WILLIAM W. GREENHALGH
Law Student Writing Competition 2008 Winner

Divining the U.S. Supreme Court's Intent:
Applying *Crawford* and *Davis* to Multipurpose Interrogations by Non-Law Enforcement Personnel

BY PILAR G. KRAMAN

The Confrontation Clause of the United States Constitution explicitly gives criminal defendants the right to confront witnesses. (U.S. CONST. amend. VI.) The U.S. Supreme Court, however, has stated that exceptions to the right of confrontation are permissible "when necessary to further an important public policy," particularly in cases in which individualized findings indicate that specific child witnesses need protection. (Maryland v. Craig, 497 U.S. 836, 845 (1990).) Although the Supreme Court held in *Craig* that states have a compelling interest to protect child victims of sex crimes from undergoing further trauma, the recent *Crawford v. Washington* decision dramatically altered the value of this interest when confrontation rights are at issue. (541 U.S. 36 (2004).)

Crawford did not involve a child witness or a victim of sexual abuse, but the holding has had a dramatic effect on child sex abuse cases. The Washington Supreme Court had upheld the admissibility of a tape-recorded statement made by a defendant's wife to police finding that the statement was reliable, despite the failure of the wife to testify due to the state marital privilege. (*Id.* at 38.) The U.S. Supreme Court, however, reversed holding that out-of-court testimonial statements by witnesses are inadmissible against a defendant if the witness is unavailable and there was no prior opportunity for cross-examination. (*Id.* at 68.) In so doing, the Court rejected the notion that a judge may independently deem testimony reliable, which had been an important role for judges when faced with very young and vulnerable witnesses. Prior to 2004, the Supreme Court had authorized admission of an out-of-court statement by an unavailable declarant if the statement bore adequate "indicia of reliability" by falling within a firmly rooted hearsay exception, or if it contained "particularized guarantees of trustworthiness." (Ohio v. Roberts, 448 U.S. 56, 66 (1980), *overruled by Crawford*, 541 U.S. 36 (2004).)

The Court determined that a distinction between testimonial and nontestimonial statements was necessary for a Confrontation Clause analysis because the Confrontation Clause was aimed at those witnesses who bear testimony. (*Crawford*, 541 U.S. at 51.) The Court did not, however, define the parameters of "testimonial" evidence:

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the *Confrontation Clause* was directed.

(*Id.* at 68.)

Historically, "testimony" has been defined as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." (*Id.*) In addition, a formal statement to government officers is testimony in a way that a casual remark to an acquaintance is not. (*Id.* at 51.)

Crawford's impact on prosecutors and courts has been significant, specifically with respect to the admissibility of statements made to nonlaw enforcement personnel. In particular, courts have struggled to define the parameters of "testimonial" in order to determine the admissibility of statements in cases where children are deemed unable to testify. The varying analyses employed by courts to determine the admissibility of out-of-court statements made by children to nonlaw enforcement personnel has led to inconsistent results. There is a practical solution that may pro-

PILAR G. KRAMAN *is an associate in the Intellectual Property Litigation Section at Young Conaway Stargatt & Taylor in Wilmington, Del. She is a 2008 graduate of the University of Pittsburgh School of Law and winner of the 2008 William W. Greenhalgh Student Writing Competition. She was presented with a $2,000 cash prize at the Criminal Justice Section Council Meeting in Washington, D.C., in October. For information on the 2009 competition, visit www.abanet.org/crimjust/students.html.*

Published in Criminal Justice, Volume 23, Number 4, Winter 2009.

duce more consistency when courts analyze these statements, specifically with respect to child declarants. But first, it is important to look at Confrontation Clause jurisprudence post-*Crawford* and examine the approaches courts are applying to out-of-court statements made by child victims.

Defining the Parameters of "Testimonial"

In June 2006, the Supreme Court decided two consolidated cases, *Davis v. Washington* and *Hammon v. Indiana*, that further distinguished testimonial from nontestimonial statements. (126 S. Ct. 2266, No. 05-5224, 2006 U.S. LEXIS 4886 (U.S. June 19, 2006).)

The Supreme Court began its analysis of *Davis*, as consolidated, by reiterating that *Crawford* applies only to testimonial hearsay. (*Id.* at 2275-76). Without providing an exhaustive definition of testimonial for all conceivable statements, the Court defined the parameters of testimonial versus nontestimonial statements in the context of a police interrogation utilizing a so-called primary purpose test. The Court said:

> 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 ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Id.* at 2273-74.)

