What's Going On? The Right to Confrontation

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In *Michigan v. Bryant*,[3] the United States Supreme Court wrote another chapter in the clash between the Confrontation Clause of the Sixth Amendment to the United States Constitution and the admissibility of extra-judicial statements. This article presents an outline of *Bryant*'s "ongoing emergency" doctrine, an examination of how *Bryant* may affect Massachusetts's decisional law, and a view that *Bryant*'s holding and dictum may mark a return to the basic contours of the reliability of excited utterances in the context of domestic-violence prosecutions.

I. THE CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[4] Citing *Crawford v. Washington*, the Court reiterated that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[5] According to the Court in *Bryant*, *Crawford* "emphasized" that the word "witness" meant "those who bear testimony" and also defined the term "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," noting that "[a]n accuser who makes a formal statement to government

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3. 131 S. Ct. 1143 (2011).

4. U.S. CONST. amend. VI.

5. *Bryant*, 131 S. Ct. at 1152 (quoting Crawford v. Washington, 541 U.S. 36, 50 (2004)).

officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[6] The Confrontation Clause applies only to testimonial hearsay, and where testimonial evidence is sought to be admitted, the Court quoted *Crawford*'s holding that "the Sixth Amendment 'demands what the common law required: unavailability and a prior opportunity for cross-examination.'"[7] "[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial."[8]

The Court in *Crawford* did not set forth a comprehensive definition of "testimonial," but it recognized that grand jury testimony, testimony given at a prior trial, and testimony provided at a preliminary hearing all fall within the meaning.[9] In addition, the Court in *Crawford* recognized that some police interrogations might produce responses that are testimonial.[10]

The Supreme Court in *Davis v. Washington*, and its companion case *Hammon v. Indiana*, "took a further step to determine more precisely which police interrogations produce testimony" for the purposes of the Confrontation Clause and which responses do not qualify.[11]

The Court introduced the concept of "primary purpose" and "ongoing emergency," explaining:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[12]

The distinction is that when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause."[13]

Davis and *Hammon* both, however, involved domestic violence.[14] *Davis*

6. *Id.* at 1153 (internal brackets and quotation marks omitted).
7. *Id.* (internal quotation marks omitted).
8. *Id.* at 1155.
9. *Crawford*, 541 U.S. at 68.
10. Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011).
11. *Id.* at 1153 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)) (internal quotation marks omitted).
12. *Id.* at 1154 (quoting *Davis*, 547 U.S. at 822).
13. *Id.* at 1155.
14. *Bryant*, 131 S. Ct. at 1153.

involved the admission of statements recorded during a 911 emergency call in which the female victim, who did not appear at trial, described the active assault and battery by her former boyfriend, an objectively clear emergency.[15] *Hammon* involved the admission of statements made by the victim to police officers and the admission of an affidavit signed by the victim, both of which recounted the assault by the defendant.[16] In this case, the statements and affidavit were made in circumstances where a threat to the victim did not exist because the victim and the assailant had been separated by police.[17] In *Davis*, the Court held that the statements were nontestimonial; in *Hammon*, the Court held that the statements were testimonial.

Bryant presented a new context. In *Bryant*, police responded at around 3:25 AM to a radio dispatch indicating that a person had been shot.[18] Five police officers responded, arriving at different times.[19] At the scene—a gas station parking lot—they found the victim lying on the ground next to his car.[20] The victim had a gunshot wound to the abdomen, appeared to be in great pain, and had difficulty speaking.[21] The police officers "did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred."[22] The victim was, however, able to respond to the questions posed by police officers.[23] The first question asked by each officer was "what happened?"[24] The victim's answer was either "I was shot" or "Rick shot me."[25] The victim also informed the police of what had occurred and that he fled from the scene of the shooting, which occurred approximately twenty-five minutes prior to their arrival.[26] The victim's statements did not reveal whether the shooting arose out of a "purely private dispute or that the threat from the shooter had ended."[27] Little was revealed about the motive for the assault.[28] All statements of the victim "occurred within the first few minutes of the police officers' arrival."[29] The victim's answers "were punctuated with questions about when emergency medical services would arrive."[30] Emergency medical

