

1-1-2011

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Recommended Citation

16 Suffolk J. Trial & App. Advoc. 227 (2011)

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THE TESTIMONIAL NATURE OF MULTIDISCIPLINARY TEAM INTERVIEWS IN MASSACHUSETTS: APPLYING *CRAWFORD* TO THE CHILD DECLARANT

*[T]he confrontation issues posed by statements made by children are enormously important, complex, and troubling. Sooner or later, the Supreme Court will have to begin resolving many of these issues.*¹

INTRODUCTION

The Confrontation Clause of the Sixth Amendment embodies the adversarial system of justice that defines American jurisprudence.² Haunted by the injustice suffered by Sir Walter Raleigh, the Framers of the United States Constitution specifically granted a criminal defendant the right to confront an adverse witness.³ The right of confrontation provides an opportunity for the defendant to cross-examine an adverse witness in the hopes of undermining the witness' testimony or credibility.⁴ Those witnesses who choose to testify against a criminal defendant, thus jeopardizing the defendant's life and liberty, must do so under the pains and penalties of perjury, and subject to cross-examination.⁵

The confrontation right is inextricably intertwined with the evidentiary Hearsay Rule.⁶ The Hearsay Rule states that an out-of-court statement asserted for the truth of the matter is not admissible except as

¹ Richard D. Friedman, *Further Developments and Thoughts on Child Witnesses*, THE CONFRONTATION BLOG (Oct. 26, 2007, 3:29 PM), http://confrontationright.blogspot.com/2007_10_01_archive.html.

² See *Maryland v. Craig*, 497 U.S. 836, 845 (1990) ("The word 'confront,' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness.").

³ U.S. CONST. amend. VI. See generally *Crawford v. Washington*, 541 U.S. 36, 44-55 (2004) (providing historical underpinnings of Confrontation Clause). The Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

⁴ See *Mattox v. United States*, 156 U.S. 237, 240-44 (1895) (interpreting Confrontation Clause as eradicating admission of depositions or ex parte affidavits against criminally accused).

⁵ See generally U.S. CONST. amend. VI (requiring in-court testimony of adverse witnesses ensures sworn statements).

⁶ See David A. Lowy & Katherine Bowles Dudich, *After Crawford: Using the Confrontation Clause in Massachusetts Courts*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 1, 2 (2007) (quoting *United States v. Brito*, 427 F.3d 53, 60 (1st Cir. 2005)), *cert. denied*, 126 S. Ct. 2983 (2006) ("[T]he Confrontation Clause analysis is 'distinct but symbiotic' to the hearsay analysis . . .").

provided by the Rules of Evidence or the Supreme Court, and in accordance with the Constitution.⁷ The interplay between the Hearsay Rule and the confrontation right creates the possibility that hearsay evidence may be admissible under the Rules of Evidence, yet banned by the Confrontation Clause, and vice versa.⁸ Therefore, hearsay exceptions may permit hearsay to be admitted, even though such admittance violates the defendant's constitutional rights.⁹ To determine whether a hearsay statement is admissible, a court must first determine whether the evidence falls within a recognized hearsay exception, and if so, must then determine whether its admittance is consonant with the Sixth Amendment.¹⁰

Establishing equality between the prosecution and defense in a criminal trial is essential to the administration of justice.¹¹ However, when an adult defendant is charged with sexually abusing, molesting, or raping a child, the constitutional safeguards that protect the adult accused from the child victim may seem unfair, superfluous, or even offensive from societal and legal viewpoints.¹² The societal interest in such cases is twofold: to limit the amount of trauma the child victim suffers during the course of the trial; and, to maximize the amount of available evidence.¹³ From a legal viewpoint, child sexual abuse ("CSA") cases are difficult to prosecute because there is often a lack of physical evidence or eyewitnesses, and children may be unavailable to testify.¹⁴ Furthermore, because children

⁷ See FED. R. EVID. 802; see also *infra* text accompanying note 50 (articulating Supreme Court's current standard for hearsay admissibility against criminal defendant).

⁸ See generally Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 183-84 & n.13 (1948) (opining hearsay doctrine protects "not [the] Trier but [the] Adversary").

⁹ See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (conditioning hearsay admissibility on "indicia of reliability" rather than constitutional mandates); see also *infra* notes 31-35 (explaining *Roberts* reasoning and holding). See generally *Crawford v. Washington*, 541 U.S. 36, 60-65 (2004) (describing inherent dangers of usurping constitutional doctrine with evidentiary rules).

¹⁰ See *Crawford*, 541 U.S. at 50-51 (rejecting view that application of Sixth Amendment is dependent upon evidence law regarding hearsay); see also *infra* text accompanying note 50 (articulating current standard for hearsay admissibility when Sixth Amendment is also implicated).

¹¹ See *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (dictum) (recognizing that justice is due to the accused and accuser), *overruled by Malloy v. Hogan*, 378 U.S. 1, 2 n.1 (1964).

¹² Cf. *Maryland v. Craig*, 497 U.S. 836, 853 (1990) ("[A] State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.").

¹³ See *Opinion of the Justices to the Senate*, 547 N.E.2d 8, 9 (Mass. 1989) (analyzing "conflicting considerations" regarding hearsay admissibility in child sexual abuse cases).

¹⁴ See Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 375-76 (2005) (identifying difficulties of prosecuting CSA cases based on nature of crime). Sexual abuse often takes place

often recant, concerns involving “suggestibility, manipulation, coaching, or confusing fact with fantasy” lead jurors to view their testimony more skeptically than that of adults.¹⁵

Forensic interviews conducted by multidisciplinary teams (“MDT”) assist prosecutors in overcoming these evidentiary hurdles because, if admitted, these interviews provide the non-testifying child an opportunity to be heard.¹⁶ An MDT is established to provide a well-coordinated response to child abuse allegations in a collaborative manner amongst the various team members, which generally include social workers, prosecutors, police officers, or mental and medical health professionals.¹⁷ This coordinated response lessens the number of interviews a child must sit through in an effort to reduce any additional trial-related trauma.¹⁸ The MDT approach in conducting forensic interviews of CSA victims has been extremely successful and “[i]t is now well accepted that the best response to the challenge of child abuse and neglect investigations is the formation of an MDT” as evidenced by all fifty states enacting legislation addressing or promoting the use of multidisciplinary or multi-agency teams in child abuse cases.¹⁹

Despite the success of MDTs in investigating and prosecuting child abuse cases, the recent shift in Confrontation Clause jurisprudence announced in *Crawford v. Washington*²⁰ has severely limited, if not entirely banned, the admission of child hearsay statements elicited during forensic interviews.²¹ In *Crawford*, the Supreme Court articulated a new standard

in secret and there is typically no physical evidence of abuse. *See id.* at 374-75 (blaming lack of evidence in cases involving penetration on children’s ability to heal quickly).

¹⁵ *Id.* at 375. Children oftentimes disclose in stages, which increases the risk of inconsistencies in the child’s testimony. *See id.* (pointing out that children often recant).

¹⁶ *See generally* Jonathan Scher, Note, *Out-of-Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAM. CT. REV. 167, 167-69 (2009) (advocating admission into evidence child statements made during “structured or semi-structured forensic interview[s]”).

¹⁷ *See infra* Part III.B.2 (explaining MDT approach with focus on Massachusetts).

¹⁸ *See* Raeder, *supra* note 14, at 381 (discussing benefits of lessening number of interviews through MDT approach). Reducing the number of interviews may also “lower[] the likelihood that unnecessarily suggestive questions will be asked.” *Id.*

¹⁹ MARK ELLS, U.S. DEP’T OF JUSTICE, FORMING A MULTIDISCIPLINARY TEAM TO INVESTIGATE CHILD ABUSE 4 (2d prtg. 2000), available at <http://www.ncjrs.gov/pdffiles1/ojdp/170020.pdf>; *see Multidisciplinary/Multi-Agency Child Protection Teams Statutes*, NAT’L DIST. ATT’YS ASS’N (last updated May 2010), <http://www.ndaa.org/pdf/Multidisciplinary%20Multi%20Agency%20Child%20Protection%20Teams.pdf> (listing state statutes regarding formation and authorization of multidisciplinary teams).

²⁰ 541 U.S. 36 (2004).

²¹ *See* Raeder, *supra* note 14, at 381-83, 388 (“*Crawford’s* impact cannot be overstated in cases where children do not testify.”); *see also* Kimberly Y. Chin, Note, “Minute and Separate”:

for determining the admissibility of out-of-court statements made by declarants who are unavailable to testify at trial: testimonial hearsay is inadmissible unless the declarant is available to testify at trial and the defendant had a prior opportunity for cross-examination.²² This standard has had a particular impact on CSA cases because the child is most often the only eyewitness, and so it is critical for the prosecution to be able to introduce the child's testimony, whether in the form of in-court testimony or hearsay.²³ Furthermore, the Supreme Court's failure to provide a more comprehensive definition of "testimonial" has led to confusion and inconsistent judgments in the lower courts regarding the admission of child victims' statements made during MDT interviews.²⁴ This Note discusses federal and Massachusetts case law regarding the confrontation right and its effect on the admissibility of a child victim's statements made during an MDT interview.²⁵ More specifically, this Note analyzes possible

Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases After Crawford and Davis, 30 B.C. THIRD WORLD L.J. 67, 88-101 (2010) (discussing *Crawford*'s effect on child abuse prosecution and suggesting "minute and separate" approach); Allie Phillips, *Child Statements in a Post-Crawford World: What the United States Supreme Court Failed to Consider with Regard to Child Victims and Witnesses 2* (Berkley Elec. Press, Working Paper No. 1903, 2006), <http://law.bepress.com/cgi/viewcontent.cgi?article=9045&context=expresso> (arguing Supreme Court is "sacrificing" child victims through *Crawford* standard); Scher, *supra* note 16, at 172-78 (acknowledging "aftermath" of *Crawford* and contending statements elicited during MDT interviews are nontestimonial).

²² See *Crawford*, 541 U.S. at 59 (conditioning admissibility of testimonial statements on declarant's unavailability and prior opportunity for cross-examination).

²³ See Prudence Beidler Carr, Comment, *Playing by All the Rules: How to Define and Provide a "Prior Opportunity for Cross-Examination" in Child Sexual Abuse Cases After Crawford v. Washington*, 97 J. CRIM. L. & CRIMINOLOGY 631, 631 (2007) (discussing testimonial standard's negative impact on CSA cases); see also *supra* notes 14-15 and accompanying text (highlighting difficulties associated with prosecuting CSA cases).

²⁴ Compare *State v. Contreras*, 979 So. 2d 896, 905 (Fla. 2008) (holding CSA victim's videotaped statements to Child Protection Team testimonial), with *State v. Bobadilla*, 709 N.W.2d 243, 256 (Minn. 2006) (holding CSA victim's videotaped statements to child protection social worker nontestimonial). See generally Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 921 (2007) (noting similar results yet varying reasoning amongst lower courts). Mosteller states:

On some of the major issues regarding the practical definition of the testimonial concept, the lower court cases are much closer to consensus than one might expect, given their rampant disagreement on the meaning of *Crawford* in other areas. However, the lower courts' agreement in terms of result does not extend to doctrinal justification for some of the results, and the key features that should determine the testimonial decision in close cases are often unclear.

Id.

