Michigan v. Bryant and *Bullcoming v. New Mexico:* Continuing Questions about the Scope of the Constitutional Right to Confront Witnesses

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Since the landmark decision in *Crawford v. Washington*,[1] courts and lawyers have grappled with a myriad of issues involving the constitutional right to confront witnesses. Two recent decisions, *Michigan v. Bryant*[2] and *Bullcoming v. New Mexico*,[3] have provided some added clarity as well as raised new concerns. This article offers some preliminary observations about these decisions and what they suggest for North Carolina.

Crawford Changes the Confrontation Landscape

In *Crawford*, the defendant was tried for assaulting and attempting to murder a man he contended tried to rape his wife. The police arrested the defendant and on two occasions separately interrogated him and his wife. The wife's tape-recorded statement contained a version of the fight between the defendant and the victim that appeared inconsistent with the defendant's claim of self-defense. At trial, the defendant invoked the marital privilege that prevented his wife from testifying, making her unavailable. The trial court allowed the prosecutor to introduce the wife's tape-recorded statement because it had an adequate indicia of reliability and trustworthiness.

The United States Supreme Court reversed. *Crawford* created the notion of testimonial evidence. At a minimum, the term "testimonial statement" applies to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial, as well as to police interrogations.[4]

Where testimonial statements are involved, *Crawford* prohibited their admission. By overruling *Ohio v. Roberts*,[5] the court eliminated any inquiry by the trial court into whether a testimonial statement is inherently reliable and, therefore, admissible, even in the absence of confrontation.

Crawford left many questions unanswered. Some clarification emerged in *Davis v. Washington*.[6] It provided some explanation of "testimonial" for the purposes of situations where a police officer questions a person. A statement is non-testimonial when it is:

> … 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.[7]

A statement is testimonial when:

> … circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[8]

The court referred to interrogations because the statements involved were the products of interrogations that, in some circumstances, may result in testimonial answers. Statements made in contexts other than interrogations, such as calls to a 911 operator, can be testimonial as well.

In one situation, the court noted that a 911 call (at least the initial interrogation conducted in connection with a 911 call) was ordinarily not designed to establish or prove some past fact. The woman described current circumstances requiring police assistance. She spoke of events as they actually happened. It was akin to a cry for help against real physical threat. The questions and answers were necessary to resolve the present emergency rather than to learn what had happened in the past. However, once the emergency ended, even though the operator continued asking questions, the woman's answers were testimonial statements because they resulted from structured police questioning.

From an objective viewpoint, the purpose of the questioning was to investigate a possible crime and gather facts about it. The statements were not deemed either testimonial or non-testimonial because of the speaker's state of mind. Rather, the statements were testimonial because

the circumstances objectively indicated they were made while the police were investigating and attempting to gather information about a possible crime.

This analysis was pivotal. Several cases had turned on the declarant's state of mind to determine her statement is testimonial character regarding whether it is admissible at subsequent trial. After *Davis,* the inquiry focuses on an objective analysis of the situation, not on the state of mind of either the declarant making or the officer taking the statement.

Bryant tweaks *Crawford* and Raises Questions

In *Bryant*, police officers received a radio communication that a man had been shot. They found the victim lying on the ground. He had been shot in the abdominal area and seemed in pain. He had trouble speaking. The police asked what happened, who shot him, and where it happened. The victim identified defendant as the person who shot him, which he claimed happened about a half an hour before the officers found him. The shooting occurred at defendant's house. Emergency medical people came to the scene and the inquiry ended. The victim died several hours later. The officers were permitted to testify about what the victim told them. After the conviction for murder, the defendant appealed. A sharply divided Michigan Supreme Court reversed, finding the statements were admitted in violation of the confrontation clause under *Crawford* and *Davis*.[9]

The Supreme Court of the United States then reversed. In short, it concluded the statements were non-testimonial. The justices joining the various opinions is instructive. Justice Sotomayor, joined by Chief Justice Robers and Justices Kennedy, Breyer, and Alito, formed the majority, with whom Justice Thomas concurred. Justice Scalia, who authored *Crawford* and *Davis*, dissented, joined by Justice Ginsburg.[10]