15. *See id.*
16. Michigan v. Bryant, 131 S. Ct. 1143, 1154 (2011).
17. *Id.* at 1154.
18. *Id.* at 1150.
19. *Id.* at 1163, 1166.
20. *Bryant*, 131 S. Ct. at 1150.
21. *Id.* at 1150.
22. Michigan v. Bryant, 131 S. Ct. 1143, 1165 (2011).
23. *See id.*
24. *Id.* at 1165.
25. *Id.*
26. *Bryant*, 131 S. Ct. at 1150.
27. *Id.* at 1163.
28. Michigan v. Bryant, 131 S. Ct. 1143, 1163-64 (2011).
29. *Id.* at 1165.
30. *Id.*

personnel arrived on scene within five to ten minutes after police arrival and transported the victim to the hospital, where he died within hours.[31] The trial court found that the prosecution had not sustained its burden of proving the statements qualified as a dying declaration; they were therefore admitted at trial as excited utterances.[32] The person named as the shooter by the victim was convicted of second-degree murder.[33]

The Supreme Court of Michigan ultimately reversed the conviction.[34] That court concluded that the admission of the statements violated Confrontation Clause principles and constituted error that required reversal.[35] The court noted that the actions of the officer did not suggest there existed an ongoing emergency and held that no emergency existed.[36] The court also held that the "primary purpose" of the police in asking the questions was to establish what "had *already* occurred[,] . . . not to enable police assistance to meet an ongoing emergency."[37] Further, the court held that the "primary purpose" of the victim was to inform the police of "who had committed the crime against him, where the crime had been committed, and where the police could find the criminal."[38] "The court did not address whether, absent a Confrontation Clause bar, the statements' admission would have been otherwise consistent with Michigan's hearsay rules or due process."[39]

On writ of certiorari, the Court was presented with "circumstances in which the 'ongoing emergency' . . . extend[ed] beyond an initial victim to a potential threat to the responding police and the public at large."[40] "[A] victim [was] found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim."[41] The circumstances provided the Court with the opportunity to "provide additional clarification with regard to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'"[42]

Bryant first explained why an "ongoing emergency" was relevant to whether responses to police interrogation can evade the Confrontation Clause.[43] It then provided guidance to evaluate the "primary purpose" of the declarant and the

31. *Id.* at 1150.
32. *Bryant*, 131 S. Ct. at 1151 n.1.
33. *Id.* at 1150.
34. Michigan v. Bryant, 131 S. Ct. 1143, 1150-51 (2011).
35. *Id.* at 1151.
36. *Id.*
37. *Id.*
38. *Bryant*, 131 S. Ct. at 1151.
39. *Id.*
40. Michigan v. Bryant, 131 S. Ct. 1143, 1151 (2011).
41. *Id.* at 1156.
42. *Id.* (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).
43. *Id.* at 1157.

interrogator.[44]

As to the contours of an emergency, the Court in *Bryant* stated it is relevant "because of the effect it has on the parties' purpose, not because of its actual existence."[45] "[A]n emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecutions. Rather, it focuses them on ending a threatening situation."[46] This focus is believed to "significantly diminish"—"not unlike that justifying the excited utterance exception in hearsay law"—"the prospect of fabrication" such that "the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."[47] The purpose "is not to create a trial record and thus not within the scope of the [Confrontation] Clause."[48]

Guiding a court's determination as to whether the primary purpose of the interrogation was to meet an ongoing emergency or whether its purpose was to produce testimonial evidence, the Court in *Bryant* identified the following test: "To determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency, which would render the resulting statements nontestimonial," a court must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties."[49]

As to the first part of the objective analysis, the Court in *Bryant*, by way of illustration, noted that interrogations "at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards," are "clearly matters of objective fact."[50] Yet, while it may be that a police station interview provides a readily apparent context of when statements would be deemed testimonial in nature, determining whether responses to police interrogation occur during or after an emergency is more complex.

First, as the *Bryant* Court stated:

> The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause.[51]

44. *Bryant*, 131 S. Ct. at 1156.

45. *Id.* at 1157 n.8.

46. Michigan v. Bryant, 131 S. Ct. 1143, 1157 (2011) (citation omitted) (internal quotation marks and brackets omitted).

47. *Id.* at 1157.

48. *Id.* at 1155.

49. *Id.* at 1156 (citation omitted) (internal quotation marks omitted).

50. *Bryant*, 131 S. Ct. at 1156.

51. *Id.* at 1157 n.8.