²⁵ Compare Parts I-II (discussing case law), with Part V (analyzing testimonial nature of MDT forensic interviews by applying relevant case law). This Note's analysis is based on the

classifications of such statements under *Crawford's* three formulations of testimonial statements.²⁶

Parts I and II provide a brief history of federal and Massachusetts Confrontation Clause jurisprudence.²⁷ Part III discusses the relevant Massachusetts statutes and case law in determining whether an MDT forensic interview is testimonial under *Crawford*.²⁸ Part IV contends that the Massachusetts child hearsay exception is unconstitutional.²⁹ Lastly, Part V analyzes MDT interviews, both procedurally and substantively, to determine whether they should be admitted against a criminal defendant in Massachusetts under *Crawford* and its progeny.³⁰

I. INTERPRETING THE CONFRONTATION CLAUSE

In *Ohio v. Roberts*,³¹ the Supreme Court established a two-part interpretation of the Confrontation Clause derived from the two underlying principles of hearsay evidence: necessity and reliability.³² *Roberts* held that a hearsay statement made by an unavailable declarant satisfies the Confrontation Clause “only if it bears adequate ‘indicia of reliability.’”³³ *Roberts* conditioned the reliability of all hearsay evidence—and therefore

Sixth Amendment’s confrontation right. Accordingly, the Massachusetts cases discussed in this Note involve Sixth Amendment claims. In my opinion, my analysis would yield the same result if analyzed under Article XII because “in cases . . . involving the hearsay rule and its exceptions, [the SJC has] always held that the protection provided by art. 12 is coextensive with the guarantees of the Sixth Amendment to the United States Constitution.” *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 221 n.1 (Mass. 2006).

²⁶ See generally *infra* Part V (suggesting MDT interviews are testimonial under any formulation).

²⁷ See *infra* Parts I-II (presenting case law development chronologically).

²⁸ See *infra* Part III (discussing treatment of potentially involved parties in testimonial analysis under Massachusetts law).

²⁹ See *infra* Part IV (contending chapter 233, section 81 of the General Laws of Massachusetts is unconstitutional).

³⁰ See *infra* Part V (analyzing MDT interview under *Crawford's* three testimonial formulations and “interrogation” definition).

³¹ 448 U.S. 56 (1980).

³² See *id.* at 65-66 (identifying necessity and reliability as basis of Confrontation Clause). In applying the rule of necessity, “the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant” regardless of whether the out-of-court statement was subject to cross-examination. *Id.* at 65. The rule of “reliability” is applicable once the declarant is deemed unavailable, and requires that the hearsay statement “is admissible only if it bears adequate ‘indicia of reliability.’” *Id.* at 66.

³³ See *id.* at 66 (reasoning evidence admissible through hearsay exceptions “comports with . . . ‘substance of the constitutional protection’” (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895))).

its admissibility—on whether the hearsay fell within a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.”³⁴ By defining Confrontation Clause jurisprudence through hearsay principles, the *Roberts* test permitted evidence law to control constitutional doctrine.³⁵

In a radical departure from the *Roberts* analytical approach, the Supreme Court, in *Crawford v. Washington*,³⁶ reinterpreted the Confrontation Clause based on an analysis of the history of the confrontation right and its adoption into the U.S. Constitution.³⁷ The recurring theme in the Court’s historical analysis was the Framers’ abhorrence of interrogatories and inquisitorial practices used in both the development of evidence and at trial.³⁸ This theme of abhorrence rested on two “principal evil[s]” the Framers sought to eradicate from the common law by cloaking the right of confrontation with constitutionality.³⁹ Replacing the two principles of hearsay, the “principal evil[s]” formed the new pair of lenses for examining the meaning and purpose of the Sixth Amendment.⁴⁰

The first identified evil concerns the civil law mode of criminal procedure and its use of ex parte examinations, by deposition or private judicial examination, as evidence against the accused.⁴¹ Writing for the Court, Justice Scalia derived two inferences from this evil.⁴² First, because the Framers’ concerns involved legal practices that occurred outside the courtroom, the Court rejected the view that the Confrontation Clause applied only to in-court testimony.⁴³ By expanding the breadth of the Confrontation Clause to out-of-court statements, the Court eradicated any existing control that the Rules of Evidence had over confrontation issues

³⁴ *Id.* (inferring constitutional reliability from hearsay rule exceptions); *see supra* note 33 (providing Court’s reasoning).

³⁵ *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) (opining that “vagaries” of evidence rules were not intended to protect confrontation right); Lowy & Dudich, *supra* note 6, at 7-8 (attributing *Crawford* holding to Court’s dissatisfaction with *Roberts* decision).

³⁶ 541 U.S. 36 (2004).

³⁷ *See id.* at 43 (ascertaining meaning of clause from historical background because Constitutional text alone is insufficient).

³⁸ *See id.* at 48 (discussing historical context surrounding adoption of confrontation right).

³⁹ *See id.* at 50 (revealing evidence law’s inadequacy in protecting defendant’s confrontation right).

⁴⁰ *See id.* at 50-60 (defining two meanings of Sixth Amendment based on historical analysis).

⁴¹ *See id.* at 50-51 (reasoning clause applies to out-of-court statements).

⁴² *See id.* at 50-53 (discussing first “principal evil”).

⁴³ *See id.* at 50-51 (expanding clause’s reach to out-of-court statements permits constitutional control over inquisitorial practices).

and therefore restored each legal source's independence.⁴⁴ Recognizing its limitations, however, Justice Scalia next conceded that the clause is not applicable to all forms of hearsay.⁴⁵ When combined, the two inferences drawn from this first evil reveal a class of hearsay that is subject to constitutional analysis, and a class that is not: "testimonial" and "nontestimonial" hearsay.⁴⁶

The second "principal evil" acknowledges exceptions, or the lack thereof, to the constitutional ban of testimonial hearsay.⁴⁷ Remaining faithful to his historical analysis, Justice Scalia determined that the Framers did not intend to recognize an exception, developed by the courts or future legislation, to the Sixth Amendment.⁴⁸ Therefore, only those exceptions existing at the time of the founding, which were unavailability and a prior opportunity to cross-examine, are recognized.⁴⁹ Combining these exceptions with the concept of testimonial and nontestimonial hearsay, the Court held that testimonial statements are only admissible against a criminal defendant if the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination.⁵⁰

II. ATTEMPTING TO DEFINE TESTIMONIAL THROUGH FEDERAL & MASSACHUSETTS CASE LAW

A. *THE CORE CLASS OF TESTIMONIAL STATEMENTS*: Crawford v. Washington

In *Crawford v. Washington*, the Court concluded that testimonial statements implicate the Confrontation Clause because such statements cause the declarant to be a "witness" against the accused within the

⁴⁴ See Lowy & Dudich, *supra* note 6, at 7 ("Against [the Roberts] backdrop, the Court attempted to disentangle the confrontation right from the rule against hearsay and re-infuse the Confrontation Clause with its original intent . . .").

⁴⁵ See *Crawford*, 541 U.S. at 51 (distinguishing offhand remarks from statements elicited through ex parte examination for confrontation purposes).

⁴⁶ See *id.* (basing distinction on whether declarant bears testimony against accused). The Court reasoned that the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony'" in the form of testimonial statements. *Id.* Accordingly, only testimonial statements are subject to a constitutional analysis. *Id.*

⁴⁷ See *id.* at 53-56 (explaining second proposition derived from historical record).

⁴⁸ *Id.* at 54 (basing conclusion on historical and textual analysis of Sixth Amendment).

⁴⁹ See *id.* (acknowledging unavailability and prior opportunity to cross-examine as exceptions existing under 1791 common law).

⁵⁰ *Crawford*, 541 U.S. at 53-54.

meaning of the Sixth Amendment.⁵¹ Classifying a statement as testimonial is thus the hook upon which a constitutional analysis hangs; without this classification, the statement's admissibility is primarily governed by the Rules of Evidence.⁵² Despite the significant ramifications this classification implicates, the *Crawford* Court withheld a comprehensive definition of the term testimonial.⁵³ Instead, the Court identified three separate formulations of the term.⁵⁴

The first formulation the Court acknowledged included "ex parte in-court testimony or its functional equivalent."⁵⁵ The second formulation concerned formalized materials typically used at trial.⁵⁶ The third formulation provided an objective standard for defining testimonial: if an objective witness would reasonably believe that her statement would be available for use at a later trial, then her statement is testimonial.⁵⁷

⁵¹ See *id.* at 51 (explaining Court's reasoning behind testimonial and nontestimonial distinction). Defendant Crawford stabbed a man to death who had allegedly tried to rape his wife, Sylvia Crawford. *Id.* at 38. At trial, the prosecution played a recorded statement in which Sylvia described the stabbing. *Id.* at 38-39 (noting that police recorded Sylvia's statement at police station). Sylvia was unavailable to testify at trial under the Washington state marital privilege, and her husband, the defendant, had no prior occasion to cross-examine her. *Id.* at 38-40. Over defense objections, Sylvia's statements were admitted and the defendant was subsequently convicted of assault. *Id.* at 40-41. The issue for the Supreme Court was whether Sylvia's statements were admitted in violation of the defendant's right to confrontation. *Id.* at 42.

⁵² Compare *supra* notes 36-50 and accompanying text (tracing *Crawford* Court's historical analysis of confrontation jurisprudence in articulating testimonial and nontestimonial classifications), with *supra* notes 31-35 and accompanying text (revealing *Roberts* Court's reliance on evidence law when admitting hearsay rather than Sixth Amendment). See generally note 44 and accompanying text (discussing confrontation right's independence from hearsay rule).

⁵³ *Crawford*, 541 U.S. at 68 (listing prior testimony and police interrogations as definitive testimonial statements). Prior testimony includes testimony given at a preliminary hearing, before a grand jury, or at a previous trial. See *id.* (reasoning prior testimony and interrogations are practices most similar to abuses Framers distrusted).

⁵⁴ See *id.* at 51-52, 68 (identifying three formulations clause applies to at minimum); Lowy & Dudich, *supra* note 6, at 7-8 (summarizing three formulations of term testimonial as outlined in *Crawford*).

⁵⁵ *Crawford*, 541 U.S. at 51 (citation omitted) (listing examples of ex parte in-court testimony or functional equivalent). The Court listed "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" as falling into this first formulation. *Id.* (citation omitted).

⁵⁶ *Id.* at 51-52 (listing "affidavits, depositions, prior testimony, or confessions" as testimonial (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring))).

