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§8.85 The Davis "Emergency Exception"

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Two years after *Crawford*, the Court revisited the Confrontation Clause in the *Davis* case, which was a consolidated review of domestic abuse convictions in Washington and Indiana. The Washington case involved the use of a woman's 911 call reporting abuse by her boyfriend, and the Indiana case involved the use of a wife's statements to officers summoned to the scene by a 911 call, in which she described her husband's assaultive behavior. In both cases, the statements fit the excited utterance exception, and the complaining witness did not testify. Adopting a "primary purpose" test, the Court concluded in the Washington case that the statement was nontestimonial. The reason was that the operator's primary purpose in questioning the caller was to enable a police response to "an ongoing emergency." In the Indiana case, however, the Court concluded that the statement *was* testimonial because the primary purpose in questioning the wife after the assault was to determine "what happened" and "investigate a possible crime," not to determine what was happening *at the time.*[1] The Court held that 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."

As it emerged in *Davis*, the emergency exception was narrowly crafted: With police on the scene in the Indiana case, and the abuser and victim physically separated, the emergency was over, although clearly hostilities might continue that police intervention did not solve. Perhaps the Court anticipated that ongoing assistance would address these risks: The man was arrested and charged, and commonly in such situations police or prosecutors obtain court orders requiring the abuser not to approach the woman as a condition of release from custody. The woman too could probably get assistance. The implicit message is that the emergency exception applies for as long as there is immediate risk of harm, coupled with a need to gather information in order to prevent or mitigate harm.[2]

The Court in *Davis* rejected a broad argument that only "initial inquiries" are nontestimonial. At the same time, the Court noted that a conversation that begins as an interrogation to determine the need for emergency assistance can "evolve into testimonial statements" once that purpose has been achieved. The line is between accounts describing the present situation in which danger must be assessed, as in the Washington case, and accounts describing what had happened in the past to bring the danger into being, as in the Indiana case. Thus initial contacts with police may be nontestimonial, while later statements may be testimonial, when the focus has shifted from

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§8.85 1. Davis v. Washington, 547 U.S. 813 (2006).

2. State v. Boggs, 185 P.3d 111 (Ariz. 2008) (statements by employee of fast food restaurant, after being shot and while dying on ground at rear of restaurant, seeking help and saying bad people might still be there, fit emergency doctrine); United States v. Arnold, 486 F.2d 177, 189-192 (6th Cir. 2007) (911 call by G, threatened by gun carried by convicted murderer A who was G's mother's boyfriend, fit emergency doctrine; G sought "protection" from ongoing emergency because A "remained at large" and was "fixing to shoot her," and fact that G went to car around corner before calling "did not make the emergency less real or less pressing," as G "had no reason to know" whether A had stayed in residence or followed her).

assessing present danger and taking steps to end it, and focuses instead on investigating crime.[3]

Bryant case

Determining when an emergency has ended and when statements to authorities become testimonial remains a continuing challenge. In the *Bryant* case,[4] the Court significantly broadened the scope of this inquiry. In *Bryant*, police found the victim Covington in a gas station parking lot at 3:25 A.M. dying of a gunshot wound to the abdomen. Police asked "what had happened, who had shot him, and where the shooting occurred." Covington answered that "Rick" Bryant had shot him at about 3 A.M., that he had a conversation with him through the back door of Bryant's house, and that as he turned to leave he was shot through the door. The conversation lasted five to ten minutes before paramedics arrived, and they transported Covington to a hospital where he died within hours. Police went to Bryant's house, found blood and a bullet on the back porch and an apparent bullet hole in the door, and also found Covington's wallet and identification. Bryant, however, had fled the scene and was arrested a year later in California and charged with the murder. The prosecutor introduced Covington's statements as "excited utterances," and Bryant was convicted. However, the Michigan Supreme Court reversed, finding that Covington's statements to the police were testimonial and did not fit the *Davis* emergency doctrine. (The prosecutor had not pursued the dying declaration exception, and the Michigan Supreme Court held that the question whether Bryant's statements fit that exception was not before it.). The U.S. Supreme Court vacated the judgment of the Michigan Supreme Court, holding that there was an ongoing emergency and therefore Covington's statements were nontestimonial hearsay.

The Court gave several reasons for finding an ongoing emergency at the time Covington made his statements. First, Covington said nothing to the police indicating that the cause of the shooting "was a purely private dispute" or that "the threat from the shooter had ended." The assailant may have posed a potential threat to the police and the public. Second, the case involved a gun, and the assailant was still at large. Here an armed shooter, whose "motive for" and "location after the shooting" were unknown, had mortally wounded someone at a location "within a few blocks and a few minutes" of the location where police found the victim. Third, Covington's answers to the officer's questions "were punctuated with questions about when emergency medical services would arrive." He was in considerable pain and had difficulty talking. Under these circumstances, the Court could not say that a person in Covington's situation would have had a "primary purpose" to make statements to establish past events relevant to a criminal prosecution. Fourth, the questions asked by the police about what had happened were the "exact type of questions" necessary to allow the police to "assess the situation," including the threat to their own safety as well as possible continuing danger to the victim and to the public. Fifth, these were only "initial" inquiries, which often produce nontestimonial statements, in contrast to the more detailed interrogation in *Crawford.* Finally, the Court noted the informality of the circumstances of the interrogation, with the victim lying bleeding in a gas station parking lot in the early hours of the morning. There was

3. State v. Shea, 965 A.2d 504 (Vt. 2008) (initial statements by victim of domestic battery fit emergency exception; these described assault and identified perpetrator; later questioning of the victim elicited statements that were testimonial).

4. Michigan v. Bryant, 562 U.S. 344 (2011).

no structured, stationhouse interview as there had been in *Crawford.*

The *Bryant* opinion made several points that are important in determining the scope of the emergency exception in future cases. The Court addressed the confusion arising from *Davis* about whether to focus on one participant in questioning rather than another by saying that a combined approach is required that focuses on "the statements and actions of both the declarant and interrogators" in determining the primary purpose of the interrogation. In dissent, Justice Scalia vigorously disagreed, saying that "[t]he declarant's intent is what counts." The Court indicated that the "primary purpose" inquiry is objective and focuses on the purpose that reasonable participants would have had, not on the subjective intent of the particular parties. The inquiry is highly context-dependent and invites consideration of "standard rules of hearsay" that treat some statements as "reliable." Finally, the Court commented that "there may be other circumstances, aside from ongoing emergencies," where statements are not procured for the "primary purpose" of criminal investigation or prosecution, and cited as examples some common hearsay exceptions such as business records and public records.

Clark case

In 2015, the Court again took up the emergency doctrine, this time in the setting of child abuse. In its decision in the *Clark* case, the Court approved the use in evidence of statements by three-year-old LP to his preschool teacher identifying his mother's live-in boyfriend "Dee Dee" as the source of injuries that the teacher had noticed (bloodshot eyes, red marks "like whips," and further injuries on the child's torso). LP's statements, the Court held in *Clark,* were uttered in the context of "an ongoing emergency involving suspected child abuse," and LP's teachers "needed to know whether it was safe to release LP to his guardian at the end of the day" and to figure out "who might be abusing the child," so their immediate concern was "to protect a vulnerable child who needed help," and there was "no indication that the primary purpose of the conversation was to gather evidence."[5]

5. Ohio v. Clark, 135 S. Ct. 2173, 2182-2183 (2015) (majority opinion by Justice Alito; Justices Scalia and Ginsburg concur in judgment).