The Luxury of Indecision:
Child Forensic Interviews
after Davis & Hammon
by Allie Phillips, J.D.

Introduction

Over two years ago, the United States Supreme Court issued the decision in

_Crawford v. Washington_ that created a new rule regarding a defendant’s confrontation rights as to hearsay statements from an unavailable witness. Before _Crawford_, an out-of-court statement made by an unavailable witness could be admitted in court if it was trustworthy and reliable and fell into a hearsay exception.2 _Crawford_ rejected this approach and announced a new rule that testimonial statements may not be admitted in court unless the witness testifies and is subject to confrontation. If the witness is unavailable3 and there has previously been an opportunity for the defendant to cross-examine the witness, then all admissible hearsay statements (including testimonial statements) previously made by that witness may be introduced at trial since the evil targeted by _Crawford_ (i.e., ex parte statements of witnesses against an accused) was satisfied at the prior hearing. If a statement is deemed nontestimonial, then the traditional hearsay exceptions apply for purposes of admitting that statement and the appearance of the witness at trial is immaterial.4

Although the _Crawford_ Court did not define what constitutes a “testimonial statement;” the core classifications of testimonial statements outlined in _Crawford;_ as well as a majority of the post- _Crawford_ cases have analyzed these two factors in determining whether a statement is testimonial: (1) Was a governmental agent involved in creating the testimony or taking a formalized statement from the witness; and (2) Would an objective person in the declarant/witness’s position reasonably believe that the statement may later be used in court? If answering yes to both factors, then the statement is testimonial.

The Arrival of Davis and Hammon

To complicate matters, the first cases by the U.S. Supreme Court to interpret _Crawford_ were issued on June 19, 2006. In _Davis v. Washington and Indiana v. Hammon_, the Court addressed the admission of excited utterances provided to a 911 operator in a cry for help stemming from an in-progress domestic disturbance ( _Davis_) and the admissions of excited utterances and a signed affidavit by the victim to police officers who were called to a home after a domestic disturbance ( _Hammon_). In the U.S. Supreme Court’s first opportunity to provide guidance since _Crawford_, the Court limited its ruling in _Davis/Hammon_ to situations involving interrogations by law enforcement and would not provide an overall definition of “testimonial.”5 In ruling whether an excited utterance is testimonial, the Court held:

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

Thus, the question _after Davis/Hammon_ becomes: “what is the primary purpose of the interrogation by law enforcement” and how does this work with the _Crawford_ objective reasonable witness standard? Although the Court limited its ruling to law enforcement interrogations, the Court commented, “even when interrogation exists, it is in the final analysis of the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.” Moreover, “our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial.”6

Thus, the Court seemingly limited the application of the _Davis/Hammon “primary purpose”_ test to situations involving interrogations by law enforcement and did not necessarily extinguish the objective declarant standard as set forth in _Crawford_.

Application to Child Abuse Cases

Since _Crawford_, the evolution of case law has been slow in providing a voice for vulnerable victims, particularly children, in court through their out-of-court statements. The first case addressing the objective witness prong from the viewpoint of a child was issued approximately one year after _Crawford_.7 To date, thirteen appellate cases have allowed out-of-court statements of very young children to be heard in court based on what the child reasonably believed at the time of making the statement.8 Will this progress be undone by the _Davis/Hammon_ primary purpose test?

The “primary purpose” test discussed in _Davis/Hammon_ focuses on the objective circumstances surrounding the investigation and taking witness statements. It is the primary purpose to gather evidence for trial or to resolve an ongoing emergency? This analysis appears to contradict the objective witness test which focuses on what is reasonable to the declarant at the time of making the statement. Although _Crawford_, _Davis_ and _Hammon_ are open to wide interpretation depending on what side of the courtroom you sit on, it is clear that arguing the objective person test after _Davis/Hammon_ is still viable.
As in Crawford, the Davis/Hammon Court continued to focus on the finding that “[t]he accused who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”4 In spite of the “primary purpose” test, the Davis/Hammon court noted that “even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”5 This is important language for prosecutors, investigators and forensic interviewers to focus on when explaining a forensic interview and arguing to introduce the statements of a child who is unable to testify.

The United States Supreme Court has focused all three cases on the primary purpose of the interview, in particular a young child, from the objective reasonable witness standard on behalf of children. For assistance on analyzing the interview from the view-point of the witness, in particular a young child, from the objective reasonable witness standard can still be of assistance in aiding the court to declare the forensic interview non-testimonial.6

Lastly, a forensic interview is most often conducted through a multi-disciplinary team (MDT) process where many purposes are being served by interviewing the child one time. Most interviews are primarily conducted to address the immediate health and welfare of the child. This may include a determination as to foster care placement for the child, a medical examination, and a psychological or social services referral. Forensic interviews are generally not conducted primarily for the purpose of prosecution. The Child First Doctrine is the foundation of APRF’s Finding Holos forensic interview training. The Child First Doctrine pre-dates Crawford and advocates: “The child is our first priority. Not the needs of the family. Not the child’s ‘story.’ Not the evi-dence. Not the needs of the court. Not the needs of police, child protection, attorneys, etc. The child is our first priority.”7 Following the Child First Doctrine may help child abuse professionals avoid the pitfalls discussed above. Conclusion

It is essential to educate courts on the limited application of the Davis/Hammon “primary purpose” test to law enforcement interroga-tions. To effectively advocate on behalf of children and allow their state-ments to be heard in court, witnesses and prosecutors must be prepared to articulate how Davis/Hammon is inapplicable to a forensic interview, and to argue the objective reasonable witness standard on behalf of young children. For assistance on Crawford, Davis and Hammon, or to receive the updated outline of post-Crawford cases, please contact the author or the National Center for Prosecution of Child Abuse.

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3 Fed. R. Evid. 803, 804.
4 Fed. R. Evid. 801.
5 Various formulations of this core class of “testimonial” statements exist: “ex parte in-court testimony or its functional equivalent—that is, material that is similar to affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, . . . contained in formalized testimonial materials, such as affidavits, deposition, prior testimony, or confessions, . . . are statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Crawford, 514 U.S. 36, 51-52.
7 Davis, Nos. 05-25224 and 05-5719, 2006 U.S. LEXIS at *16 (footnote 1).
8 Id.
9 Id.
10 Id. at *17 (footnote 2).
11 See these post Davis/Hammon cases: United States v. Ellis, 2006 U.S. App. LEXIS 21417 (7th Cir. Ind. 2006) (a lab technician who collected blood/urine samples did not do so with an eye toward prosecution). United States v. Fellows, 454 F.3d 660 (7th Cir. Ill. 2006) (co--comptuer statements were not made with the expectations that they would be used at trial); United States v. Johnson, 2006 U.S. App. LEXIS 2766 (11th Cir. Fla. 2006) (defendant’s confession to an inmate was not made with the belief it would later be used at trial).
14 Davis, Nos. 05-5224 and 05-5719, 2006 U.S. LEXIS at *19.
15 Id. at 916.
16 709 N.W.2d 243 (Minn. 2006).
17 Id. at 254.
18 Id. at 255.
19 Id. at 255-56.