The majority distinguished *Davis*, saying it involved a domestic dispute. *Bryant*, on the other hand, involved police finding the victim in a public place having been shot. Important for the majority, the police did not know where the shooter was. The situation constituted an "ongoing emergency," creating a potential threat to both the public at large and the police. The majority tried to clarify the "primary purpose" doctrine from *Davis.* Here, the primary purpose of the questioning was to enable the police to meet an "ongoing emergency." Using some of the basic analysis from *Davis*, the court explained a reviewing court must objectively examine all the circumstances involved, including the statements and actions of the people involved. The existence of an "ongoing emergency" is very important in determining the "primary purpose" of the interrogation. The inquiry should focus on both the person making the statement and the person asking the question.[11]

The court looked at the circumstances to see if an "ongoing emergency" existed. The victim did not say anything about the shooting being part of a private dispute. It did not appear that the threat had ended. There might be possible risks to the public and to the police. The risks of continuing harm was different from *Davis.* A gun was involved, which meant a continuing emergency with an armed shooter. No one knew his motive or his location. Under these circumstances, the primary purpose of the statement or the questions was not to establish facts relevant to a criminal prosecution. The informality of the situation also supported the non-testimonial nature of the victim's statements.[12]

There are some puzzling if not troubling aspects of this decision, as it creates a somewhat murky and perhaps even incoherent approach to the *Crawford* rule about testimonial statements. There seem to be unjustified gaps in which a court might characterize virtually any statement as non-testimonial. Now, "primary purpose" is not simply a test to choose between whether a statement is testimonial or made in response to an "ongoing emergency." There is a burden or need to establish to determine the primary purpose of the conversation.

Bryant also adopts "a combined approach" to decide if the statement is testimonial, looking at the purpose or intent of both the speaker and the questioner. But because *Bryant* continues to use what it terms an objective test, the inquiry cannot be what did the speaker and the questioner intend. An objective inquiry would ask what a "reasonable" speaker and a "reasonable" questioner would intend.

Yet *Bryant* phrased the test in terms of purpose rather than understanding. Using an objective test, a court would need to discern the purpose "a reasonable speaker" and "a reasonable questioner" would possess. But a person's "purpose seems inherently subjective. Different yet still "reasonable" people might have different desires in the same situation.

Bryant also interjects a new notion that requires discerning the combined purpose of the interrogation. The majority does not explain what this notion entails, much as *Crawford* left open the full definition of "testimonial." Indeed, Justice Scalia, in his acerbic dissent, noted the quandary where, as might often be the situation, the speaker might have one purpose and the questioner another purpose.

In some ways, the analysis rings of "inherent reliability" under *Ohio v. Roberts.* Bryant suggests a factor in the application of its "primary purpose" test could be reliability, particularly with the majority hinting that hearsay principles might be applicable.

For now, the critical aspects of a situation for the "primary purposes" analysis seem to be whether there is an ongoing emergency, the zone of danger to the police and to the public, and the degree of informality in the questioning. Bryant is likely not the final word in the *Crawford* lineage.

Melendez-Diaz v. Massachusetts[13] and testimony about results of forensic testing

One of the important questions raised by *Crawford* concerned whether forensic laboratory were testimonial. *Melendez-Diaz* involved the admission, over confrontation-clause objections, of three "certificates of analysis" showing the results of forensic testing on multiple bags of substances taken by the police from the defendant's car. The certificates, sworn to before a notary public, reported the substances were cocaine in certain weights. At trial, the

prosecution introduced the certificates, but the analysts who performed the tests did not testify.

