's decision—that there was no ongoing emergen-

whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence." (citing New York v. Quarles, 467 U.S. 649, 656 (1984))).

228. *Id.* *But see Bryant*, 131 S. Ct. at 1161 (majority opinion) (stating that "[t]he combined approach . . . ameliorates problems that could arise from looking solely to one participant").

229. 916 N.E.2d 269, 276–77 (Ind. App. 2009); *see also* Part II.B.2.

230. *Wright*, 916 N.E.2d at 276–77.

231. *Id.* at 276.

232. *Id.* at 272.

233. *Id.* at 272–73.

234. *Id.*; *cf.* Michigan v. Bryant, 131 S. Ct. 1143, 1171–72 (2011) (Scalia, J., dissenting) (stating that there was no ongoing emergency where the officers all questioned the declarant before conducting a search of the gas station).

235. *Wright*, 916 N.E.2d at 272–73.

cy and that the police aimed to obtain information for a later criminal prosecution. Accordingly, the court could have reasonably determined that the declarant's statements were inadmissible, testimonial evidence.

Restricting analysis of *Wright* to the intent of the declarant leads to a clearer answer about whether the declarant's statements may be admitted. Having escaped his attacker and found refuge in police protection, the declarant referenced past events in telling law enforcement how he sustained his injuries.[236] Viewed objectively, the declarant did not provide information to the police to end an attack and resolve an ongoing emergency.[237] Based on this conclusion, the declarant's statements were testimonial and should not have been admitted, absent a prior opportunity for cross-examination by the defendant. Consequently, the declarant-focused approach prevents the admission of statements that a combined approach allows into evidence, thereby demonstrating the added protection that the former standard offers defendants.

The additional safeguards of the declarant-focused approach may provide the difference between acquittal and conviction.[238] The exercise of the confrontation right, as explained earlier, ensures an opportunity for cross-examination.[239] Cross-examination, in turn, allows the defendant to expose critical flaws in the evidence against him.[240] By revealing gaps and inconsistencies in the evidence, the defendant may introduce a reasonable doubt of his guilt and defeat the case against him.[241] The right to confrontation affords the defendant a

236. *Id.* *Contra* Davis v. Washington, 547 U.S. 813, 827 (2006) (explaining that the declarant faced imminent danger when describing domestic abuse simultaneously with its occurrence).

237. Although the declarant was certainly suffering from serious injuries, the declarant's statements did not provide the information necessary for the police to assess the nature of his wounds or provide first aid. The declarant's statement that "Sean" had stabbed him in no way aided the administration of medical care but instead provided essential information for a criminal investigation. *Wright*, 916 N.E.2d at 273. For additional facts of *Wright*, see Part II.B.2.

238. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) (suggesting that, in barring statements under the Confrontation Clause, the defendant may avoid conviction).

239. *See supra* text accompanying notes 219–221.

240. *See Mattox*, 156 U.S. at 242–43 (explaining the truth-seeking function of cross-examination); *see also* Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 501 (2006) (highlighting the potential of cross-examination to test the evidence against the accused and to uncover the truth).

241. *See, e.g.*, Josephine Ross, *What's Reliability Got to Do with the Confrontation Clause After* Crawford*?*, 14 WIDENER L. REV. 383, 396–97 (2009) (providing an example where cross-examination might have uncovered flaws in a witness's testimony and resulted in the jury doubting the reliability of his statements).

chance to uncover the weaknesses of the prosecution's case, and merits the increased safeguards provided by the declarant-focused approach, as compared with the inadequate protection offered by the *Bryant* Court's combined focus on the declarant and his interrogators.

V. CONCLUSION

In *Michigan v. Bryant*, the Court determined that Covington's statements to the police were nontestimonial and beyond the scope of the Confrontation Clause because they were obtained through an interrogation aimed at resolving an ongoing emergency.[242] The Court's combined focus on both the declarant and the interrogators to categorize Covington's statements as nontestimonial followed from the Court's incomplete and contradictory directives in *Crawford* and *Davis*.[243] The Court therefore backed itself into a combined inquiry that enables state and lower federal courts to obtain virtually any result on a given set of facts and fails to adequately guarantee defendants' confrontation rights.[244] Rather than rely upon a combined focus on the declarant and the officers, the Court should have developed a declarant-focused approach that restricts discretionary analysis and protects defendants' rights to confront the witnesses against them.[245]

242. Michigan v. Bryant, 131 S. Ct. 1143, 1166–67 (2011) (majority opinion).

243. *See supra* Part IV.A.

244. *See supra* Part IV.B.

245. *See supra* Part IV.C.