⁵⁷ *Id.* at 52 (holding that analysis of declarant's objective belief includes analyzing circumstances under which statement was made). But see *Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring) (criticizing arbitrariness of Court's third formulation). Chief Justice Rehnquist named sworn affidavits and depositions as testimonial, and opined that "any classification of statements as testimonial beyond [sworn statements] will be somewhat arbitrary, merely a proxy

Unconcerned with articulating a precise definition, the Court suggested that a “common nucleus” existed among the different formulations and that the distinctions between them “define the Clause’s coverage at various levels of abstraction around it.”⁵⁸

While it failed to articulate a precise definition of the term testimonial, the Supreme Court provided some insight, holding that, at a minimum, statements are testimonial if made at a “preliminary hearing, before a grand jury, or at a former trial; and [if made during] police interrogations.”⁵⁹ Consistently ambiguous, the Court withheld a definition for the term “interrogation,” noting only that the term was to be understood in its “colloquial, rather than any technical legal, sense.”⁶⁰ Referring to examinations by justices of the peace in England, the Court held that the absence of oath in police interrogations is not dispositive in determining admissibility.⁶¹ The insignificance of whether statements are given under oath greatly expands the Confrontation Clause’s reach by granting it access to unsworn, out-of-court statements.⁶²

B. THE TWO CLASSES OF TESTIMONIAL: Commonwealth v. Gonsalves

Attempting to establish a more precise definition of testimonial, in *Commonwealth v. Gonsalves*,⁶³ the Supreme Judicial Court of Massachusetts (“SJC”) identified and defined two classes of testimonial statements: “per se testimonial” and “testimonial in fact.”⁶⁴ Per se testimonial statements are those made in response to questioning by law enforcement agents, except when the questioning is within the government’s peacekeeping or community caretaking function.⁶⁵ The SJC

for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.” *Id.* Adhering to the majority’s historical approach, Chief Justice Rehnquist supported his theory by indicating that unsworn testimonial statements and nontestimonial statements, under common law, were treated similarly. *See id.*

⁵⁸ *See id.* at 52 (majority opinion) (withholding explanation of shared common nucleus).

⁵⁹ *Id.* at 68 (reasoning that these practices are akin to abuses Confrontation Clause seeks to eradicate).

⁶⁰ *See Crawford*, 541 U.S. at 53 n.4 (acknowledging existence of various definitions of “interrogation” and failing to select or define them).

⁶¹ *See id.* at 52 (referring to unsworn statements in trial of Sir Walter Raleigh).

⁶² *See id.* at 50-53 (providing broad definition of testimonial). *But cf. supra* note 57 (presenting Chief Justice Rehnquist’s critique of classifying unsworn statements as testimonial).

⁶³ 833 N.E.2d 549 (Mass. 2005).

⁶⁴ *See id.* at 552 (defining two classes of testimonial statements).

⁶⁵ *See id.* at 555-56 (noting community caretaking exception to per se testimonial statements); *infra* notes 70-71 and accompanying text (defining community caretaking function and its relatedness to emergency questioning). The SJC held that in addition to statements

held that the use of a per se testimonial statement against a criminal defendant implicates the Confrontation Clause.⁶⁶ Statements elicited through law enforcement interrogations are therefore inadmissible under *Crawford*, unless the declarant either testifies at trial or is presently unavailable, and the defendant had a prior opportunity to cross-examine the declarant.⁶⁷

Adhering to the term's colloquial sense, the SJC defined "interrogation" expansively as meaning "all law enforcement questioning related to the investigation or prosecution of a crime."⁶⁸ Such investigative interrogations may be conducted by "police, prosecutors, or others acting directly on their behalf."⁶⁹ Recognizing an exception, the SJC held that emergency questioning by law enforcement agents does not constitute an interrogation under *Crawford* because it arises out of the government's community caretaking function.⁷⁰ As opposed to the investigative purposes of an interrogation, the purpose of emergency questioning is to secure a volatile scene or to assess the need for or provide medical assistance.⁷¹

elicited during police interrogation, a declarant's "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" is per se testimonial. See *Gonsalves*, 833 N.E.2d at 554 (quoting *Crawford v. Washington*, 541 U.S. 36, 68 (2004)).

⁶⁶ See *Gonsalves*, 833 N.E.2d at 556 (classifying statement as per se testimonial ends constitutional analysis).

⁶⁷ See *id.* at 558-59 (outlining analysis of per se testimonial statements and ramifications of such classification).

⁶⁸ *Id.* at 561, 555 (citing *People v. West*, 823 N.E.2d 82, 88 (Ill. App. Ct. 2005)) (noting purpose of investigatory interrogations is to preliminarily gather facts and assess probability of crime).

⁶⁹ See *id.* at 555-56 (identifying law enforcement agents for *Crawford* purposes).

⁷⁰ See *id.* at 556 ([E]mergency questioning is] "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* (quoting *Commonwealth v. Evans*, 764 N.E.2d 841, 844 (Mass. 2002) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). "[T]he community caretaking function is implicated if there is an objectively reasonable basis for believing that the safety of an individual or the public is jeopardized." *Id.* at 556 (alteration in original) (quoting *Commonwealth v. Brinson*, 800 N.E.2d 1032, 1037 (Mass. 2003)) (citing *Commonwealth v. Evans*, 764 N.E.2d 841, 844 (Mass. 2002)); cf. *Commonwealth v. Smigliano*, 694 N.E.2d 341, 343-44 (Mass. 1998) (holding that caretaking function is implicated only when there is need for immediate assistance).

⁷¹ See *Gonsalves*, 833 N.E.2d at 556 (relying on colloquial understanding of emergency questioning in distinguishing it from interrogation). In Massachusetts, an objective standard is used to determine whether a need to secure a volatile scene exists. See *id.* at 557. A "volatile scene" is not restricted to the scene of the initial incident in situations that pose an immediate danger to the community (e.g., fleeing party is driving under the influence, fleeing person is armed with intent to execute specific threats, hostage is being held). See *id.* at 556 n.4 (acknowledging situations where volatile scene expands beyond original scene). However, "the volatile scene exception to the definition of interrogation does not encompass questioning meant to apprehend the perpetrator without a more concrete concern of impending harm." *Id.* In the absence of such a concern, statements elicited for the apprehension of the perpetrator may be

Although not testimonial per se, out-of-court statements elicited through emergency questioning may still be testimonial in fact, and therefore must be further analyzed to determine whether they are testimonial in fact.⁷² A statement is testimonial in fact if “a reasonable person in the declarant’s position would anticipate [the] statement being used against the accused” in the investigation and prosecution of a crime.⁷³ In articulating this standard, the SJC attempted to expand and develop *Crawford* by providing a comprehensive definition of testimonial.⁷⁴

C. THE PRIMARY PURPOSE TEST: *Davis v. Washington*

As state courts across the country began to develop their own divergent interpretations of *Crawford*, the need for a more precise definition of testimonial was profound.⁷⁵ In *Davis v. Washington*,⁷⁶ the Supreme Court, in a consolidated opinion authored by Justice Scalia, incrementally spelled out the consequences of *Crawford*.⁷⁷ Focusing only on statements made to law enforcement agents, the Court held that the primary purpose of the *interrogation* determines whether the statements are

testimonial per se. *See id.* (withholding opinion on categorization of 9-1-1 calls); *cf.* *Davis v. Washington*, 547 U.S. 813, 828-29 (2006) (concluding 9-1-1 call nontestimonial).

⁷² *See Gonsalves*, 833 N.E.2d at 552, 557-59 (emphasizing constitutional analysis incomplete after concluding statement nontestimonial per se).

⁷³ *Id.* at 552, 558 (citing *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)) (adopting *Cromer* formulation because of its consistency with *Crawford* and historical purposes of Confrontation Clause).

The *Cromer* formulation does not rely on the declarant’s knowledge of trial procedure or the formality of the statement. Rather, it focuses on the declarant’s intent by evaluating the specific circumstances in which the out-of-court statement is made. Therefore, it is a formulation that would find testimonial *all* statements the declarant knew or should have known might be used to investigate or prosecute an accused.

Id. at 558. Providing further instruction, the SJC noted that the judge, in examining the circumstances under which the statement was made, may consider evidence pertaining to the purpose for which the statement was made, including the potential for manipulation by the questioner or declarant. *See id.* at 558 n.8 (identifying evidence judge may consider in assessing reasonable person’s expectations under like circumstances). Determining whether a statement is testimonial in fact is a fact-specific inquiry and must be determined on a case-by-case basis. *Id.* at 557, 559.

⁷⁴ *See id.* at 552 (noting Supreme Court deferred articulation of comprehensive definition of testimonial in *Crawford*).

⁷⁵ *See Lowy & Dudich, supra* note 6, at 12-13 (opining need for clarification on key Confrontation Clause issues cannot be overstated).

⁷⁶ 547 U.S. 813 (2006).

⁷⁷ *See id.* at 822 (withholding “exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial”).

testimonial in nature.⁷⁸ The primary purpose, in turn, is gleaned from the circumstances surrounding the interrogation and is dependent upon the existence or nonexistence of an ongoing emergency.⁷⁹

Statements are nontestimonial when the interrogation's primary purpose "is to enable police assistance to meet an ongoing emergency."⁸⁰ Applying this reasoning to *Davis*, the Court held that the victim's statements made during the course of a 9-1-1 call were nontestimonial.⁸¹ By contrasting the interrogations in *Davis* with the one in *Crawford*, the Court outlined four factors to consider when classifying statements made during a police interrogation for Confrontation Clause purposes.⁸² By

⁷⁸ See *id.* at 822 (limiting holding to interrogations because statements at issue are products of interrogation). Despite its focus on the interrogation's primary purpose, the Court claims that ultimately, it is the analysis of the declarant's statement itself that determines its testimonial or nontestimonial nature. See *id.* ("[I]t is in the final analysis [of] the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.").

⁷⁹ See *id.* at 822 (identifying two classifications of circumstances and corresponding implications for characterizing hearsay statements); Lowy & Dudich, *supra* note 6, at 15 ("Unlike the reliability focus in *Roberts* or the testimonial focus in *Crawford*, the *Davis* Court shifted the focus to the emergency or non-emergency nature of the particular situation.").

⁸⁰ *Davis*, 547 U.S. at 822; cf. *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 557 (Mass. 2005) (holding law enforcement agent's emergency questioning does not produce testimonial per se statements).

⁸¹ See *Davis*, 547 U.S. at 815, 828 (reasoning victim "was not acting as a witness" nor "testifying"). *Davis* involved statements made by McCottry, a domestic abuse victim, in response to a 9-1-1 operator's questions while the defendant was allegedly still inside McCottry's home. See *id.* 817-18 (transcribing conversation between McCottry and 9-1-1 operator). The Supreme Court did recognize, however, that some statements made during the course of an interrogation may be testimonial, while others may not. See *id.* at 828-29 (believing trial courts will recognize the point at which statements made during interrogation become testimonial); cf. *Gonsalves*, 833 N.E.2d at 557 (opining that judges are capable of distinguishing community caretaking questioning from investigative questioning). Thus, if a conversation begins as an interrogation to determine the need for emergency assistance, and that need is met, statements made after the emergency has ended would be testimonial. See *Davis*, 547 U.S. at 828-29 (providing emergency ends when interrogator acquires information needed to address emergency situation). The Court, in dicta, maintained that the emergency in *Davis* ended when the defendant drove away from the premises. See *id.* (suggesting presence of defendant made situation an emergency). At this point, the 9-1-1 operator instructed "McCottry to be quiet, and proceeded to pose a battery of questions." *Id.* (comparing McCottry's statements at this point to the "structured police questioning" in *Crawford*). It is worth noting that this distinction was made in dicta because the *Davis* Court was asked to classify only McCottry's initial statements. See *id.* at 829 (referring to McCottry's statements identifying Davis as her assailant as her initial, nontestimonial statements).