The Supreme Court, in a 5-4 decision, found "little doubt that the [certificates] fall within the 'core class of testimonial statements'" under *Crawford*.[14] "[T]he analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." *Id.*

Melendez-Diaz was straightforward application of Crawford that resolved an important question where some courts limited the application of Crawford.[15]

Melendez-Diaz provided several noteworthy observations. First, the majority pointedly rejected any suggestion that the reliability of the challenged evidence avoided any constitutional infirmity from a lack of confrontation. Second, the majority made it clear the burden of producing the absent witness rested solely on the government, not the defendant. Third, the majority dispensed with any distinction between witnesses, i.e. there is no such thing as an unconventional, technical, or neutral witness. Fourth, the majority rebuked the notion that the testing itself was neutral and therefore not subject to cross-examination. Fifth, the majority noted that the inconvenience caused by the right to confront witnesses would provide no basis for relaxing the Constitution.

***Bullcoming v. New Mexico*:[16] Further clarification and new questions

Some courts did not get the message in *Melendez-Diaz*. *Bullcoming* provides some clarification.

It seemed a fairly rote application of *Melendez-Diaz*. The defendant was involved in a car accident. His eyes were bloodshot; he smelled of alcohol. The police came and arrested him for drunk driving. He refused to take a breath test. They drew blood and sent it to a lab for a gas chromatograph test to determine blood alcohol content. A non-testifying analyst ran the test that showed a BAC of 0.2. He completed a certification. The prosecution did not call him, as he had been put on unpaid leave. The defendant objected. The prosecution then introduced the certification as a "business record" during the testimony of an analyst who neither observed the testing nor the certification. The state appellate court held that the certification was testimonial but found no confrontation problem because (1) the non-testifying analyst was a "mere scrivener" who only "transcribed" the results of the machine, and (2) the testifying analyst was an expert on the gas chromatograph machine. But the testifying analyst had no independent opinion about the defendant's blood alcohol content. He did not conduct the testing or observe it. He merely parroted what a non-testifying expert saw, tested, and opined.[17]

The Supreme Court reversed. The defendant had the right to confront the tester, the one who made the certification. According to the court, "Our precedent cannot sensibly be read any other way." The substitute analyst could not convey what the tester knew or saw. He could not "expose any lapses or lies on the certifying analyst's part." The witness also did not know why the analyst had been placed on unpaid leave. Nothing suggested the testifying analyst had any "independent opinion" concerning blood alcohol content.[18]

Bullcoming had a strange alignment of justices. Justice Ginsburg wrote the opinion for the Court, with Justice Scalia joining her opinion in full. Justice Sotomayor concurred in all but Part IV and wrote her own separate opinion. Justice Kagan concurred in all but Part IV but did not join Justice Sotomayor's opinion. Justice Thomas concurred in all but Part IV and Footnote 6 but did not join Justice Sotomayor's opinion. Thus, there seem to be four votes for Footnote 6. Footnote 6 deals with an observation in *Melendez-Diaz* "that business and public records are 'generally admissible absent confrontation¼because--having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial--they are not testimonial."[19] This observation is hardly surprising and should not be read, absent further direction, to mean a document created for the purpose of being used as evidence is not rendered non-testimonial merely because it is kept in the ordinary course of governmental business or is a matter of public record.[20]

Part IV, which garnered only two votes, rejected the notion that enforcing the confrontation clause in these situations would unduly burden the states. That point seemed settled in *Melendez-Diaz*. However, the five-vote majority in *Melendez-Diaz* included former Justices Stevens and Souter (as well as Justice Thomas) who have been replaced by Justices Sotomayor and Kagan. The latter appear not as taken with the confrontation right as their predecessors, based on the analysis in *Bryant*. However, their unwillingness to concur in Part IV may simply mean they did not think it was necessary to the decision inappropriate for inclusion in the opinion.

Justice Sotomayor's concurring opinion is troubling to some degree and helpful to some degree. *Bryant* and its alignment of justices stepped away, somewhat, from *Crawford*. Justice Sotomayor wrote *Bryant*. Her *Bullcoming* concurrence stressed the primary purpose doctrine and how it deals with the purposeful creation of evidence. She notes a laboratory report reflecting forensic testing was plainly something that would be used at trial. This notion should be very helpful in the general run of lab cases in North Carolina.