It is "a highly context-dependent inquiry."[52] An emergency does not necessarily end merely because the assault on a victim ceases.[53] Nor is it necessarily defined by reference to a single victim. Limited to an active assault on a victim and reference to the victim, an "ongoing emergency" would be too narrowly defined regarding both duration and reference. "[T]he scope of an emergency in terms of its threat to individuals other than the initial assailant and victim will often depend on the type of dispute involved."[54] The type and use of a weapon may expand the zone of danger presented to a victim and extend a potential threat beyond the victim to responding police and the public.[55] "An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue."[56] In this respect, an additional relevant factor is "[t]he victim's medical state" because it "provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, [police], and the public."[57]

Second, what may first appear to be an emergency may evolve into a nonemergency situation and, through this transformation, statements made in response to police interrogation may move from nontestimonial to testimonial. The Court stated:

> This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or . . . flees with little prospect of posing a threat to the public.[58]

Statements made after the transformation are excluded.[59]

As to the second part of the test, i.e., a court's evaluation of the "statements and actions of the parties," the Court in *Bryant* stated that "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred."[60] The test accounts for what

52. Michigan v. Bryant, 131 S. Ct. 1143, 1158 (2011).
53. *See id.* at 1164.
54. *Id.* at 1163.
55. *Id.* at 1158.
56. *Bryant*, 131 S. Ct. at 1158.
57. *Id.* at 1159.
58. Michigan v. Bryant, 131 S. Ct. 1143, 1159 (2011).
59. *Id.* at 1159-60.
60. *Id.* at 1156.

the Court termed "mixed motives" that may be harbored by both an interrogator and victim.

With regard to a police interrogator, the Court noted, "Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession."[61] In this context, "all of the relevant circumstances" are examined in determining the primary purpose of the interrogator, including, for example, "the identity of an interrogator, and the content and tenor of [the interrogator's] questions."[62]

As to a victim's "mixed motive," the Court stated:

> Victims are also likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated. Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive. The victim's injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution.[63]

As in the case of the interrogator, the "mixed motive" analysis applied to a victim does not "transform" what is an "objective inquiry into a subjective one."[64] The analysis "focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim's physical state."[65]

While *Bryant* states that

> [t]he existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation[,][66]

the Court emphasized "that the existence *vel non* of an ongoing emergency is

61. *Id.* at 1161.
62. *Bryant*, 131 S. Ct. at 1162.
63. *Id.* at 1161.
64. Michigan v. Bryant, 131 S. Ct. 1143, 1161 (2011).
65. *Id.* at 1161-62.
66. *Id.* at 1162.

not the touchstone of the testimonial inquiry."[67] "[W]hether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation."[68] But, even if the self-evident importance of an actual ongoing emergency does not exist,

> the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation.[69]

"[T]he ultimate inquiry is whether the 'primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency.'"[70]

Regarding the formality/informality dichotomy, the Court stated:

> Formality is not the sole touchstone of [the] primary purpose inquiry because, although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to "establish or prove past events potentially relevant to later criminal prosecution," informality does not necessarily indicate the presence of an [ongoing] emergency or the lack of testimonial intent.[71]

Applying these principles, the Court reversed the Supreme Court of Michigan's holding that the statements of the victim were testimonial. Informed by the factual circumstances as described above and addressing the statements and actions of the parties, the Court stated that asking questions regarding what happened, who did the shooting, and where the shooting occurred, all of which took place within the first few minutes of arrival, "were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public, including to allow them to ascertain whether they would be encountering a violent felon."[72] "Nothing in [the victim's] responses indicated to the police that, contrary to their expectation upon responding to a call reporting a shooting, there was no emergency or that a prior emergency had

67. *Id.* at 1165.

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

69. *Id.* at 1162.

70. Michigan v. Bryant, 131 S. Ct. 1143, 1165 (2011) (brackets omitted).

71. *Id.* at 1160 (citation omitted).