Thus, when a police interrogation is directed at establishing facts of a past crime, or to identify or provide evidence to convict a perpetrator, the elicited statements are testimonial hearsay. (*Id.* at 2276.) Alternatively, a statement to police not designed to prove a past fact but to describe current circumstances that might require police assistance, such as a 911 call made during an emergency, is nontestimonial. (*Id.*) The important evaluation for purposes of the Confrontation Clause is an analysis of the declarant's statements, not the questions asked. (*Id.*)

In *Davis*, the Supreme Court only addressed when statements elicited by police interrogations are testimonial or nontestimonial. Therefore, we continue to have no clear guidance as to when a statement is testimonial when not part of a police interrogation.

After the *Crawford* decision, the Sixth Circuit formulated a test to assist the courts and prosecutors within its jurisdiction to determine whether statements are testimonial. In *United States v. Cromer*, the court held:

> The proper inquiry . . . is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.

(389 F.3d 662, 675 (6th Cir. 2004).)

The majority of courts interpreting the interrelationship between *Crawford* and *Davis* apply a similar objective, declarant-centered approach.

For example, in *State v. Mechling*, the West Virginia Supreme Court considered whether statements made to nonlaw enforcement officials were testimonial. (633 S.E.2d 311 (W. Va. 2006).) There, James Allen Mechling allegedly battered his girlfriend, Angela Thorn. Thorn was subpoened but did not appear to testify, limiting the prosecution's witnesses to two police officers and Thorn's neighbor, Ralph Alvarez. (*Id.* at 369.) Alvarez testified that he was in his yard when he heard arguing and later witnessed Mechling swinging at something, possibly Thorn. (*Id.* at 370.) Although Alvarez could not say whether Mechling's swing physically made contact with Thorn, he testified that Thorn told him that Mechling hit her. (*Id.*)

Mechling argued that based on *Crawford* and *Davis*, Thorn's statements to Alvarez were testimonial because an objective witness would reasonably believe that the statements could be used for prosecution. (*Id.* at 378.) When remanding the case due to insufficient facts to determine the issue, the court noted that it seemed that Thorn's statements would be nontestimonial "to the extent that Mr. Alvarez was intervening to address an emergency and heard Ms. Thorn state 'what is happening.' But those statements would be testimonial if the statements related 'what happened,' and the circumstances reflect a significant lapse of time before the statements were made to Mr. Alvarez." (*Id.*)

In *Mechling*, the court seemingly interpreted *Davis* to require analysis of the primary purpose of the interrogation in conjunction with what a reasonable declarant would perceive. This application of *Davis* is arguably the most practical considering that the motivations of the interrogator may be hard to determine and lead to inconsistent results. The declarant-centered approach becomes problematic, however, when the declarant is a young child.

Out-of-Court Statements Made by Minors

The Supreme Court will have to clarify the impact of *Crawford* and *Davis* on statements made by children. Specifically, should the declarant's statement be analyzed from a reasonable person's or a reasonable child's perspective; and how should a court weigh multiple purposes of an interrogation? Furthermore, considering the focus of *Davis* on the primary purpose of the interrogation, is an objective declarant-focused inquiry ever appropriate in a Confrontation Clause analysis?

Courts have reached varying results analyzing statements made by children when applying a declarant-focused inquiry to a Confrontation Clause analysis. Specifically, courts have had to address whether the proper analysis of the declarant's statements is from the aspect of a reasonable person or a reasonable child. Typically, courts have ignored age when examining police interrogations. In *State v. Mack*, for example, the Oregon Supreme Court applied *Crawford* to statements made by a three-year-old witness who was interviewed by a social worker at the request of law enforcement. (101 P.3d 349 (Or. 2004).) The child witness was interviewed by the social worker at the police station and later at the child's home. (*Id.* at 349-50.) The court held that the statements were inadmissible under the Confrontation Clause because they "fell within the core class of testimonial evidence that *Crawford* identified." (*Id.* at 352.) If the witness had been an adult there is no question that the statements would be testimonial; viewed objectively, a reasonable adult witness would have foreseen that the statements would be used to prosecute the defendant. This is particularly clear because the primary purpose of the interrogation was unequivocally to collect evidence for prosecution. It is difficult to imagine, however, that a three-year-old understood the prosecutorial process and procedures for collecting and using evidence. But, viewing the declarant's intent in making the statements through the lens of an objective child could render statements that are clearly testimonial, such as the statements in *Mack*, admissible at least for purposes of the Confrontation Clause. Allowing the admission of these statements, simply because the child may not understand the potential use of his or her statements at trial, would offend *Crawford*'s restrictions on testimonial hearsay. Understandably, courts have consistently considered statements that are clearly collected as part of a formal police investigation testimonial without considering the intent or the age of the child in making the statements. (*See, e.g.*, People v. Cage, 155 P.3d 205, 216 (Cal. 2007); People v. Stechly, 870 N.E.2d 333, 357 (Ill. 2007); People v. Vigil, 127 P.3d 916, 924 (Colo. 2006).) This result makes sense when the primary purpose of the interrogation is clearly to collect evidence for use at trial.