⁸² See *Davis*, 547 U.S. at 827 (comparing circumstances of *Davis* and *Crawford* interrogations to objectively determine their primary purposes). First, the temporal relationship between when the incident occurred and when the statements were made should be considered. See *id.* (noting McCottry spoke as events "were actually happening" while *Crawford* spoke hours after events occurred). Second, the imminence of danger while the declarant is speaking should be considered. See *id.* at 827, 832 (referring to statement made in the presence of imminent

classifying the *Davis* statements as nontestimonial, the Supreme Court held that not all statements made to law enforcement agents are testimonial.⁸³

However, when the interrogation's primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution," the statements are testimonial.⁸⁴ In *Hammon*, the Court held that the victim's written statements, contained in an affidavit given to the police, were testimonial.⁸⁵ The Court reasoned that the victim's statements were neither a cry for help, nor did they enable police officers to immediately end a threatening situation.⁸⁶ Though the *Davis* decision provided some insight into the nature of statements elicited through law enforcement questioning, it nevertheless failed to provide a precise definition of "testimonial" and "interrogation."⁸⁷

danger as a "cry for help"). Next, the Court considered the nature of the interrogator's questions. *See id.* at 827 (distinguishing questions asked to *resolve* present emergency from those asked to learn about past events). Lastly, the Court considered the level of formality of the interrogations. *See id.* (viewing circumstances surrounding interrogation as indicative of nature of statements). The Court viewed Crawford's interrogation, where Crawford responded calmly to a series of questions with the interrogator taping and making notes of her answers, as more formal; it viewed McCottry's interrogation, in which McCottry responded frantically over the telephone in an unstable environment, as more informal. *See id.* (concluding differences in setting and tone of declarant's responses indicative of formality degree). *But see id.* at 830 (basing formality on degree of resemblance between interrogation and civil-law *ex parte* examinations). In sum, Crawford's statements were testimonial while McCottry's statements were not. *See id.* at 827, 830 (highlighting differences in holdings by outlining four factors in *Davis* decision).

⁸³ *See id.* at 822 (indicating circumstances in which police questioning produces nontestimonial statements); *cf. Gonsalves*, 833 N.E.2d at 556-57 (articulating community caretaking function that produces nontestimonial statements elicited during law enforcement interrogation).

⁸⁴ *Davis*, 547 U.S. at 822.

⁸⁵ *See id.* at 829 (reasoning that statements were testimonial because primary purpose of interrogation was to investigate crime). In *Hammon*, the statements at issue were elicited through police questioning, conducted in the victim's home. *See id.* at 830 (noting that interrogation conducted in separate room without defendant present). "What we called the 'striking resemblance' of the *Crawford* statement to civil-law *ex parte* examinations, is shared by [the victim's] statement here." *Id.* at 830 (citing *Crawford v. Washington*, 541 U.S. 36, 52 (2004)). Comparing the facts of *Hammon* to those of *Crawford*, the Court noted that both declarants were actively separated from the defendant. *See id.* Both statements recounted how alleged past events began and progressed. *See id.* (noting statements were deliberately made in response to police questioning). Also, both statements were made some time after the described incident ended. *See id.*; *see also supra* note 82 (listing temporal relationship as first factor in testimonial analysis). Elaborating on this temporal factor, the Court pointed out that "[w]hen the officer questioned Amy . . . he was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'" *Davis*, 547 U.S. at 830 (indicating primary purpose, if not sole purpose of interrogation, was ascertainment of possible crime).

⁸⁶ *See Davis*, 547 U.S. at 832 (rejecting argument that statements were nontestimonial because they were given at alleged crime scene).

⁸⁷ *Cf. Lowy & Dudich, supra* note 6, at 12-13 (conceding Court "at least" developed

D. *THE CORE CLASS REVISITED*: Melendez-Diaz v. Massachusetts

In *Melendez-Diaz v. Massachusetts*,⁸⁸ the Supreme Court held that laboratory test results, contained in certificates of analysis, constitute testimonial evidence for confrontation purposes.⁸⁹ The Court reasoned that certificates of analysis are the equivalent to sworn affidavits and therefore, under *Crawford*, fall into the “core class of testimonial statements.”⁹⁰ Furthermore, the Court concluded that the certificates 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.”⁹¹

III. DEFINING TESTIMONIAL IN THE CHILD CONTEXT

A. *THE CHILD DECLARANT*: Commonwealth v. DeOliveira

In *Commonwealth v. DeOliveira*,⁹² the SJC faced the issue of whether a CSA victim’s statements to an emergency room pediatrician were testimonial under *Crawford*.⁹³ Following *Gonsalves*’ two-part analytical approach, the court held that the child’s statements were not made in response to police interrogation, and therefore, were not testimonial per se.⁹⁴ The court then held that the statements were not

“interrogation” definition).

⁸⁸ 129 S. Ct. 2527 (2009).

⁸⁹ See *id.* at 2532 (clarifying earlier holding in *Crawford* and extending testimonial classification to laboratory test results).

⁹⁰ *Id.* (quoting *Crawford*, 541 U.S. at 51-52) (concluding certificate of analysis is an affidavit despite denomination); see *supra* Part II.A (explaining three formulations of “core class of ‘testimonial’ statements”). The fact in question was whether the substance Melendez-Diaz had in possession was cocaine; the test results indicated that the substance was in fact cocaine, and thus the Court reasoned that the certificates were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Davis*, 547 U.S. at 830 (2006)) (emphasis omitted in original).

⁹¹ *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 52) (acknowledging sole purpose of certificates is to provide prima facie evidence of analyzed substance).

⁹² 849 N.E.2d 218 (Mass. 2006).

⁹³ *Id.* at 224.

⁹⁴ See *id.* at 225 (holding statements nontestimonial per se despite police presence at hospital). In so holding, the SJC concluded that there was no indication that the doctor acted as a law enforcement agent. See *id.* In its legal analysis, the court did not discuss the fact that the doctor was a mandated reporter under chapter 119, section 51A of the General Laws of Massachusetts. See *DeOliveira*, 849 N.E.2d at 223, 225 (mentioning mandated reporter status in fact section only); see also MASS. GEN. LAWS ch. 119, § 51A (2008) (mandated reporter statute). The doctor testified that the purpose of his examination was to determine whether the child had been sexually abused or injured, and whether the child was in need of medical treatment.

testimonial in fact because a reasonable person in the child's position would not anticipate the prosecutorial use of her statements.⁹⁵

The SJC conceded that, under *Crawford*, logic dictates any statement made by a young declarant to be nontestimonial, unless it was elicited through police questioning.⁹⁶ Nevertheless, the SJC did not interpret *Crawford* as supporting “a rule of such encompassing latitude” and therefore declined to adopt the logical conclusion as law.⁹⁷ Rather than adopting a bright-line rule, the SJC understood *Crawford* to suggest that statements made by young children *may* be testimonial.⁹⁸ Because of this possibility, the SJC uses a case-by-case approach in cases involving child declarants.⁹⁹

B. THE STATE ACTOR: Department of Children and Families & The Multidisciplinary Team

1. Department of Children and Families

The Department of Children and Families (“DCF”) is the state agency responsible for protecting the children of the Commonwealth from abuse or neglect.¹⁰⁰ To assist DCF in locating such children, Massachusetts law defines certain professionals as mandated reporters, and requires that

DeOliveira, 849 N.E.2d at 223. The SJC adopted the doctor's testimony as truth and concluded that the doctor's role was “entirely independent from law enforcement.” *Id.* at 225. Addressing the presence of police at the hospital, the SJC concluded that police presence alone cannot turn questioning by a physician into an interrogation by law enforcement. *See id.* at 225 (concluding police not present during physical examination and did not instruct doctor on examination procedures).

⁹⁵ *See DeOliveira*, 849 N.E.2d at 226 n.11 (correlating age with level of knowledge or sophistication in determining outcome of “reasonable person” standard); *see also* Mosteller, *supra* note 24, at 953 n.122 (suggesting court's focus would have been different had *Davis* standard been applied). The court concluded that the child understood the doctor's questioning to be for medical purposes only. *See DeOliveira*, 849 N.E.2d at 226 (relying on child's age and manner in which she answered questions). The court further concluded that there was nothing in the record to indicate that the child even recognized the criminality of the situation. *See id.* (determining testimonial nature of child's statements through case-by-case analysis).

⁹⁶ *DeOliveira*, 849 N.E.2d at 225.

⁹⁷ *Id.* (basing interpretation on level of importance *Crawford* placed on preserving and respecting defendant's confrontation right).

⁹⁸ *See id.* at 226 n.10 (citing *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004)) (discussing tension between *Crawford* and *White v. Illinois*, 502 U.S. 346 (1992)).

⁹⁹ *Id.* at 226 n.10 (declining adoption of “reasonable child” standard).

¹⁰⁰ MASS. GEN. LAWS ch. 18B, § 3 (2008). More specifically, the Department's primary duty is to protect children from abuse or neglect inflicted by a parent or parent substitute. MASS. GEN. LAWS ch. 119, § 1 (Supp. 2008).

these reporters immediately contact DCF if they have reasonable cause to believe that a child suffers from abuse or neglect.¹⁰¹ Following this initial report, a mandated reporter must file, within forty-eight hours, a written report (“51A report”) detailing the suspected abuse.¹⁰²

Once a 51A report is filed, DCF immediately screens the report to assess whether DCF involvement is warranted, and if so, whether the situation requires an emergency response as determined by the alleged situation’s severity.¹⁰³ If accepted, either a Child Protective Services (“CPS”) Investigation or Assessment Response is assigned to the report.¹⁰⁴

¹⁰¹ MASS. GEN. LAWS ch. 119, § 51A(a) (Supp. 2008) (requiring immediate oral report to DCF and written report within 48 hours); *see also* MASS. GEN. LAWS ch. 119, § 21 (Supp. 2008) (defining mandated reporters).

¹⁰² Ch. 119, § 51A(a); *see* ch. 119, § 21 (providing and defining “51A report” terminology); *see also* ch. 119, § 51A(d) (mandating inclusion of certain information within 51A report). A mandated reporter may also contact local law enforcement authorities or the Office of the Child Advocate in addition to filing a report with the Department. Ch. 119, § 51A(a).

¹⁰³ 110 MASS. CODE REGS. 4.21-4.25 (2009) (outlining screening process and “emergency report” requirements). DCF involvement is warranted only where there is reasonable cause to believe that a parent, caretaker, or parent substitute was the perpetrator of the reported child abuse or neglect. ch. 119, § 1 (stating crucial result of DCF investigation is to either “support” or “unsupport” 51A report). If a 51A report is supported, Massachusetts law requires the DCF investigator to provide the child’s parent or caretaker with a statement of rights, including: written notice of the 51A report; a description of the nature and possible effects of the investigation; and notice that any information given could be used in subsequent court proceedings. *See* 110 MASS. CODE REGS. 4.26(4)(a), 4.27(5) (2009) (requiring statement of rights in emergency and non-emergency responses). *See generally* Jay McManus, *The Reporting and Investigation of Suspected Abuse and Neglect*, in CPCS CHILD WELFARE PRACTICE IN MASSACHUSETTS §§ 2.4, 2.1 (“Despite [DCF] regulations, the Parent’s Guide does not inform parents that their statements to the investigator may be used in subsequent court proceedings.”). *But see* Commonwealth v. Morais, 727 N.E.2d 831, 833-34 (Mass. 2000) (holding non-parent or caretaker defendant not entitled to statement of rights during DCF interview). Massachusetts law requires DCF to make specific findings in their investigation of child abuse allegations. MASS. GEN. LAWS ch. 119, § 51B(b) (Supp. 2008) (requiring inclusion of six factors in DCF conducted investigation). In conducting their investigation, “[t]he department shall coordinate with other agencies to make all reasonable efforts to minimize the number of interviews of any potential victim of child abuse or neglect.” ch. 119, § 51B(b); *see* McManus, *supra* § 2.4, § 2.2 (explaining DCF joint investigations with district attorney or law enforcement). DCF, once the investigation and evaluation of the 51A report is complete, must make a written determination on two issues: the child’s safety and the risk of physical or emotional injury to that child or any other children residing in the same household; and “whether the suspected child abuse or neglect is substantiated.” ch. 119, § 51B(b). An emergency response is required “[i]f the department has reasonable cause to believe a child’s health or safety is in immediate danger from abuse or neglect.” ch. 119, § 51B(c),(e) (permitting immediate removal of child in emergency situation and providing response time frame).