72. *Id.* at 1166 (citations omitted) (internal quotation marks omitted); *see supra* text accompanying notes 18-20.

ended."[73] The victim's statement that he had fled the shooting scene suggested that the victim perceived an ongoing threat.[74] The victim "did not indicate any possible motive for the shooting, and thereby gave no reason to think that the shooter would not shoot again if he arrived on the scene."[75] In these circumstances, the responses to the questions were "the type of nontestimonial statements [the Court] contemplated in *Davis*."[76]

The Court also stated that the circumstances demonstrated the informality of the questioning.[77] As reflected in trial testimony, "the situation was fluid and somewhat confused: the officers arrived at different times; apparently each, upon arrival, asked [the victim] 'what happened?'; and . . . they did not conduct a structured interrogation."[78] The questioning addressed what was perceived to be an ongoing emergency by the police and "lacked any formality that would have alerted [the victim] to or focused him on the possible future prosecutorial use of his statements."[79]

In the end, the *Bryant* Court held that the primary purpose of the declarant's statements was not to create trial testimony and "the admissibility of [such] statement[s] is the concern of state and federal rules of evidence, not the Confrontation Clause."[80] The Court remanded the *Bryant* case to the "Michigan courts to decide . . . whether the statements' admissions was otherwise permitted by state hearsay rules."[81] However, the Court also added the comment that, in addition to having not addressed whether the statements were admissible under Michigan hearsay rules, the Supreme Court of Michigan "did not address whether, absent a Confrontation Clause bar, the statements' admission would have been otherwise consistent with . . . due process."[82]

II. ARTICLE XII OF THE MASSACHUSETTS DECLARATION OF RIGHTS

What, then, does *Bryant* mean for Massachusetts? A reflexive response may be that the Supreme Judicial Court will follow *Bryant*'s ongoing-emergency analysis as a matter of state constitutional law. This may be an accurate prognostication. With limited exception, "the Supreme Judicial Court has always held that the protection provided by art. 12 [of the Massachusetts Declaration of Rights] is coextensive with the guarantees of the Sixth

73. *Bryant*, 131 S. Ct. at 1166.
74. *Id.* at 1164.
75. *Id.*
76. Michigan v. Bryant, 131 S. Ct. 1143, 1164 (2011).
77. *Id.* at 1166.
78. *Id.*
79. *Id.*
80. *Bryant*, 131 S. Ct. at 1155.
81. *Id.* at 1167.
82. Michigan v. Bryant, 131 S. Ct. 1143, 1151 (2011).

Amendment to the United States Constitution."[83] But Justice Scalia, in dissent, called the "story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose . . . so transparently false," that the Court's "opinion distorts . . . Confrontation Clause jurisprudence and leaves it in a shambles."[84] More specifically, Justice Scalia stated:

> The only virtue of the Court's approach (if it can be misnamned [sic] a virtue) is that it leaves judges free to reach the "fairest" result under the totality of the circumstances. If the dastardly police trick a declarant into giving an incriminating statement against a sympathetic defendant, a court can focus on the police's intent and declare the statement testimonial. If the defendant "deserves" to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial. And when all else fails, a court can mix-and-match perspectives to reach its desired outcome.[85]

So, what if the Supreme Judicial Court agrees, or has some measure of alignment, with the view of Justice Scalia? A basic principle of federalism is that a state constitution may provide greater protection to its citizens, but not less than what is demanded under the United States Constitution.[86] Could the Massachusetts Declaration of Rights provide greater protection?

It is unlikely, at least as to *Bryant*'s reference to the "mixed motive" of the interrogator, that Article XII of the Massachusetts Declaration of Rights could provide greater protection to defendants by limiting the analysis to a single-motive reference. Regardless of whether *Commonwealth v. Gonsalves*[87] could initially be read to include reference to the interrogator, *Bryant* changed the *Gonsalves* formulation in at least one respect—certainty was added; the declarant's primary purpose and that of the interrogator are both relevant. As to the interrogator, the primary purpose of the question informs the primary purpose of the response and it is the response, after all, that is at issue.[88] The seemingly casual question of "What's going on?" produces a response different in purpose than that from the imperative statement of "What's going on!" The certainty of a mixed-motive analysis expands the possibility of statements

83. Commonwealth v. Shangkuan, 943 N.E.2d 466, 474 (Mass. App. Ct. 2011) (internal quotation marks omitted). The cases in which the Supreme Judicial Court held that Article XII provides greater protection than the Sixth Amendment "involved the physical configuration of the courtroom and the defendant's ability literally 'to meet' testifying witnesses 'face to face' as required by the plain language of art. 12." Commonwealth v. Whelton, 696 N.E.2d 540, 545 (Mass. 1998).

84. *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting).

85. *Id.* at 1170.

86. Att'y Gen. v. Colleton, 444 N.E.2d 915, 918-19, 919 n.5 (Mass. 1982).

87. 833 N.E.2d 549 (Mass. 2005).