Where police interrogation is not an issue, many courts consider the declarant's age when analyzing the out-of-court statements. In *Stechly*, for example, the Illinois Supreme Court held that outside the context of government interrogation, the declarant's perspective is paramount; and the declarant's age is one of the objective factors to be taken into account. (807 N.E.2d at 362-63.) In *Vigil*, the Colorado Supreme Court held that an analysis of whether a reasonable person in declarant's position would have believed statements to medical personnel and family would be used later for trial includes consideration of the declarant's age. (127 P.3d at 925-26.) Likewise, the Minnesota Supreme Court has held that a child's young age is a consideration when determining whether statements collected by a social worker pursuant to a statutory scheme for reporting sexual abuse are nontestimonial. (State v. Bobadilla, 709 N.W.2d 243, 255 (Minn. 2006).)

Where statements are made clearly for the purposes of medical treatment or to protect the safety and welfare of a child, with no indication of government involvement, many courts find these statements nontestimonial. In *Cage*, for example, the child victim presented to the emergency room with a large gash on his face and neck. (155 P.3d at 218.) The child's statements to the treating physician regarding what happened were deemed nontestimonial because the doctor's sole purpose was to determine the nature of the wound and thus the proper treatment to render. Likewise, when the primary purpose of an interrogation is clearly prosecutorial, it may not be necessary to discern whether a reasonable declarant intended to bear testimony. In the absence of law enforcement personnel, however, courts tend to apply the objective-declarant test to determine whether a statement is testimonial. (*See, e.g.,* State v. Siler, No. 2006-0185, 2007 Ohio LEXIS 2588, at *16 (Ohio Oct. 25, 2007).) However, in many cases involving child declarants, the primary purpose of the child's examination may not be apparent or the interrogation may have multiple purposes.

In multiple-purpose cases, many courts tend to apply a fact-based inquiry to determine whether there is evidence that the statements were elicited for the purposes of preserving evidence for trial and if so, apply the primary purpose test. If not, the objective declarant test will apply. This approach leads to varying results. For example, in *Stechly*, the five-year-old child made statements regarding sexual abuse to her mother. (870 N.E.2d at 363.) The child's mother rushed her to the emergency room where a nurse met them and questioned the child about what had happened. (*Id.* at 364.) A doctor later examined the child. The Illinois Supreme Court held that the child's conversation with the nurse was testimonial. The court concluded that the nurse questioned the child after the mother had already told hospital personnel that abuse may have occurred and that there was no medical purpose for questioning the child. (*Id.* at 364-65.) Most importantly, the court concluded that, although questioned by a registered nurse in the emergency room, the primary purpose of the interview was to gather information for the sole purpose of passing it on to authorities. (*Id.* at 365.)

By contrast, in *State v. Krasky*, when the police received a report of alleged child abuse the detective assigned to the case along with a social worker directed the child's foster mother to take the child to a children's resource center to interview and examine the child. (736 N.W.2d 636, 638-39 (Minn. 2007).) A nurse spoke to the foster mother, who described the comments made to her regarding the abuse; and then she interviewed the child before conducting a physical examination. (*Id.* at 639.) Both the interview and the examination were videotaped. The court held that admission

of the videotape did not violate the Confrontation Clause. Focusing on the primary purpose of the interrogation from the perspectives of the declarant and the questioner, the court determined that the primary purpose of the child's statements were to protect her health and welfare. (*Id.* at 641-42.) The dissent disagreed with the majority that the videotape was admissible because reliance on the health and welfare purpose of the interview ignores the fact that another purpose was to prosecute the defendant. (*Id.* at 647-48 (Page, J. dissenting).) Moreover, the examination occurred 18 months after the alleged abuse took place and after the defendant had been incarcerated.