¹⁰⁴ MASS. DEP’T OF CHILDREN & FAMILIES, CHILD ABUSE AND NEGLECT REPORTING: A GUIDE FOR MANDATED REPORTERS, *available at* http://www.mass.gov/Ecoohhs2/docs/dss/can_mandated_reporters_guide.pdf [hereinafter GUIDE] (detailing effects of “screened in” reports).

Cases of sexual or serious physical abuse typically receive a CPS Investigation Response.¹⁰⁵ If, at the end of its investigation, DCF has reasonable cause to believe that a child has been sexually assaulted, DCF must notify the appropriate district attorney and law enforcement agency within five business days.¹⁰⁶ If “early evidence” indicates such a belief, however, DCF must notify the appropriate district attorney and local law enforcement immediately, notwithstanding the incomplete investigation.¹⁰⁷ When making a referral, DCF must provide the district attorney and law enforcement agency with copies of the 51A and 51B reports.¹⁰⁸

2. The Multidisciplinary Team¹⁰⁹

When receiving a 51A report involving allegations of child sexual abuse, DCF may choose to collaborate with the district attorney’s office in its 51B investigation of the allegations in an effort to minimize the number of times the child is interviewed.¹¹⁰ While determining the veracity of the allegations is always the primary objective, one of the motivating concerns behind the development of an MDT is reducing the additional trauma and stress a child may suffer due to repeated investigations.¹¹¹ In Massachusetts, multidisciplinary teams are generally coordinated by a specialized unit within the district attorney’s office and may consist of prosecutors, victim advocates, police, forensic interviewers, DCF social workers, and mental or medical health professionals.¹¹² If available, the

¹⁰⁵ *Id.*

¹⁰⁶ 110 MASS. CODE REGS. 4.51 (2009); *see* ch. 119, § 51B(k) (outlining procedure for substantiated 51A report).

¹⁰⁷ ch. 119, § 51B(k).

¹⁰⁸ *See* 110 MASS. CODE REGS. 4.50-4.52 (outlining procedures for mandatory and discretionary referrals to District Attorney and law enforcement).

¹⁰⁹ *See* McManus, *supra* note 103, §§ 2.4, 2.2 (noting names of joint investigation teams vary depending on location).

¹¹⁰ *See* ch. 119, § 51B(b) (requiring Department to make “all reasonable efforts to minimize” number of interviews of child victim); ELLS, *supra* note 19, at 2-4 (listing “less ‘system inflicted’ trauma to children and families” as benefit of MDT approach). *But see supra* notes 106-08 and accompanying text (discussing mandatory DCF referral to district attorney and law enforcement under certain circumstances).

¹¹¹ *See generally* MASS. GEN. LAWS ch. 119, § 51B(b); ELLS, *supra* note 19, at 2-4 (promoting MDT approach to minimize additional trauma to CSA victim).

¹¹² *See* 110 MASS. CODE REGS. 4.54 (2009) (mandating MDT members); McManus, *supra* note 103, §§ 2.4, 2.2 (listing typical makeup of MDT); MASS. CHILDREN’S ALLIANCE, CHILDREN’S ADVOCACY CENTERS IN MASSACHUSETTS, *available at* http://www.machildrensalliance.org/brochures/MACA_English.pdf [hereinafter MACA] (identifying members of multidisciplinary teams). “Members of [an MDT] represent the

interviews are generally held at a Children's Advocacy Center ("CAC").¹¹³

CACs provide a safe and child-friendly environment for the interviewing process.¹¹⁴ Interviews are conducted by specially trained forensic interviewers who speak with the child at a level that is appropriate for the child's intellectual and emotional development; each interview is customized to meet the child's developmental and psychological needs.¹¹⁵ While the forensic interviewer is speaking with the child, the remaining team members may observe the interview through a one-way mirror and may suggest additional questions.¹¹⁶

C. THE INVESTIGATOR: Commonwealth v. Howard

In *Commonwealth v. Howard*,¹¹⁷ the SJC held that a DCF investigator's interview with a criminal defendant constituted "the equivalent of direct police interrogation" and thus implicated the defendant's Sixth Amendment right to counsel.¹¹⁸ In reaching this

government agencies and private practitioners responsible for investigating crimes against children and protecting and treating children in a particular community." ELLS, *supra* note 19, at 2. In Massachusetts, at least one member of an MDT must have "training and experience in the fields of child welfare or criminal justice." MASS. GEN. LAWS ch. 119, § 51D (2008).

¹¹³ See ELLS, *supra* note 19, at 4-5 (recognizing CAC as specialized MDT interview facility). Massachusetts has a CAC in every county. MACA, *supra* note 112 (listing each Massachusetts CAC and providing contact information).

¹¹⁴ See MACA, *supra* note 112 ("The vision of [the Massachusetts Children Alliance] is to promote an environment where children are free from . . . abuse and neglect, and where all children are treated with dignity and respect.").

¹¹⁵ See generally MACA, *supra* note 112 (ensuring "therapeutically and forensically sound" evaluations by MDT members).

¹¹⁶ McManus, *supra* note 103, §§ 2.4, 2.2 (noting observing team members may suggest additional questions to interviewer before interview concludes).

¹¹⁷ 845 N.E.2d 368 (Mass. 2006). The defendant was convicted of indecent assault and battery and of forcibly raping his fourteen-year old niece. *Id.* at 369. The victim disclosed the facts of the rape to her mother and a friend on July 14, 2002, approximately eight months after the incident: they immediately reported the rape to local police. *See id.* at 369 (noting victim's delayed admission resulted from shame of "incest baby"). DCF received a 51A report alleging sexual abuse of the victim by the defendant the following day. *Id.* at 370. A Sexual Assault Intervention Network ("SAIN") team interviewed the victim on July 17, 2002. *See id.* The interview was conducted in the presence of a DCF investigator, a trooper from the Massachusetts State police detective unit, and a victim witness advocate from the District Attorney's office. *Id.*

¹¹⁸ *Id.* at 372-73; see also U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."). *But see* Commonwealth v. Morais, 727 N.E.2d 831, 833-34 (Mass. 2000) (holding DCF worker not required to provide statement of rights to defendant not in custody). The DCF investigator met with the defendant on July 30, 2002. *Howard*, 845 N.E.2d at 370-71. She informed him that she was part of a joint investigation with the District Attorney's office and that he had the right to counsel. *Id.* (noting interviewer asked if defendant wanted counsel present after disclosing that

conclusion, the SJC held that a DCF investigator is a law enforcement agent for Sixth Amendment purposes.¹¹⁹ The court noted that whether a person is a law enforcement agent is a determination made on a case-by-case basis, dependent on the constitutional ramifications of the specific questioning at issue: there is no set classification.¹²⁰

D. THE CHILD HEARSAY EXCEPTION: Mass. Gen. Laws ch. 233, § 81 (2008)

In addition to the more traditionally recognized hearsay exceptions, Massachusetts enacted a child hearsay exception under chapter 233, section 81 of the General Laws of Massachusetts.¹²¹ This exception applies in cases involving the admissibility of out-of-court statements made by CSA victims under the age of ten who are unavailable for trial.¹²² The proponent

interview was voluntary). The DCF investigator did not, however, inform the defendant that his words could be used in future court proceedings. *Id.* Following the interview, the DCF investigator included the defendant's statements in her 51B report and forwarded the report to the District Attorney's office. *Id.*; see also *supra* notes 106-08 and accompanying text (discussing mandatory DCF referrals).

¹¹⁹ See *Howard*, 845 N.E.2d at 372-73 (overruling trial court's finding). The court acknowledged that the DCF investigator's interview with the defendant was held "in furtherance of her responsibilities for the care and protection of children." *Id.* Nevertheless, the SJC held that the interview was "prohibited governmental interrogation." *Id.* at 373 (defining interview as "police interrogation" despite investigator's arguably non-prosecutorial primary purpose). "[T]he SJC will] not tolerate interrogation practices by government officials or their agents that will provide the prosecution with the 'equivalent of direct police interrogation.'" *Id.* (quoting *Commonwealth v. Hilton*, 823 N.E.2d 383, 400 (Mass. 2005)) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986)).

¹²⁰ *Id.* at 372. The court defined "law enforcement agents" broadly: "persons whose official duties direct them to interact with a defendant and who may be required to turn any incriminating response over to the police and prosecutor." *Id.*

¹²¹ MASS. GEN. LAWS ch. 233, § 81 (2008). Prosecutors in a CSA case most often rely on two hearsay exceptions: excited utterances and statements for purposes of medical diagnosis or treatment. See *Raeder*, *supra* note 14, at 376 (insinuating that child hearsay exceptions are unnecessary because of "expansive interpretations" given to traditional exceptions).

¹²² See ch. 233, § 81(a) (establishing requirements). The statement must describe the alleged sexual contact, the circumstances surrounding the alleged incident, or must identify the alleged perpetrator. See *id.* The statement must concern a material fact and must be "more probative on the point for which it is offered than any other evidence" obtainable "through reasonable efforts." *Id.* The testifying witness must have heard the child make the statement notwithstanding to whom, if anyone, the statement was addressed. *Id.* Pursuant to subsection (b) and (c) of chapter 233, section 81 of the General Laws of Massachusetts, the judge must find that the child is unavailable as a witness and that the statement is reliable. *Id.* There must also be other independently admitted evidence that corroborates the proffered statement. *Commonwealth v. Colin C.*, 643 N.E.2d 19, 24 (Mass. 1994) (imposing corroboration requirement in addition to existing statutory requirements). If all statutory requirements are met, the child's hearsay statement "shall be admissible as substantive evidence in any criminal proceeding." ch. 233, §

of such evidence must prove by more than a mere preponderance of evidence that there is a compelling need for the child's statement.¹²³ If the child is deemed unavailable for trial, "the statement may be admissible if imbued with such 'particularized guarantees of trustworthiness'" that its admission would not offend the fundamental principles of the confrontation right.¹²⁴ A separate hearing must be held on the record when determining the reliability of the child's out-of-court statement and the court must support its conclusion with specific findings.¹²⁵

To date, the SJC has not determined the constitutionality of the child hearsay exception.¹²⁶ Furthermore, no Massachusetts appellate court has yet concluded that a hearsay statement introduced under the exception demonstrates sufficient guarantees of reliability to be admissible.¹²⁷

81(a).