88. Michigan v. Bryant, 131 S. Ct. 1143, 1161 n.11 (2011).

being deemed nontestimonial and thus being admitted against a defendant. At the same time, it also affords greater protection to a defendant. By evaluating the interrogator's purpose, the defendant may receive a greater benefit than if only the declarant's actions are examined: the exclusion of a declarant's statement unless the requirements of the Confrontation Clause are satisfied. Certainly, a Confrontation Clause analysis should not depend on reference to whether it benefits the state or a defendant.

Yet, while Justice Scalia found fault with the Court's inclusion of the interrogator's purpose, he also found concern in the Court's "distorted view" of an ongoing emergency.[89] The distortion referred to, however, was not that an ongoing emergency could never be examined by reference to a threat to a victim, police, or the public, but, rather, it was in the manipulative-outcome analysis that a court may apply. It may be, then, that in constitutional terms, the Supreme Judicial Court could be more conservative in a factual application of what is considered an ongoing emergency and align the concept of "volatility" expressed in *Gonsalves*, if this concept differs from *Bryant*. The change would come not in the structure of the required analysis, but in the application of factual findings to the structure.

In *Gonsalves*, the Supreme Judicial Court, applying *Crawford*, explained its understanding of what *Crawford* meant by the term "interrogation."[90] The court held that "interrogation must be understood expansively to mean all law enforcement questioning related to the investigation and prosecution of a crime."[91] This expansive definition, however, was limited by the exclusion of "[q]uestioning by law enforcement agents, whether police, prosecutors, or others acting directly on their behalf, . . . to secure a volatile scene or to establish the need for or provide medical care," which would include investigatory interrogation, such as preliminary fact gathering and assessing whether a crime has taken place.[92]

It further stated that statements that are per se testimonial and those that are testimonial in fact are subject to the requirement of the Confrontation Clause.[93]

The *Gonsalves* court categorized as per se testimonial statements that are

> part of an affidavit, deposition, confession, or prior testimony at a preliminary hearing, before a grand jury, or at a former trial, or [statements] procured through law enforcement interrogation (which does not include emergency questioning by law enforcement to secure a volatile scene or determine the

89. *Id.* at 1169, 1173 (Scalia, J., dissenting).
90. *Gonsalves*, 833 N.E.2d at 554-55.
91. *Id.* at 555.
92. *Id.*
93. Commonwealth v. Gonsalves, 833 N.E.2d 549, 556 (Mass. 2005).

need for or provide medical care).[94]

In contrast to per se testimonial statements, the court noted that "[s]tatements made in response to emergency questioning by law enforcement to secure a volatile scene or determine the need for or provide medical care are not per se testimonial," nor are "out-of-court statements made in response to questions from people who are *not* law enforcement agents, and statements offered spontaneously, without prompting, regardless of who heard them."[95] Yet, the *Gonsalves* court qualified these statements as testimonial in fact if a reasonable person in the declarant's position would anticipate the statement being used against the accused in investigating and prosecuting a crime.[96] The determination of whether a statement that is not per se testimonial is still, in fact, testimonial requires a fact-specific inquiry that focuses on the declarant's intent by evaluating the specific circumstances in which the statement was made.[97]

The concept of volatility seemingly could provide a basis for the Supreme Judicial Court to align itself with the concerns expressed by Justice Scalia. However, in *Commonwealth v. Smith*,[98] a case in which the Supreme Judicial Court, with reference to *Bryant*, examined the introduction of a spontaneous utterance against the defendant's right of confrontation, the court noted that the defendant did not challenge the admission of the utterance under Article XII and stated that "[t]he omission [wa]s of no consequence" because of its prior holdings aligning Article XII with the Sixth Amendment.[99]

The Supreme Judicial Court employed a similar analysis in *Commonwealth v. Beatrice*.[100] *Beatrice* involved the introduction at trial of the tape recording of a 911 call in which the victim reported having been assaulted by her boyfriend and during the call, in response to the 911 operator's question, identified her boyfriend by name.[101] The introduction was objected to on the grounds of the Sixth Amendment. The defendant did not challenge its admission under Article XII.[102] As in the *Smith* case, *Beatrice* was decided in light of the Sixth Amendment principles discussed in *Bryant*. What is of interest is that the court stated that "for a statement to be nontestimonial, there must be an ongoing emergency, and the primary purpose of the interrogation must be to meet that emergency, not to prove past events that may be relevant

