US Supreme Court further weakens right to face one's accuser

By Michael Stapleton
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On February 28, in the case *Michigan v. Bryant*, the US Supreme Court issued yet another decision undermining constitutional protections, in this case the Sixth Amendment's Confrontation Clause. The decision further limits an individual's right to confront his or her accusers.

The case arises out of an incident that took place in the early morning hours of April 29, 2001, in Detroit, Michigan. Police were dispatched to a gas station parking lot where they found Anthony Covington lying on the ground next to his car with a gunshot wound to his abdomen. In less than 10 minutes, five different Detroit police officers questioned Covington about who had shot him, only stopping when paramedics arrived. Covington told them that Richard Bryant had shot him. He died hours later.

At Bryant's trial, the judge allowed the officers to testify that Covington had implicated Bryant, ruling that the Confrontation Clause did not prevent the admission of Covington's statements, despite the fact that he was not present and subject to questioning by Bryant's attorney. The jury found Bryant guilty of second-degree murder, and he appealed. The Supreme Court of Michigan overturned his conviction, deciding that Covington's statements were barred by the Confrontation Clause, which grants the accused the right to face his accuser. The state of Michigan appealed to the US Supreme Court, which sided with the trial court and reinstated the conviction.

Obama nominee Justice Sonia Sotomayor wrote the majority opinion. She was joined by Chief John Justice Roberts and Justices Anthony Kennedy, Stephen Breyer, and Samuel Alito. Clarence Thomas filed a brief opinion concurring in the 6-2 decision. Justices Antonin Scalia and Ruth Bader Ginsburg filed dissenting opinions. Newly appointed Justice Elena Kagan took no part in the case.

The lineup of Supreme Court justices in this case is unusual. In the majority opinion undermining a fundamental democratic right, Justices Sotomayor and Breyer, the erstwhile liberals, were joined by the "centrist" Kennedy and conservative justices Alito and Roberts. Scalia, a top contender for the title of the most right-wing justice ever to sit on the Supreme Court, appears in dissent as a defender of the Bill of Rights, along with Ginsburg, a liberal.

The decision handed down by the majority enlarges an exception to the Confrontation Clause, of the Sixth Amendment, which states that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." When the clause was written, the founding fathers had in mind the political trials of 16th and 17th century England, where justices of the peace and other officials questioned witnesses outside of court and then were allowed to read that testimony in court instead of having the witnesses testify in court subject to questioning. The most famous case was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, an alleged accomplice, had provided evidence against Raleigh to the Privy Council and in a letter. Cobham's statements were read to the jury, but he did not appear. Raleigh demanded, "Let Cobham be here, let him speak it. Call my accuser before my face." The jury nevertheless convicted him, and he was sentenced to death.

In 2004, in *Crawford v. Washington*, the US Supreme Court affirmed the core protection of the Sixth Amendment. In that case, a husband, Crawford, stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the prosecution played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though Crawford had no opportunity to confront and question her about her statement. The Supreme Court held that this evidence was inadmissible

in light of the Sixth Amendment.

Subsequent decisions, including *Bryant*, have retreated from *Crawford*. The Supreme Court has decided that the Sixth Amendment only applies where the evidence in question is "testimonial." If a statement is not testimonial, according to the Supreme Court, the Sixth Amendment does not prevent a jury from hearing it. In 2006, in *Davis v. Washington*, the court decided that statements made in a 911 call during a domestic assault were non-testimonial because their primary purpose was to resolve an "ongoing emergency" rather than to establish a past fact.

The court's decision in *Bryant* expands the "ongoing emergency" loophole to include a consideration of the "potential threat to responding police and the public at large." Trial judges will also now have to consider not just the intent of the person making the statements, but the intent of the person asking questions, typically the police. The majority in *Bryant* states that "courts should look to all of the relevant circumstances" in determining whether a statement is testimonial. Thus, according to the Supreme Court, if the police are afraid for their lives while conducting an interrogation, the Sixth Amendment is bypassed.

After advocating such a fact-specific approach, the court went on to analyze the facts in *Bryant* in the most abstract and false fashion. Justice Scalia exposed this feature of the majority's opinion in his dissent: "Today's tale—a 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—is so transparently false that professing to believe it demeans this institution."

"From Covington's perspective," Scalia wrote, "his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant. He knew the 'threatening situation,' had ended six blocks away and 25 minutes earlier when he fled from Bryant's back porch. [I]t was entirely beyond imagination that Bryant would again open fire while Covington was surrounded by five armed police officers."

Considering the police officers' purpose, which Scalia considers irrelevant, he nonetheless writes, "None—absolutely none—of their actions indicated that they perceived an imminent threat. They did not draw their weapons, and indeed did not immediately search the gas station for potential shooters. To the contrary, all five testified that they questioned Covington before conducting any investigation at the scene." He further comments, "Breathlessly, [the majority] worries that a shooter could leave the scene armed and ready to pull the trigger again. Nothing suggests the five officers in this case shared the Court's…view."

Predicting how courts around the country will use the decision in *Bryant*, Scalia correctly observes, "Where the prosecution cries 'emergency,' the admissibility of a statement now turns on a 'a highly context-dependent inquiry." If a judge believes that a "defendant 'deserves' to go to jail, the court can focus on whatever perspective is necessary to declare damning hearsay non-testimonial. And when all else fails, a court can mix and match perspectives to reach its desired outcome. Unfortunately, under this malleable approach 'the guarantee of confrontation is no guarantee at all.'"

Justice Scalia is not a principled defender of constitutional rights. A very small sample of his judicial record includes opinions that the constitution does not protect abortion rights or habeas corpus rights for detainees held at Guantánamo Bay, nor place limitations on the death penalty for underage or mentally retarded defendants. He played an instrumental role in the notorious *Bush v. Gore* decision that stopped the recount in Florida in the 2000 presidential election. He also recently spoke at the House Tea Party Caucus on constitutional limits.

The fact that Justice Scalia can pose as the court's defender of constitutional protections underscores the failure of liberalism, i.e., of the perspective that democratic rights can be made compatible with capitalism. Not one of the court's "liberals" has been a consistent defender of constitutional rights. As social inequality has skyrocketed, it has been accompanied by an assault on democratic rights by the political establishment, which is subservient to the interests of the bourgeoisie. The *Bryant* case serves as one example of how this assault has been facilitated by liberals and conservatives alike on the Supreme Court.