¹²³ See ch. 233, § 81(b) (requiring proponent to show "diligent and good faith effort" to produce child and prove unavailability); *Colin C.*, 643 N.E.2d at 25 (quoting *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 376 (Mass. 1988)) (applying *Bergstrom* necessity requirement for admission of videotaped testimony to admission of child hearsay). In *Bergstrom*, the SJC held that chapter 278, section 16D of the General Laws of Massachusetts was unconstitutional to the extent that it violated a defendant's right to confrontation by permitting a child witness to testify outside the defendant's physical presence. *Bergstrom*, 524 N.E.2d at 374-75 (addressing constitutionality of statute permitting children to testify through electronic means outside of defendant's presence). The SJC noted that "a compelling need could be shown where, by proof beyond a reasonable doubt, the recording of the testimony of a child witness outside the courtroom . . . is shown to be necessary so as to avoid severe and long lasting emotional trauma to the child." *Id.* at 376.

¹²⁴ *Colin C.*, 643 N.E.2d at 24 (quoting *Bergstrom*, 524 N.E.2d at 373) (quoting *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)) (referring to confrontation right under Article 12 of Massachusetts Constitution). An out-of-court statement is admissible if it was made under oath, accurately recorded, and the defendant had an opportunity to cross-examine the declarant. See ch. 233, § 81(c)(1). If these three conditions are not met, the statement is admissible only if the judge finds that the "statement was made under circumstances inherently demonstrating a special guarantee of reliability." ch. 233, § 81(c)(2). The court must, however, consider the following three factors:

- (i) the clarity of the statement, meaning, the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a treating psychiatrist, psychologist, or clinician; (ii) the time, content and circumstances of the statement; (iii) the child's sincerity and ability to appreciate the consequences of such statement.

Id.

¹²⁵ Ch. 233, § 81(c); *Colin C.*, 643 N.E.2d at 25 (imposing additional requirement of supporting reliability conclusion with specific findings on record).

¹²⁶ See *Colin C.*, 643 N.E.2d at 23 (resolving case without ruling on statute's constitutionality).

¹²⁷ See, e.g., *Colin C.*, 643 N.E.2d at 23 (reaching conclusion without determining admissibility of statements under child hearsay exception); *Commonwealth v. Baptiste*, No. 02-P-

Nevertheless, the SJC has not foreclosed the possibility of admitting a CSA victim's out-of-court statement through the child hearsay exception because its constitutionality remains intact.¹²⁸

IV. THE MASSACHUSETTS CHILD HEARSAY EXCEPTION IS UNCONSTITUTIONAL

Courts must be cognizant of the inextricable conflict of interests at play in CSA cases: the societal interest in reducing "trial-related trauma" of CSA victims and the legal interest in preserving the integrity of our criminal justice system.¹²⁹ A child hearsay exception, however, only favors the prosecution, leaving the defense to the mercy of testimony he has not, and cannot, cross-examine.¹³⁰ More specifically, the exception is unconstitutional because it tracks the trustworthiness requirements of *Roberts*, which were specifically overruled in *Crawford*, as the standard for determining hearsay admissibility: without requiring a prior opportunity for cross-examination, the exception is at odds with *Crawford* and is therefore unconstitutional.¹³¹ The confrontation right may yield in limited circumstances, but it may not yield to the extent that it admits an unavailable CSA victim's statement, elicited through an MDT interview, through the Massachusetts child hearsay exception because to do so would permit the Rules of Evidence to trump constitutional doctrine.¹³²

1471, 2003 WL 22227763, at *1 (Mass. App. Ct. Sept. 26, 2003) (concluding hearsay inadmissible based on lack of corroboration and inadequate proof of compelling need); *Commonwealth v. Joubert*, 647 N.E.2d 1238, 1241-42 (Mass. App. Ct. 1995) (concluding hearsay inadmissible based on lack of corroboration and "substantial indicia of reliability").

¹²⁸ See *supra* note 126 and accompanying text (noting SJC's failure to address exception's constitutionality).

¹²⁹ See *Opinion of the Justices to the Senate*, 547 N.E.2d 8, 9 (Mass. 1989) ("[T]he Supreme Judicial Court often has recognized the tension between these conflicting, and valid, interests."); see also *supra* notes 12-15 and accompanying text (discussing tension between competing concerns in CSA cases).

¹³⁰ See ch. 233, § 81 (failing to condition admissibility on prior opportunity for cross-examination); *Opinion of the Justices to the Senate*, 547 N.E.2d 8, 10-12 (Mass. 1989) (questioning child hearsay exception's constitutionality under Massachusetts constitution). The SJC opined that the child hearsay exception contravenes the "face to face" requirement of Article 12 of the Massachusetts Constitution and therefore considered it unnecessary to determine the constitutionality of the exception under the Sixth Amendment. See *id.* at 9-12 (reasoning that Article 12 requirement is stricter than Sixth Amendment).

¹³¹ Compare ch. 233, § 81, and *supra* notes 31-35 (explaining *Roberts* Court's reliance on necessity and reliability in determining hearsay admissibility), with *supra* notes 36-50 (summarizing *Crawford* Court's historical analysis in departing from *Roberts* decision).

¹³² Cf. *supra* note 50 and accompanying text (articulating current standard for hearsay admissibility when Sixth Amendment is implicated).

V. DETERMINING THE TESTIMONIAL NATURE OF
MULTIDISCIPLINARY TEAM INTERVIEWS UNDER FEDERAL &
MASSACHUSETTS LAW

A. *EX PARTE IN-COURT TESTIMONY OR ITS FUNCTIONAL
EQUIVALENT*

1. An MDT Interview is the Functional Equivalent of Police
Interrogation

Under federal and Massachusetts law, an MDT interview with a CSA victim is an interrogation for Confrontation Clause purposes; the SJC, in accordance with *Crawford*, defined “interrogation” as meaning “all law enforcement questioning related to the investigation or prosecution of a crime” conducted by “police, prosecutors, or others acting directly on their behalf.”¹³³ A forensic interviewer’s questioning as part of an MDT is related to the investigation and to the prosecution of the alleged sexual abuse because the purpose of the interview is to determine whether a crime was committed: the interviewer preliminarily gathers the facts and assesses the probability of the crime.¹³⁴ The obligatory referral to the appropriate district attorney’s office and police under chapter 119, section 51B(k) of the General Laws of Massachusetts presupposes that the alleged perpetrator will be charged with the crime and thus presumes the future involvement of those two agencies in the investigation and prosecution, respectively, of the alleged crime.¹³⁵

¹³³ Commonwealth v. Gonsalves, 833 N.E.2d 549, 555-56 (Mass. 2005) (defining “interrogation”); see also *supra* notes 60, 68-69 and accompanying text (discussing *Crawford* and *Gonsalves* “interrogation” definition).

¹³⁴ See MASS. GEN. LAWS ch. 119, § 51B(b) (2008) (“Upon completion of the investigation and evaluation, the department shall make a written determination relative to: . . . (ii) whether the suspected child abuse or neglect is substantiated.”); MACA, *supra* note 112 (describing forensic interview as “fact-finding” interview); see also State v. Contreras, 979 So. 2d 896, 905 (Fla. 2008) (“[T]his kind of interview by a CPT is indistinguishable from an ordinary police interrogation. Moreover, the primary, if not the sole, purpose of the CPT interview was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to a later [trial].”) (citations omitted).

¹³⁵ See *supra* notes 106-08 and accompanying text (outlining Massachusetts statutory reporting requirements). An analogous line of argument has been made concerning mandatory reporters. Compare Raeder, *supra* note 14, at 377 (“[M]andatory reporting arguably makes any reporter a government proxy, virtually excluding all hearsay of unavailable children. [It is surprising] that some courts make no mention of these statutes in analyzing whether a child’s statements are testimonial.”), with Commonwealth v. DeOliveira, 849 N.E.2d 218, 223 (Mass. 2006) (failing to address constitutional implications of doctor’s status as mandated reporter).

Moreover, MDTs generally consist of a forensic interviewer, a representative from the district attorney's office, and a police officer; Massachusetts law strongly suggests that an MDT consist of law enforcement personnel.¹³⁶ Note that law enforcement MDT members are not just physically present at the interview, but play an active role in the interview itself due to their ability to communicate with the interviewer during the interview.¹³⁷ During the interview, the members who are not physically present in the interviewing room are nevertheless actively participating in the interview, notwithstanding a one-way mirror, because of their ability to either directly communicate with the forensic interviewer before the interview, or electronically communicate, via a headset, during the interview itself.¹³⁸ Thus, the forensic interviewer is merely a proxy for all interested parties; she is a law enforcement agent under Massachusetts law.¹³⁹ To hold otherwise would ignore the constitutional ramifications of the questioning, perpetrating the very evil the Confrontation Clause seeks to eradicate from American jurisprudence.¹⁴⁰

The *Crawford* Court affirmed that the historical abhorrence of pre-trial inquisitorial practices exercised by government officials is the crux of the constitutional analysis: "The Sixth Amendment must be interpreted with this focus in mind."¹⁴¹ If the Sixth Amendment grants a defendant the

Because *DeOliveira* was decided prior to *Davis*, the question remains in Massachusetts as to whether the mandated reporter requirement will be a persuasive, or even a decisive factor in determining the police interrogation's primary purpose. See generally *Mosteller*, *supra* note 24, at 953 n.122 (suggesting *DeOliveira* holding would be different had it been decided under *Davis*).

¹³⁶ See *supra* note 112 and accompanying text (identifying MDT members). See generally MASS. GEN. LAWS ch. 18C, § 11 (2008) (requiring aligned efforts with law enforcement in investigation and prosecution of CSA cases); MASS. GEN. LAWS ch. 119, § 51D (2008) (listing "criminal justice" experience as one of two requirements for MDT membership).

¹³⁷ See *McManus*, *supra* note 103, §§ 2.4, 2.2 ("The [MDT members observing the interview from behind a one-way mirror] may suggest additional lines of questioning to the interview interview[er]."); see also *supra* note 94 (discussing SJC approach to police involvement versus presence in *DeOliveira*).

¹³⁸ See *McManus*, *supra* note 103, §§ 2.4, 2.2 (noting observing team members may suggest additional questions to interviewer before interview concludes).

¹³⁹ Cf. *Commonwealth v. Howard*, 845 N.E.2d 368, 371 (Mass. 2006) (assuming DCF investigator knew district attorney and police would receive report based on SAIN membership).

¹⁴⁰ See *id.* at 372 (stating SJC's approach in determining whether State actor is law enforcement agent); see also *supra* note 36 and accompanying text (listing admittance of ex parte examinations against accused as one "evil" confrontation seeks to quash). In *Howard*, the SJC announced that when determining whether a State actor is a law enforcement agent for Sixth Amendment purposes, the court's "primary concern [is], and remains, with the constitutional implications of questioning on matters concerning pending charges posed by persons whose official duties direct them to interact with a defendant and who may be required to turn any incriminating responses over to the police and prosecutor." 845 N.E.2d at 372.