94. *Id.* at 558.
95. *Id.* at 557.
96. *Id.* at 558.
97. *Gonsalves*, 833 N.E.2d at 558.
98. 951 N.E.2d 674 (Mass. 2011).
99. *Id.* at 680 n.3.
100. 951 N.E.2d 26 (Mass. 2011).
101. *Id.* at 30.
102. *Id.* at 29 n.2.

to criminal investigation or prosecution."[103] The court, perhaps because of the factual circumstances, did not acknowledge the statements in *Bryant* "that the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry";[104] and "whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation."[105] Perhaps if an Article XII objection is properly raised in circumstances where an objective ongoing emergency does not exist, the Supreme Judicial Court will depart from its alignment and require the objective presence of an ongoing emergency.

III. DUE PROCESS AND EXCITED UTTERANCES

The Court in *Bryant* commented that the Supreme Court of Michigan "did not address whether, absent a Confrontation Clause bar, the statements' admission would have been otherwise consistent with Michigan's hearsay rules or due process."[106] Should this be of concern to the Massachusetts practitioner? This reference begs the question of whether such statements will align with the excited-utterance exception to the rule against hearsay. Or, should the excited utterance exception not be appropriate, whether the statement will be admissible under some other standard evidentiary rule.

It may be that the *Bryant* Court's recognition of the victim having been shot in the abdomen, appearing to be in great pain, and having difficulty speaking, reflects the Court's belief that the victim had diminished capacity to fabricate answers to the posed questions about the emergency. Further, it might be that when combined with the general belief that a declarant in an emergency situation has diminished thought capability, which serves as a basis for finding an excited utterance reliable, the Court recognized that multiple hearsay exceptions may likely have coexisted in the circumstances.[107] And, perhaps in the majority of cases there will be this coexistence: the victim whose statements are proffered will, at the time the statements were made, have remained under the stress of the emergency such that the excited utterance exception may be invoked as the exception through which the statements are admitted. Yet, it does necessarily follow that, if the response is found nontestimonial because of the emergency presented, the statement also qualifies as an excited utterance.

As stated in *Commonwealth v. King*,

> The excited utterance exception to the hearsay rule is based on the experience

103. *Id.* at 32.
104. Michigan v. Bryant, 131 S. Ct. 1143, 1165 (2011).
105. *Id.* at 1160.
106. *Id.* at 1151.
107. *Id.* at 1150.

> that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts. For the purpose of the spontaneous utterance exception to the hearsay rule, an utterance is spontaneous if it is made under the influence of an exciting event and before the declarant has had time to contrive or fabricate the remark, and *thus* it has sufficient indicia of reliability.[108]

Surely one can envision circumstances in which the declarant maintains control over his or her senses and reasoned reflection but makes a statement in response to police so that an ongoing emergency can be met. For example, police respond to a neighbor's report of sounds indicating an ongoing domestic dispute. Police arrive and as they approach a man bleeding from his lip and walking down a driveway which is covered with a great deal of broken glassware, they ask, "What's going on?" and the man calmly replies that his wife discovered his affair and is throwing glassware at him.

This observation is not merely theoretical. The Court stated that, "[w]hen, as in *Davis*, the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause."[109] If the responses do not constitute testimonial hearsay for the purposes of the Confrontation Clause because they are deemed responses to an ongoing emergency, and, in addition, the statements are deemed reliable because of the thought process of a victim responding to the emergency, this recognition of reliability itself may be sufficient for the admissibility of the responses under the Due Process Clauses of the Fifth and Fourteenth Amendments without resorting to any established evidentiary rules of hearsay, such as the excited-utterance exception.[110]

The statements would, of course, still constitute hearsay, and Massachusetts does not recognize an "ongoing emergency" exception to the common-law hearsay rules. The Supreme Judicial Court would need to specifically establish such an exception because it rejected adoption of "the 'innominate' or residual

108. Commonwealth v. King, 763 N.E.2d 1071, 1076 (Mass. 2002) (citations omitted) (internal quotation marks omitted).

109. *Bryant*, 131 S. Ct. at 1165.

