

Don't Blame

Crawford or *Bryant*: the Confrontation Clause Mess is All *Davis*'s Fault]

39 Rutgers L. Rec. 104 (2012) | [WestLaw](#) | [LexisNexis](#) | [PDF](#)

In *Michigan v. Bryant*, a gunshot victim provided responding officers with the identity of the man who shot him as he lay dying in a parking lot. In determining whether the subsequent use of the deceased declarant's statement at trial violated the Confrontation Clause, the *Bryant* Court applied the "testimonial versus nontestimonial" analysis established in the Court's previous decision, *Crawford v. Washington*. Holding that testimonial hearsay included statements detailing past events, while nontestimonial statements involved the resolution of an "ongoing emergency," the *Bryant* Court applied a multi-factor, "totality of the circumstances" analysis in finding that the deceased declarant's identification had been directed at an ongoing emergency. As such, the hearsay statement was nontestimonial and, accordingly, outside the protection of the Confrontation Clause.

Bryant was roundly (and deservedly) criticized by all commentators, who unanimously accused the Court of making a sham of Confrontation Clause jurisprudence. To an extent, the *Crawford* decision also faced the brunt of the criticism. But for the authors of this article, it is the Court's Confrontation Clause analysis in *Davis v. Washington*, a case involving a 911 call, which is truly to blame for the debacle that is the *Bryant* decision; for it was *Davis* that carelessly equated "nontestimonial" with a decontextualized, commonplace notion of an "ongoing emergency." It was this mistake that led to the unfortunate decision in *Bryant*.

As this article will demonstrate, the issue for purposes of Confrontation Clause analysis in cases like *Davis* and *Bryant* is not whether there exists an ongoing emergency in some general sense, but rather, whose emergency it is. If the emergency is the government's, then any statements made by citizens to help the government address that emergency are testimonial. If the emergency is one in which a citizen is seeking the government's help (regardless of whether or not it's also the government's emergency), statements made by the citizen are nontestimonial.

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