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Update

APRI

American Prosecutors Research Institute

Unsafe Havens I: Prosecuting Online Crimes Against Children November 27–December 1, 2006

Nashville, TN

An advanced trial advocacy training in cases involving the prosecution of online child sexual exploitation. Due to the complexity of these online cases, this advanced course will focus primarily upon the prosecutor's role in the investigation and pre-trial litigation of these cases. Applications must be received by October 27, 2006, to be considered and those chosen to participate will be notified. There is no fee for the course and lodging is included with course registration. Please visit our Web site at www.ndaa.org for more information.

The 4th Annual International Race to Stop the Silence:

Stop Child Sexual Abuse 8K Race, 5K Fun Run/Walk, Kids' Fun Run will be held at 8:00 am Saturday, April 14, 2007, in West Potomac Park, Washington, DC. To register, visit http://www.stopcsa.org/race.cfm.

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The Luxury of Indecision: Child Forensic Interviews after *Davis & Hammon*

by Allie Phillips, J.D.[1]

Introduction

Over two years ago, the United States Supreme Court issued the decision in *Crawford v. Washington*[2] 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.[3] *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 unavailable[4] 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.

Although the *Crawford* Court did not define what constitutes a "testimonial statement," the core classifications of testimonial statements outlined in *Crawford*,[5] 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*,[6] 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 admission 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."[7] 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 prosecution.[8]

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."[9] Moreover, "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"[10] 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*.[11]

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*.[12] 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.[13] 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. 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 "[a]n accuser 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."[14] 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."[15] 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 core meaning of the Sixth Amendment to the Constitution: A criminal defendant "shall enjoy the right … to be confronted with witnesses against him." The Supreme Court has made clear that witnesses who bear testimony against an accused are witnesses for purposes of the Sixth Amendment. Is a young child at a forensic interview at a child advocacy center knowledgeable that s/he is a witness bearing testimony against an accused? This issue was best addressed in *Minnesota v. Bobadilla*.[16]

In *Bobadilla*, the Minnesota Supreme Court focused on the primary or substantial purpose of the statement from both the witness and government questioner's position. In doing so, the court found that statements of a young child, here the age of three at the time of the forensic interview, were non-testimonial. The *Bobadilla* analysis is consistent with the new primary purpose test in *Davis/Hammon*. The *Bobadilla* court found that "neither the child-protection worker nor the child declarant … were acting, to a substantial degree, in order to produce a statement for trial."[17] In analyzing the statute on reporting and responding to allegations of child abuse, the court noted that the mandated reporting and investigatory scheme of the Minnesota statute, in addition to the statutory obligation to protect the health and welfare of children of abuse, made statements obtained for purposes of trial to be incidental to other issues surrounding the interview. "[A]ssessing and responding to imminent risks to [the child's] health and welfare"[18] was the primary or substantial purpose of the interview. "Moreover, given [the child's] very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial. As amicus American Prosecutors Research Institute makes clear, children of [this child's] age are simply unable to understand the legal system and the consequences of statements made during the legal process."[19]

If required to address the primary purpose of the forensic interview, focusing on the language in your state statute regarding responding to and investigating allegations of child abuse may be an important factor to help distinguish the forensic interview from the police interrogations of *Davis/Hammon*. Additionally, an analysis of the interview from the viewpoint 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 nontestimonial.[20]

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 APRI's *Finding Words* 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 evidence. Not the needs of the courts. Not the needs of police, child protection, attorneys, etc. The child is our first priority."[21] 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 interrogations. To effectively advocate on behalf of children and allow their statements 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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2 514 U.S. 36 (2004).
3 Fed. R. Evid. 803, 804.
4 Fed. R. Evid. 804(a).
5 "Various formulations of this core class of "testimonial" statements exist: '*ex parte* in-court testimony or its functional equivalent—that is, material such as 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, *** extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, *** [or] 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*, 541 U.S. 36, 51-52.
6 126 S. Ct. 2266; 165 L. Ed. 2d 224; 2006 U.S. LEXIS 4886 (2006).
7 *Davis*, Nos. 05-5224 and 05-5705, 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. Tolliver, 454 F.3d 660 (7th Cir. Ill. 2006) (co-conspirator statements were not made with the expectation that they would be used at trial); United States v. Johnson, 2006 U.S. App. LEXIS 20766 (11th Cir. Fla. 2006) (defendant's confession to an inmate was not made with the belief it would later be used at trial).
12 State v. Dezee, No. 51521-7-I, 2005 Wash. App. LEXIS 104 (Wash. Ct. App. 2005) (nine-year-old's statements to mother).
13 State v. Copley, 2006 Ohio 2737 (Ohio Ct. App. 2006) (three-year-old's statements to his mother); Commonwealth v. DeOliveira, 849 N.E.2d 218 (Mass. 2006) (six-year-old's statements to a doctor); State v. Muttart, 2006 Ohio 2506 (Ohio Ct. App. 2006) (five- and six-year-old children's statements to a medical professional); State v. Brigman, 629 S.E.2d 307 (N.C. Ct. App. 2006) (a child not quite three years old cannot understand that statements made to a doctor may later be used in court); Miller v. Fleming, No. C04-1289P, 2006 U. S. Dist. LEXIS 17284 (W.D. Wash. 2006) (seven-year-old's statements to a doctor); State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006) (three-year-old's statements to a CPS worker at a forensic interview); Colorado v. Vigil, 127 P.3d 916 (Colo. 2006) (seven-year-old's statements to a doctor); State v. Blount, No. COA05-134, 2005 N.C. App. LEXIS 2606 (N.C. Ct. App. 2005) (three-year-old's statements to a social worker); People v. Sharp, No. 04CA0619, 2005 Colo. App. LEXIS 1761 (Colo. Ct. App. 2005) (five-year-old's statements to a forensic interviewer); United States v. Coulter, 62 M.J. 520 (N-M.C.C.A. 2005) (two-year-old's statements to mother); In re D.L., 2005 Ohio 2320 (Ohio Ct. App. 2005) (three-year-old's statements made during a medical exam); State v. Krasky, 696 N.W.2d 816 (Minn. Ct. App. 2005) (seven-year-old's statements to a nurse practitioner); and Lagunas v. State, 187 S.W.3d 503 (Tex. App. 2005) (four-year-old witness's statement to a police officer).
14 *Davis*, Nos. 05-5224 and 05-5705, 2006 U.S. LEXIS at *19.
15 Id. at *16.
16 709 N.W.2d 243 (Minn. 2006).
17 Id. at 254.
18 Id. at 255.
19 Id. at 255-56.
20 *See* Allie Phillips, "*Child Forensic Interviews after Crawford v. Washington: Testimonial or Not?*" 39:4 THE PROSECUTOR (July-August 2005).
21 One of the first publications regarding "The Child First Doctrine" appeared in Ann Ahlquist and Bob Ryan, *Interviewing Children Reliably and Credibly: Investigative Interview Workbook*, CORNERHOUSE INTERAGENCY CHILD ABUSE EVALUATION AND TRAINING CENTER: MINNEAPOLIS, MN 18 (1993).

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