¹⁴¹ *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

right to have counsel present when being interviewed by a DCF investigator because of the possibility that the defendant's remarks may later be used against him in a criminal trial, as was decided in *Commonwealth v. Howard*, then the Sixth Amendment should also grant the defendant the right to confront the accuser about the accuser's statements to a DCF investigator because of the possibility that those statements too might be introduced against the defendant.¹⁴² This line of reasoning conforms with the Constitution because both rights, although granted in different clauses, ultimately stem from the same source—the Sixth Amendment—and therefore serve the same purpose: to protect the criminally accused from *ex parte* examinations.¹⁴³ Accordingly, to hold that the Sixth Amendment only protects the defendant from his own words, and not from the words of the accuser—regardless of the accuser's age—would be unconstitutional.¹⁴⁴

2. The Primary Purpose of an MDT Interview is to Create a Prosecutorial Record

Prior to the *Davis* Court's declaration of the primary purpose test, the SJC, in *Gonsalves*, held that statements elicited through law enforcement questioning are testimonial *per se* if the interrogation's purpose is to gather facts and assess a crime's probability.¹⁴⁵ Though stated somewhat differently, the *Davis* primary purpose test parallels the *Gonsalves* testimonial *per se* analysis by classifying statements made during law enforcement questioning as testimonial if the interrogation's purpose is to create a prosecutorial record.¹⁴⁶ Recognizing an exception, both tests classify statements as nontestimonial where the primary purpose is to assess the need for emergency assistance.¹⁴⁷ If the exception applies,

¹⁴² *Cf. supra* notes 117-20 (detailing *Howard* court's holding and reasoning on issue of DCF investigator's status).

¹⁴³ See U.S. CONST. amend. VI (protecting rights of criminally accused by requiring presence of counsel and confrontation).

¹⁴⁴ See *supra* notes 142-43 and accompanying text (contending *Howard* reasoning should apply to confrontation cases); see also Mosteller, *supra* note 24, at 975 (“[C]hildren function as knowing witnesses who make pointed accusations used in criminal cases in precisely the same way as do adult witnesses testifying about past facts in the courtroom.”).

¹⁴⁵ See *supra* notes 65-67 and accompanying text (explaining *Gonsalves* testimonial *per se* analysis).

¹⁴⁶ See *supra* text accompanying note 84 (summarizing *Davis* Court's definition of testimonial statements).

¹⁴⁷ Compare *supra* notes 70-71 and accompanying text (discussing *Gonsalves* exception), with *supra* text accompanying note 80 (discussing *Davis* exception).

the statement is nontestimonial under *Davis* and the constitutional analysis ends.¹⁴⁸ Under *Gonsalves*, however, the statement may still be testimonial in fact.¹⁴⁹ Where the two tests diverge, *Davis* controls.¹⁵⁰

The primary purpose of an MDT interview is arguably best derived from analyzing the interviewer's purpose, rather than from the child declarant's intent or expectations.¹⁵¹ Focusing on the interviewer's purpose is the most intelligible approach given the Framers' abhorrence of ex parte interrogations of witnesses *by government officials*.¹⁵² Accordingly, an interviewer's purpose for questioning an alleged child victim should dictate the primary purpose of an MDT interview.¹⁵³ Several jurisdictions have already adopted this line of reasoning when determining whether CSA victims' statements to police officers or MDT members are testimonial.¹⁵⁴

Massachusetts courts should find that statements made by a child declarant in an MDT interview are testimonial because the purpose of the government agent's questioning serves an investigatory and prosecutorial purpose.¹⁵⁵ Stated differently, a forensic interviewer's questions are

¹⁴⁸ See *supra* text accompanying note 80 (stating *Davis* emergency questioning exception).

¹⁴⁹ See *supra* text accompanying note 72 (noting *Gonsalves* two-step testimonial analysis).

¹⁵⁰ See Lowy & Dudich, *supra* note 6, at 16-17 (suggesting *Gonsalves* testimonial in fact analysis still controls Article 12 confrontation challenges).

¹⁵¹ See Mosteller, *supra* note 24, at 970 (hypothesizing that courts were already focusing on questioner's purpose prior to *Davis*); cf. *supra* note 95 (discussing Massachusetts' objective child standard). Mosteller opines that courts are more likely to focus on the questioner's purpose in child cases for two reasons:

First, a focus on the intent or expectation of the child feels artificial or unknowable. Second, especially for statements made by small children or to police, a focus on the child's intent or expectation would give a free pass to government production of evidence that the Supreme Court has said should receive special scrutiny.

Id.

¹⁵² See Mosteller, *supra* note 24, at 984 (contending questioner's purpose determines testimonial classification in CSA cases); see also *supra* note 41 and accompanying text (acknowledging Framers' concerns with civil law mode of criminal procedure).

¹⁵³ See *supra* note 151 and accompanying text.

¹⁵⁴ See, e.g., *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 757-58 (Cal. Ct. App. 2004) (holding child's statements to forensic interviewer at CSA victim center testimonial); *State v. Snowden*, 867 A.2d 314, 326 (Md. 2005) (holding child's statements to social worker testimonial because made "in contemplation of later trial"); *State v. Justus*, 205 S.W.3d 872, 880-81 (Mo. 2006) (holding CSA victim's statements to sex abuse counselors testimonial based on questioner's primary purpose); *Flores v. State*, 120 P.3d 1170, 1178-79 (Nev. 2005) (holding child's statements to child abuse investigators testimonial based on mandated reporter status); *State v. Mack*, 101 P.3d 349, 352 (Or. 2004) (holding child's statements were testimonial because human services caseworker was proxy for police).

¹⁵⁵ See *supra* note 134 (contending interviewer's purpose is to determine whether crime was committed). See generally *supra* Part III.B.2 (providing general overview of MDTs).

backward-looking: the purpose of questioning an alleged child victim is to determine whether a crime *was* committed.¹⁵⁶ Considering the third factor outlined in *Davis*, the backward-looking nature of MDT questioning indicates that the primary purpose is to learn about past events, rather than to meet the needs of an ongoing emergency, and produces testimonial statements.¹⁵⁷

3. There is No On-Going Emergency Based on a Consideration of the *Davis* Factors

The Supreme Court, through its analysis in *Davis*, outlined four factors courts should consider when determining whether an interrogation's primary purpose is to address an "ongoing emergency."¹⁵⁸ As the Massachusetts community caretaking exception is akin to but less strict than the *Davis* exception, the admissibility of CSA victim's statements made during MDT interviews must be analyzed under *Davis*.¹⁵⁹ Collectively, consideration of the *Davis* factors indicates the degree of formality observed during an interview, which in turn indicates the existence (or non-existence) of an ongoing emergency: the more formal the interview is, the less likely an emergency situation exists.¹⁶⁰

Applying the first factor, the temporal relationship between an alleged sexual assault and the subsequent MDT interview signals an emergency's nonexistence because the interview is conducted at some point *after* the incident has already ended.¹⁶¹ It is nearly impossible, however, for a law enforcement agent to elicit statements from a child

¹⁵⁶ See *supra* notes 133-34 (highlighting investigatory purposes of MDT interviews).

¹⁵⁷ See *infra* Part V.A.3 (concluding absence of emergency based on consideration of *Davis* factors); see also *supra* note 82 (listing *Davis* factors).

¹⁵⁸ See *Davis v. Washington*, 547 U.S. 813, 822 (2006); *supra* note 82 (outlining four factors considered in *Davis*).

¹⁵⁹ Compare *supra* notes 80-82 and accompanying text (summarizing federal emergency questioning exception under *Davis*), with *supra* notes 70-71 and accompanying text (summarizing Massachusetts emergency questioning exception under *Gonsalves*).

¹⁶⁰ See *supra* note 82 (outlining four factors indicative of formal interrogation). The logic behind the *Davis* Court's focus on formality is that in an emergency situation, there is no time to observe formalities. See 547 U.S. at 822.

¹⁶¹ See *Mosteller*, *supra* note 24, at 971-72 (passing of time indicates termination of emergency and "other non-prosecutorial interests"). There is no set time frame when assessing the temporal relationship. See generally *In re T.T.*, 815 N.E.2d 789, 801 (Ill. App. Ct. 2004) (concluding statements elicited during CPS interview approximately five months after alleged incident testimonial); *Rangel v. State*, 199 S.W.3d 523, 534-35 (Tex. Ct. App. 2006) (concluding statements elicited during CPS interview two months after alleged incident testimonial).

while the abuse “[*was*] actually happening.”¹⁶² Consequently, the temporal relationship between the incident and the MDT interview is an unpersuasive factor in child abuse cases and is arguably irrelevant.¹⁶³ The second factor considers whether a child is in imminent danger during an MDT interview.¹⁶⁴ This determination rests upon whether the interview is conducted in the presence of the alleged perpetrator.¹⁶⁵ Since the alleged perpetrator is not present at the MDT interview, the child is not in imminent danger while speaking with the interviewer—analysis of this second factor points to the child’s statements being testimonial.¹⁶⁶

Viewed objectively, analysis of the first two factors indicates that the purpose of an MDT interviewer’s questioning is not to resolve a present emergency, but rather to learn about past events.¹⁶⁷ The child declarant, in response to a structured series of questions posed at some point after the alleged incident, can recount how past events progressed without the alleged perpetrator being present.¹⁶⁸ Thus, under *Davis*’ third factor, the backward-looking nature of an MDT interviewer’s questioning denotes the testimonial nature of the child’s statements.¹⁶⁹

However, if early evidence indicates that a child’s health or safety is in immediate danger, then any DCF questioning arguably falls under the emergency questioning exception because such questioning’s primary purpose, under Massachusetts law, is to assess and determine the child’s safety.¹⁷⁰ Emergency response questioning must be conducted within

¹⁶² *Davis*, 547 U.S. at 827.

¹⁶³ See Anthony J. Franze & Jacob E. Smiles, *Still “Left in the Dark”: The Confrontation Clause and Child Abuse Cases After Davis v. Washington*, 105 MICH. L. REV. FIRST IMPRESSIONS 33, 34 (2006), <http://www.michiganlawreview.org/assets/fi/105/franze.pdf> (“[T]he ‘primary purpose/ongoing emergency’ test appears largely irrelevant to most child abuse cases.”).

¹⁶⁴ See *supra* note 82 (discussing second factor in *Davis* primary purpose test).

¹⁶⁵ See *Davis*, 547 U.S. at 828-29 (concluding emergency ended when defendant left declarant’s presence).

¹⁶⁶ See *id.* Compare *supra* note 112 and accompanying text (failing to list alleged perpetrator or defense counsel as MDT members), with *supra* note 116 and accompanying text (failing to list alleged perpetrator or defense counsel as persons present at MDT interview).

¹⁶⁷ See *supra* notes 161-66 and accompanying text (displaying MDT interview occurs after alleged incident outside alleged perpetrator’s presence).

¹⁶⁸ See *supra* notes 155-57 and accompanying text (analyzing MDT interview logistics in acknowledging questioning’s investigatory purpose).

¹⁶⁹ See *supra* Part V.A.2 (contending creation of prosecutorial record is MDT questioning’s primary purpose).