110. Michigan v. Bryant, 131 S. Ct. 1143, 1157, 1162 n.13 (2011).

exception to the hearsay rule that is recognized in the [Federal Rules of Evidence]."[111] Although the court commented that it does "not regard the common law hearsay exceptions as frozen in their established contours, and [has] been prepared on suitable occasions to venture forth," the Supreme Judicial Court, in rejecting the recognition of the innominate exception, characterized the federal rule as "rather broad," and stated that it did "not believe the administration of justice in this Commonwealth would be advanced by adoption of a [residual] rule whose application in practice has been marked by conflicting and illogical results."[112] Accordingly, the Supreme Judicial Court would need to specifically adopt an ongoing-emergency exception, or, alternatively, adopt an innominate exception and limit the scope of the rule to its view of an ongoing emergency. But perhaps Justice Scalia's concern regarding the malleability of the *Bryant* rule to reach a desired result may dissuade the court from adopting an ongoing-emergency common-law hearsay exception.

Assuming the concepts of excited utterances and statements made in response to police interrogation regarding an ongoing emergency coexist in certain circumstances, it appears that sometimes such statements can be admitted notwithstanding the Confrontation Clause, keeping in mind that "[t]he constitutional provision of the confrontation clause trumps the common-law rules of evidence."[113] For an out-of-court statement to be admitted against a defendant without the defendant having an opportunity to cross-examine, the Commonwealth "must jump two hurdles": the statement must qualify as an excited utterance and it must not be testimonial.[114] In the context of the ongoing emergency, both hurdles will likely resolve in favor of admission.

IV. EXCITED UTTERANCES AS THE SOLE BASIS OF ADMISSIBILITY

Has *Bryant* foreshadowed the admissibility of excited utterances where the emergency has objectively ended? Can a statement qualifying as an excited utterance evade the Confrontation Clause? Perhaps, for the Court in *Bryant* stated that, apart from an ongoing-emergency analysis, "there may be *other* circumstances . . . when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony."[115] In a real sense, police will continue to respond to a dispatch and ask the person whom they encounter and who appears under stress produced by some external influence, "what happened," or "what's going on?" The responding police officers may know little, if anything, regarding the nature of the circumstances underlying the

111. Commonwealth v. Pope, 491 N.E.2d 240, 244 (Mass. 1986) (referencing FED. R. OF EVID. 804(b)(5)).
112. *Id.* at 244 & n.9; Commonwealth v. Meech, 403 N.E.2d 1174, 1179 (Mass. 1980).
113. Commonwealth v. Gonsalves, 833 N.E.2d 549, 559 (Mass. 2005).
114. Commonwealth v. Hurley, 913 N.E.2d 850, 860 (Mass. 2009).
115. *Bryant*, 131 S. Ct. at 1155.

dispatch. Even when called to a domestic dispute where, objectively, there is no ongoing threat to the assumed victim, the question posed could be viewed as characteristic of the type of question a reasonable police officer would ask to determine if police assistance was actually needed. As to the declarant, the nature of the hearsay exception effectively allows admission of only nonreflective responses; those statements the declarant perceives will be used for the purposes of trial are unlikely to be admitted.[116] An admissible statement will have no design or purpose; it will express a nonreflective mental state. It may have future utility, but the statement was not made with a design that it will be used at trial. Moreover, such a nonreflective statement seemingly does not have the attribute of solemnity, which is marked by the quality of seriousness.[117] It is, in the end, a *solemn declaration* of a witness that is testimonial under the Sixth Amendment and is at issue in a Confrontation Clause analysis. Perhaps, as suggested by Justice Scalia, we have returned to a "reliability" test and excited utterances standing alone will evade the Confrontation Clause.[118]

What is going on?

116. "A spontaneous utterance will be admitted in evidence if (1) there is an occurrence or event 'sufficiently startling to render inoperative the normal reflective thought processes of the observer,' and (2) if the declarant's statement was 'a spontaneous reaction to the occurrence or event and not the result of reflective thought.'" Commonwealth v. Santiago, 774 N.E.2d 143, 146 (Mass. 2002) (quoting 2 MCCORMICK, EVIDENCE § 272, at 204 (5th ed. 1999)).

117. In *Crawford*, the Court defined the term "testimony" by quoting the definition as found in 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). *Crawford v. Washington*, 541 U.S. 36, 51 (2004). The same dictionary defines the term "solemn," when used in a nonreligious context, as "4. Affecting with seriousness; impressing or adapted to impress seriousness; gravity or reverence; sober, serious. 5. Grave, serious, or affectedly grave; as a *solemn* face." 2 WEBSTER, *supra*.

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