

GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 09–150

MICHIGAN, PETITIONER *v.* RICHARD PERRY
BRYANT

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF MICHIGAN

[February 28, 2011]

JUSTICE GINSBURG, dissenting.

I agree with JUSTICE SCALIA that Covington’s statements were testimonial and that “[t]he declarant’s intent is what counts.” *Ante*, at 2 (dissenting opinion). Even if the interrogators’ intent were what counts, I further agree, Covington’s statements would still be testimonial. *Ante*, at 8. It is most likely that “the officers viewed their encounter with Covington [as] an investigation into a past crime with no ongoing or immediate consequences.” *Ante*, at 10. Today’s decision, JUSTICE SCALIA rightly notes, “creates an expansive exception to the Confrontation Clause for violent crimes.” *Ibid*. In so doing, the decision confounds our recent Confrontation Clause jurisprudence, *ante*, at 12, which made it plain that “[r]eliability tells us nothing about whether a statement is testimonial,” *ante*, at 14 (emphasis deleted).

I would add, however, this observation. In *Crawford v. Washington*, 541 U. S. 36, 56, n. 6 (2004), this Court noted that, in the law we inherited from England, there was a well-established exception to the confrontation requirement: The cloak protecting the accused against admission of out-of-court testimonial statements was removed for dying declarations. This historic exception, we recalled in *Giles v. California*, 554 U. S. 353, 358 (2008); see *id.*, at 361–362, 368, applied to statements made by a person

GINSBURG, J., dissenting

about to die and aware that death was imminent. Were the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions. The Michigan Supreme Court, however, held, as a matter of state law, that the prosecutor had abandoned the issue. See 483 Mich. 132, 156–157, 768 N. W. 2d 65, 78 (2009). The matter, therefore, is not one the Court can address in this case.