Stechly and *Krasky* demonstrate that applying the primary purpose and/or objective–declarant tests is not clear-cut in cases involving children interviewed under circumstances where multiple purposes are equally supported by the record. The Supreme Court, in *Davis*, did not address this complicated scenario where the primary purpose is unclear, such as situations as in *Krasky* where there is no ongoing emergency but the interrogation's purpose could be seen as prospective rather than retrospective.

Creating a Workable Test for Multipurpose Interrogations

After *Crawford* and *Davis*, admissibility of out-of-court statements that once hinged upon reliability now are determined based on a distinction of testimonial or nontestimonial. Furthermore, the Court in *Davis* made clear that the important evaluation for purposes of the Confrontation Clause is an analysis of the declarant's statements, not the questions asked. (126 S. Ct. at 2274 n.1.) This lends support to the so-called *Cromer* test, discussed *supra*, adopted in some form in most jurisdictions.

In cases where the record clearly supports multiple purposes, such as protection of the health and welfare of a child and collection of information for potential use at trial, it makes sense to attempt to glean the primary purpose of the interrogation by viewing the circumstances through the lens of an objective declarant. (*See* State v. Hooper, No. 33826, 2007 Idaho LEXIS 234, at *16-17 (Idaho Dec. 24, 2007) (the court applied a "totality of the circumstances" approach to determine whether a videotaped statement of a six-year-old child was testimonial when the purpose of the interview conducted by a forensic nurse was twofold—medical treatment and to collect evidence for prosecution).) Looking at the record in this manner will prevent under-inclusion of statements due to the fact that young children may not understand the prosecutorial use of their statements. Furthermore, potential manipulation by law enforcement officials is lessened because the simple lack of formality will not be enough to render a statement nontestimonial. Moreover, where law enforcement officials are clearly not involved, an emergency should not be necessary. In child abuse cases it may be perfectly reasonable to attempt to ascertain "what happened" in order to determine the child's present and/or future safety or health concerns. Furthermore, the fact that a child might be safely in a hospital room does not mean that the child's safety is not an issue. In sum, the *entire circumstances* should be analyzed from the view of an objective declarant. Simply because an interviewer is collecting information that may be used at trial should not render the remainder of the record inconsequential.

Looking again at *Stechly,* through the lens of an objective declarant, it does not make sense that the "sole purpose" of the interview was to pass information collected onto authorities. (*Id.* at 365.) The mother immediately brought the child to the hospital based on the child's statements to her mother of abuse. Moreover, if the physician who examined the child had conducted the interview, instead of the nurse prior to the examination, it seems the statements could be viewed as medically necessary to determine what happened in order to ascertain the medical needs of the child. This minor alteration of the facts does not change the view that a reasonable declarant would not necessarily be bearing testimony. The mother brought the child to the emergency room because there was an emergency situation—her child was potentially being sexually abused. Talking to the child to understand the scope of the situation was necessary to determine the possible danger the child was in. Moreover, in these multiple-purpose scenarios, the child's age is one factor that should be taken into consideration. Age is relevant to determine the scope of the situation, not particularly to understand whether the child knew she was bearing testimony.

Conclusion

In *Crawford*, the Supreme Court focused on the objective view of the declarant; and in *Davis* the Court created the so-called primary purpose test that focused on the interrogator. This led to Justice Thomas's criticism of the majority opinion in *Davis* that "a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the 'primary purpose' of police interrogations." (*Davis*, 126 S. Ct. at 2280 (Thomas, J. dissenting).) In a recent case, the Washington Supreme Court correctly pointed out that the more accurate statement is that "until the Supreme Court more fully develops precisely what is 'testimonial' under the *confrontation clause*, all courts will be divining the intent of our nation's highest court." (State v. Mason, 162 P.3d 396, 401 (Wash. 2007) (emphasis in original).) Until then the best approach to deal with the most complicated cases to analyze under *Crawford* and *Davis*, multipurpose cases, is to look at the entire record through the lens of an objective declarant. This approach takes into account age, but only as one factor to consider, and broadens the view (or removes entirely) the notion of what is or is not an emergency. ■