However, her concurrence seized on the lower court's description of the analyst as a "mere scrivener." She distinguishes a hypothetical witness who is trained in the machine and does more than merely repeat or read the report when she testifies. This observation hints she might not have a confrontation problem with a substitute analyst who knows the test, reads the graph or details in a report, and gives her own opinion.

She also clears up some uncertainty lurking in her use of "reliability" in *Bryant*. She suggests this language should not be accorded great weight, at least in terms of equating "testimonial" with "reliable." In his *Bryant* dissent, Justice Kennedy argued the majority found reliability to be "an essential part of the constitutional inquiry" for confrontation purposes. In her *Bullcoming* concurrence, Justice Sotomayor notes, "Contrary to the dissent's characterization, Bryant deemed reliability, as reflected in the hearsay rules, to be 'relevant,' not 'essential.'" She goes on to note, "The rules of evidence, not the Confron-

tation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation."[21]

Justice Sotomayor also notes the case did not involve a witness being "asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." This language suggests she recognizes that if the underlying reports is admitted into evidence and it appears to support the opinion of the in-court witness only to the extent it is true, then confrontation of the person who wrote the report would be necessary. In other words, using the report ostensibly to support the "opinion" of the testifying expert would implicate confrontation.

A lingering question remains regarding whether a report can be used and introduced under Rule 703 as the basis of an opinion that need not be limited to otherwise admissible evidence. Presumably, some clarity on this issue will come when *Williams v. Illinois* is decided in the coming term. In *Williams*, the prosecution offered DNA analysis done by an independent laboratory. The testifying expert, who neither conducted nor observed the laboratory testing, opined the sperm found in the victim was identical to the defendant's sample. The lower court found no confrontation problem, in part because the reports fit within hearsay exceptions and were not offered for their truth and in part because the reports were not offered as evidence but only as a basis for the testifying expert's opinion.[22] ◆

1. 541 U.S. 36 (2004).
2. 131 S.Ct. 1143 (2011).
3. 131 S.Ct. 2705 (2011).
4. *Crawford*, 541 U.S. at 51-52.
5. 448 U.S. 56 (1980).
6. 547 U.S. 813 (2006).
7. *Davis*, 547 U.S. at 822.
8. *Id*. at 826.
9. 131 S.Ct. at 1150-52.
10. Justice Kagan did not participate as she was Solicitor General when the United States filed its amicus brief supporting the State of Michigan.
11. *Id*. at 1156-62.
12. *Id*.
13. 129 S.Ct. 2527 (2009).
14. *Id*. at 2532.
15. *See State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, *cert. denied,* 166 L.Ed.2d 413 (2006). *Forte* involved the admissibility of expert testimony regarding physical evidence connecting defendant to the crime. The agent who conducted a test on trace evidence did not testify. His reports were introduced into evidence through the testimony of another agent, who had been his supervisor, as a business record under N.C. R. Evid. 803(6). Defendant challenged the admissibility of the reports under *Crawford*. The Supreme Court of North Carolina found the reports were not testimonial. They contained the results of the agent's objective analysis of evidence, did not bear witness against the defendant, and were neutral. Although they were prepared knowing they might eventually be used in court, they were not prepared exclusively for trial. *Forte* appears incorrect under *Melendez-Diaz*.
16. 131 S.Ct. 2705 (2011).
17. *Id*. at 2709-11.
18. *Id*. at 2715-17.
19. *Id*. at 2714 n.6 (citation to *Melendez-Diaz* omitted).
20. *State v. Locklear*, 363 N.C. 483, 681 S.E.2d 293 (2009), involved an autopsy report admitted to show cause of death for a victim of murder not being tried, admitted as prior bad act. *See* N.C. R. Evid. 404(b). The autopsy report was testimonial. Its admission violated *Crawford*, but any error was harmless. This notion from *Locklear* seems correct and tends to suggest no business or public record analysis would make the report non-testimonial.
21. 131 S.Ct. at 2719-22 (Sotomayor, concurring).
22. *People v. Williams*, 939 N.E.2d 268, 274-82 (Ill. 2010).