¹⁷⁰ See MASS. GEN. LAWS ch. 119, § 51B(c),(e) (2008) (permitting immediate removal of child and requiring 24-hour response time in emergency situation); see also *supra* notes 103-08 and accompanying text (discussing DCF investigation process).

twenty-four hours of DCF receiving the § 51A report.¹⁷¹ If interviewed within this time frame, statements referring to the child's safety may be nontestimonial and therefore admissible under *Davis*.¹⁷² The success of this argument depends on whether the child has been removed from the alleged offender's presence or custody because, if removed, then the child's safety is assumed, and therefore the questioning's purpose is to establish a prosecutorial record.¹⁷³

Consideration of an MDT interview's procedural elements under *Davis*' fourth and final factor leads to the conclusion that an MDT interview is best characterized as a formal interrogation.¹⁷⁴ First, a forensic interviewer, specially trained in communicating with children, conducts the interview.¹⁷⁵ As some courts have held, the title itself—*forensic interviewer*—exposes the relatedness of the interviewer's purpose in eliciting statements and the later use of those statements in court.¹⁷⁶

¹⁷¹ See ch. 119, § 51B(c),(e) (providing emergency response standard and time frame); see also *supra* note 103-08 and accompanying text (discussing DCF investigation process).

¹⁷² Cf. Mosteller, *supra* note 24, at 971 (“Conversations between a child and a social services caseworker whose professional interests include the health, physical placement, and safety of the child are . . . problematic, because of the clear overlap with the prosecutorial interest.”).

¹⁷³ See Mosteller, *supra* note 24, at 971-72 (“[I]f the child has already been removed from the apparent offender's home, the interview by social services is less likely to primarily concern placement than prosecution.”); *supra* notes 164-66 and accompanying text (discussing effects of alleged offender's *presence* during questioning). In Massachusetts, the counterargument to this line of reasoning – in regards to *custody* – is that, under the community caretaking exception, a “volatile scene” is not restricted to the scene of the initial incident in situations that pose an immediate danger to the community and therefore the fact that the child has already been removed from custody (i.e., the volatile scene) is not dispositive. See *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 556 (Mass. 2005) (stating community caretaking exception requirements); see also *supra* notes 70-71 and accompanying text (discussing community caretaking exception). This counterargument will fail unless the prosecution can establish that a “concrete concern of impending harm” exists independently from simply the need to apprehend the alleged offender. See *Gonsalves* 833 N.E.2d at 556 n.4 (providing case law examples of situations that pose immediate danger to community).

¹⁷⁴ See *Davis v. Washington*, 547 U.S. 813, 827 (2006) (viewing circumstances surrounding questioning as indicative of degree of formality); Raeder, *supra* note 14, at 381-83 (discussing *Crawford*'s impact on statements elicited through MDT interviews); see also *State v. Hooper*, No. 31025, 2006 WL 2328233, at *3 (Idaho Ct. App. Aug. 11, 2006) (emphasizing formality of MDT interview in holding child's statements elicited during interview testimonial).

¹⁷⁵ See McManus, *supra* note 103, at §§ 2.4, 2.2 (naming “interview specialist” as typical MDT member in Massachusetts); *supra* note 115 and accompanying text (describing forensic interviewers' abilities and skills).

¹⁷⁶ See, e.g., *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005) (defining “forensic” as being “connected with, or [was to be] used in courts of law” (alteration in original) (citation omitted)); *Contreras v. State*, 910 So. 2d 901, 905 (Fla. Dist. Ct. App. 2005) (reiterating statutory forensic duties of child protection unit members); *Hooper*, No. 31025, 2006 WL 2328233, *4 n.6 (“‘Forensic’ means ‘of, relating to or denoting the application of scientific methods and techniques to the investigation of a crime’ or ‘of or relating to courts of law.’”)

Second, an MDT interview consists of a structured series of questioning, with the interviewer and observing MDT members making notes of the child's statements.¹⁷⁷ Whether an interview is recorded may influence a court's determination on the interview's degree of formality.¹⁷⁸ Third, the interview takes place in a closed environment; separated from the defendant, the MDT secures the child's safety while simultaneously conducting an ex parte interrogation of the victim.¹⁷⁹ In conclusion, these formalities produce statements that are "an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial."¹⁸⁰ Thus, a child's statement made during such an interview is testimonial and therefore cannot be introduced against a criminal defendant unless the child is either deemed unavailable, or the defendant had a prior opportunity for cross-examination.¹⁸¹

B. OBJECTIVE WITNESS STANDARD

In *Melendez-Diaz*, the Supreme Court's reliance on the objective witness' reasonable belief seems to indicate that all three formulations of testimonial statements outlined in *Crawford* remain applicable.¹⁸² Reconciling *Davis* with *Melendez-Diaz*, the primary purpose test is applicable in cases that involve questioning by law enforcement, or agents thereof.¹⁸³ If law enforcement is not involved, then, under *Melendez-Diaz*

(citation omitted)); *State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006) ("Forensic by definition means 'suitable to courts.'" (citation omitted)).

¹⁷⁷ See *supra* note 116 and accompanying text (explaining how MDT members observe interview); see also *supra* notes 136-40 and accompanying text (discussing effect of MDT members' presence at interview on questioning's primary purpose).

¹⁷⁸ See *Mosteller*, *supra* note 24, at 962-65 (discussing influence of recordation on determining whether questioning was functional equivalent of police interrogation). Electronically recording an MDT interview is not required in Massachusetts, but is considered "good practice." *Commonwealth v. Upton U.*, 795 N.E.2d 575, 578 (Mass. App. Ct. 2003).

¹⁷⁹ See *supra* text accompanying notes 164-66 (discussing alleged perpetrators' absence from MDT interview and its effect on child's safety).

¹⁸⁰ *Davis v. Washington*, 547 U.S. 813, 830 (2006); see *supra* Parts V.A.1-2 (contending MDT interview is functional equivalent of police interrogation and serves investigatory purpose).

¹⁸¹ See *Raeder*, *supra* note 14, at 382 ("[I]t is clear that we must recognize that statements made to multidisciplinary teams will not be admitted unless the child testifies."); see also cases cited *supra* note 154 (holding statements elicited during MDT interviews are testimonial).

¹⁸² See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (applying all three formulations).

¹⁸³ See *Davis*, 547 U.S. at 823 n.2 (limiting holding to law enforcement questioning).

courts may apply an objective witness standard.¹⁸⁴ The Massachusetts standard established in *Gonsalves* as the testimonial in fact analysis, aligns with *Crawford's* third formulation of testimonial statements.¹⁸⁵ Therefore, if it is determined that an MDT interviewer is not a law enforcement agent for confrontation purposes, Massachusetts courts may ask whether, under the circumstances, the reasonable person would understand that her statements would be available for use in future litigation.¹⁸⁶ In cases involving young children, the SJC has refused to adopt a “reasonable child standard” because it acknowledges the possibility that children’s statements may be testimonial, and therefore prefers a case-by-case approach in such cases.¹⁸⁷

The objective witness standard is preferable over the *Davis* primary purpose test in situations involving non-law enforcement questioning because under *Davis*, courts will be tempted to acknowledge non-prosecutorial purposes, such as protecting the child’s health or welfare, which may lead to an increase in the admittance of child victims’ testimonial statements.¹⁸⁸ If the *Davis* primary purpose test is applied in

¹⁸⁴ See *Melendez-Diaz*, 129 S. Ct. at 2532 (applying objective witness standard); *People v. Vigil*, 127 P.3d 916, 926 n.8 (Colo. 2006) (explaining proper application of objective witness test).

We emphasize that the objective witness test involves an analysis separate from and in addition to the police interrogation test. For example, if a child makes a statement to a government agent as part of a police interrogation, his statement is testimonial irrespective of the child’s expectations regarding whether the statement will be available for use at a later trial.

Id.

¹⁸⁵ Compare *supra* text accompanying note 57 (articulating *Crawford's* third testimonial formulation), and *supra* text accompanying note 91 (quoting *Melendez-Diaz's* use of third testimonial formulation), with *supra* note 73 and accompanying text (explaining *Gonsalves's* testimonial in fact analysis).

¹⁸⁶ See *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 225-26 (Mass. 2006) (focusing on reasonable child’s expectations after determining doctor not law enforcement agent).

¹⁸⁷ See *DeOliveira*, 849 N.E.2d at 226 n.10 (“[A case-by-case approach] is, in our opinion, a preferable way to resolve questions raised in the wake of *Crawford*, at least until the United States Supreme Court ultimately provides further guidance.”); see also *supra* text accompanying notes 95-99 (summarizing *DeOliveira* holding and reasoning). But see *Mosteller*, *supra* note 24 at n.122 (pointing out that *DeOliveira* and *Davis* were decided on same day).

¹⁸⁸ See *Mosteller*, *supra* note 24, at 972-74 (illustrating this argument by critiquing *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006)).

The confrontation right can be diminished to shallow formalism in a critical area if the health and welfare purpose is recognized as a separate purpose from law enforcement and if all that is required to make a statement nontestimonial is that the person conducting the questioning has health and welfare as his or her primary purpose.

situations where the questioner is not a law enforcement agent, then it seems as though the purpose of the questioning would ultimately be determined simply by the interviewer's relationship with the child, occupation, or membership on a multidisciplinary team, allowing courts to ignore the objective circumstances surrounding the specific questioning at issue.¹⁸⁹ Distinguishing between prosecutorial and non-prosecutorial purposes is particularly difficult in jurisdictions like Massachusetts, "with coordinated systems for investigating child abuse" because of the coexistence of prosecutorial and non-prosecutorial purposes of different team members.¹⁹⁰ Accordingly, prosecutors would argue that statements to MDT members who, but for their membership on the MDT, are not affiliated with law enforcement are nontestimonial because they serve a non-prosecutorial purpose on the team, while the defense bar would argue that because of their membership on the team, or because of their mandatory reporter status, they serve a prosecutorial purpose and thus the child's statements are testimonial. These conflicting arguments present "a key test of whether the testimonial statement system has substance" or simply require articulation of some non-investigatory purpose to avoid the Sixth Amendment.¹⁹¹

CONCLUSION

Neither the Supreme Court nor the SJC has yet determined whether a child victim's responses to a forensic interviewer's questioning, as part of a multidisciplinary team interview, are admissible in a criminal trial where the child does not testify. Until this issue is resolved, Massachusetts prosecutors must acknowledge *Crawford's* impact on CSA cases and admit that the MDT approach, while crucial to the investigation and prosecution of sexual crimes committed against children, creates testimonial statements. Without further guidance from the Supreme Court, the SJC should follow a strict, formalistic application of *Crawford* to CSA cases and find child hearsay statements procured through multidisciplinary forensic interviews inadmissible because of the defendant's Sixth

Id. at 973.

¹⁸⁹ *See id.* at 970 ("[A] child may make a clearly accusatory statement and fully understand its impact, but courts can ignore contrary indicators if the child makes the statement to a parent or doctor with a primary purpose other than criminal prosecution.").

¹⁹⁰ *See id.* at 970-75 (articulating mixed-purpose category of statements and suggesting non-categorical limitations on such statements).

¹⁹¹ *See id.* at 974 (opining articulation of non-investigatory purpose of MDT interview is "an avoidance strategy").

Amendment right of confrontation. Notwithstanding the societal interest in protecting CSA victims and ensuring that “pernicious malefactors may be brought to justice,” the SJC must maintain our criminal justice system’s credibility by acknowledging the fundamental principles of fairness upon which it was founded; it must not permit competing societal interests to supplant a criminally accused’s constitutional rights.¹⁹² Though difficult to accept, given the heinousness of the crime, children are “witnesses against the accused” under the Sixth Amendment.

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¹⁹² *Opinion of the Justices to the Senate*, 547 N.E.2d 8, 9 (Mass. 1989).