

# Diminished right of confrontation post ‘Michigan v. Bryant’

Published: 2:23 pm Thu, January 5, 2012

By Michael A. DelSignore and Elizabeth Sweeney

The U.S. Supreme Court’s 2011 *Michigan v. Bryant* decision has had a significant impact on the prosecution of domestic assault and battery cases. Recent cases applying the primary purpose test reveal that Massachusetts courts are using a reliability analysis that threatens to diminish the right of confrontation in these suits.

## • The primary purpose test as set forth in *Davis v. Washington*

In *Davis v. Washington* and *Indiana v. Hammon*, the Supreme Court addressed two common domestic assault and battery situations.

In *Davis*, the victim called 911 to report that Davis beat her and then left the premises. In *Hammon*, the court addressed the admission of excited utterances through a signed affidavit by the victim to police officers who were called to the home after a domestic disturbance.

The *Davis/Hammon* cases provided the court an opportunity to clarify the meaning of “testimonial” as written in *Crawford v. Washington*, 541 U.S. 36 (2004).

In *Davis*, the Supreme Court held that “it suffices to decide the present cases to hold that [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” 547 U.S. at 814-815.

In further clarification, the court said: “[Statements] 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.” *Id.* at 815.

## • *Michigan v. Bryant’s* expansion of primary purpose test definition

The *Bryant* decision expanded the primary purpose test first articulated in *Davis*.

In *Bryant*, the court addressed whether the “primary purpose” of police interrogating a victim, who had been shot, was “to meet an ongoing emergency,” establishing the statements as non-testimonial and thus admissible at trial. *Bryant*, 131 S.Ct. at 1156.

In applying the primary purpose test, the court stated it would “objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” The court held that an objective encounter “provides the most accurate assessment of the ‘primary purpose of the interrogation.’”

Moreover, the court substantially broadened the admissibility of statements in writing that the “primary purpose test” could be satisfied by “something other than making or procuring an out-of-court substitute for trial testimony.”

The majority’s application of the Confrontation Clause in *Bryant* sharply contrasts with the court’s opinion in *Crawford v. Washington*.

First, in *Crawford*, the court abandoned the *Ohio v. Roberts* application of the Confrontation Clause. *Roberts* held that an unavailable witness’s out-of-court statement may be admitted if a particular statement was within a “firmly rooted hearsay exception” or had “particularized guarantees of trustworthiness.” 448 U.S., at 66.

In *Bryant*, the majority opinion resurrected that notion when the court suggested that hearsay exceptions satisfy the requirement of “*other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.” 131 S.Ct. at 1155.

Second, the decision in *Bryant* also differs from *Crawford* when it repeatedly discusses “reliability,” a scheme used in *Roberts* that was purported to have been abandoned with the *Crawford* decision.

The majority said the purpose of the Confrontation Clause is to prevent untruths; therefore, it is reasonable to allow an exception to the Confrontation Clause when the circumstances sufficiently establish that the truth is likely.

#### • **Application of *Bryant* in recent Supreme Judicial Court decisions**

The diminished nature of the right of confrontation can be seen in a recent case from the SJC, applying the primary purpose test in the case of *Commonwealth v. Beatrice*. 460 Mass. 255 (2011).

The case involved a 911 call of a reported domestic assault and battery. The victim told the 911 operator she was using her neighbor’s phone and said, “My boyfriend just beat me up. He beat the shit out of me. I need a cruiser.” The 911 operator asked the victim for her boyfriend’s name and whether he was still in the apartment; the victim stated that he was packing his things, that she did not need an ambulance, and that the police should come before he left.

The SJC held that it is reasonable to conclude that the emergency in a domestic assault and battery continues until the police arrive to secure the scene. The court found that a reasonable person would recognize that an enraged boyfriend might demand or force entry into the neighbor’s apartment or lie and wait until the victim leaves the apartment. It further found that until the threat is dispensed with the arrival of the police or the departure of the defendant, the emergency is ongoing.

The *Beatrice* decision expands the ongoing emergency exception beyond that, which would be recognized by the Supreme Court as it would place no limitations on the ongoing emergency exception if the court were allowed to consider and anticipate the actions of the defendant.

Because the defendant could have returned, the emergency continues until the arrival of the police. That rationale is contrary to *Bryant* and *Davis*, neither which discuss the timing of police arrival as a factor in the length of the emergency.

The Appeals Court’s decision in *Commonwealth v. Patterson*. 79 Mass. App. Ct. 316 (2011), again revealed a subjective reliability analysis being applied in domestic assault and battery cases.

*Patterson* involved police responding to a 911 hang-up call. When police arrived, they saw a scared and crying 5-year-old girl who was repeatedly yelling, “No police.” The child’s mother was also very shaken and nervous. The police saw an empty gun holster on the kitchen floor. The defendant entered the kitchen, and then the child stated, “He pushed mommy into the wall. He had a gun.” *Id.*

The court held that the child’s statements were made spontaneously without police questioning, as the police walked into a volatile and unstable scene of a domestic disturbance. There was nothing to suggest that the child’s statements were made for any purpose other than to secure aid. In addition, it was highly unlikely that the 5-year-old had in mind that the statements would be used at a criminal trial.

Accordingly, the court found the statements non-testimonial as they were being made for the primary purpose of enabling police to assist with an ongoing emergency.

When viewing the *Beatrice* and *Patterson* decisions, it is clear that critical evidence in the trial against both defendants was admitted into evidence with neither defendant being afforded the ability to

confront it through cross examination. The conclusion regarding the primary purpose of the statements was nothing other than the court's own conclusion that the statements were obviously reliable.

Massachusetts courts should adopt the reasoning of the New Jersey Supreme Court in *State v. Basil*, 202 N.J. 570 (2010). In *Basil*, the victim in the case claimed that the defendant pointed a gun at her. The police did not secure the name and address of the victim. The prosecutor admitted the victim's statement to the police.

The New Jersey court found the statements testimonial because the officers were holding the defendant at the time of the identification. The witness returned to the scene to assist in the police investigation. The court held that that was not a cry for help, as the witness knew that the officer was holding the defendant and the gun was not in the defendant's hands.

The court's language in *Basil* is instructive in that the court suggested a more cautious approach in applying the primary purpose test when the non-testimonial statement accounts for a piece of evidence against a defendant.

In challenging the admissibility of testimonial statements during a motion in limine, defense lawyers should attempt to emphasize the gap in time between the statement to the police or 911 operator and alleged incident, and the change in circumstances, including the location of the participants, to undermine a determination that the emergency is ongoing.

Additionally, borrowing from the language of *Basil*, Massachusetts courts are urged to apply a more cautious approach when a non-testimonial statement is a critical piece of evidence in the case against a defendant.

Attorneys need to press for courts to place limitations on the ongoing emergency doctrine to prevent the right of confrontation from being diminished in domestic assault and battery trials.

*Michael A. DelSignore is a criminal lawyer who handles domestic assault and battery cases in Bristol and Norfolk counties. Elizabeth Sweeney is also a criminal lawyer and a recent graduate of Western New England University School of Law.*