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**STILL “LEFT IN THE DARK”:
THE CONFRONTATION CLAUSE AND CHILD ABUSE CASES
AFTER *DAVIS V. WASHINGTON***

Anthony J. Franze & Jacob E. Smiles^{*†}

INTRODUCTION

In his concurring opinion in *Crawford v. Washington*, Chief Justice Rehnquist criticized the majority for holding that the Confrontation Clause applies to “testimonial” statements but leaving for “another day” any effort to define sufficiently what “testimonial” means. Prosecutors and defendants, he said, “should not be left in the dark in this manner.”

Over the next two years, both sides grappled with the meaning of testimonial, each gleaning import from sections of *Crawford* that seemingly proved *their* test was the right one. When the Court granted *certiorari* in *Davis v. Washington* and *Hammon v. Indiana* (hereinafter *Davis*), hopes were high that the Court would provide the answers—the definitive test for testimonial. Not surprisingly, it did not.

That is not to say that the decision was a wash. In domestic violence cases—particularly when a domestic violence victim makes statements to a police officer or 911 operator during an on-going emergency—the Court did clarify the parameters of the Confrontation Clause. But what the Court did not do, and in all fairness had no need to do given the context in which the cases arose, was clarify issues surrounding one of the other core classes of cases impacted by *Crawford*: child abuse prosecutions.

In this essay, we consider the potential implications of *Davis* on two issues relevant to child abuse cases: how the Court’s new test for “testimonial” might apply when the statements are by a child claiming abuse and whether statements to non-law enforcement personnel can ever be testimonial. We then briefly identify a few of the many questions left unanswered by the decision. Though *Davis* certainly has implications for child abuse cases, true clarity will have to wait for yet another day.

I. IS THE NEW TEST RELEVANT TO CHILD ABUSE PROSECUTIONS?

In *Davis*, the Court adopted a new test for “testimonial” statements:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the

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primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

On its face, the “primary purpose/ongoing emergency” test appears largely irrelevant to most child abuse cases. Rarely, if ever, will a victim of child sexual abuse run down the street screaming for help while being chased by the perpetrator. Instead, child sexual abuse typically occurs in secret, and the perpetrators are usually family members or others who exploit a trusting relationship with the child. As the Court in *Pennsylvania v. Ritchie* recognized almost two decades ago, “[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.” Viewed narrowly, then, the new test suggests little relevance to child abuse cases.

Stepping back, however, the “primary purpose” component of the test will likely find its way into the testimonial analysis concerning statements made by child victims. The *Davis* Court focused on a targeted main purpose (dealing with emergency) as a means to exclude an alternative improper purpose (proving past events for potential use in prosecution). No principled reason supports limiting the test solely to situations involving the emergency/non-emergency dichotomy if statements arise in other contexts clearly suggesting that the primary purpose was something other than proving past events for prosecution. In child abuse cases, for instance, when a parent talks to a child about injuries to the child’s genitals, a teacher asks about unusual behavior, or a doctor asks questions relevant to treatment, the *primary* purpose is not to prove past events for prosecution, but to protect or treat the child. Similarly, the *primary* purpose of forensic examinations—which often are performed by state social workers who may work in child protection teams that include law enforcement—is to protect the health and welfare of the child. Indeed, the primary purpose approach is consistent in many ways with a pre-*Davis* analysis used by some courts, which looked to the purposes underlying forensic interviews and medical exams in assessing the testimonial nature of statements made by child victims.

A question also exists whether other post-*Crawford* tests for “testimonial” survive *Davis*. Many courts, drawing on language from *Crawford*, applied a “reasonable person” test to determine whether a statement was testimonial. Generally, a statement was testimonial if a reasonable declarant would believe that the statements would be used at trial. For child abuse cases, the key issue became whether this inquiry was viewed from a reasonable adult’s perspective or that of a reasonable child the age of the declarant. The standard chosen often determined the outcome. Reasonable adults often would know statements could be for prosecutorial purposes; most young children would not. At least with regard to statements by adults, *Davis* appears to leave little room for the reasonable person standard. It was the test

strongly urged by both petitioners in *Davis* and was not adopted by the Court. On the contrary, the Court shifted focus away from the declarant to the motives of the police. That said, the Court did not reject other tests. Given the lack of definitive guidance, courts already seem to be resorting to pre-*Davis* formulations in assessing whether statements are testimonial.

II. STATEMENTS TO NON-LAW ENFORCEMENT & THE *BRASIER* CASE

In many ways, *Davis* is potentially more important in child abuse cases for what the Court expressly declined to do. The petitioner in *Hammon* urged the Court to adopt a test for “testimonial” that could have included statements made to someone other than a government officer. The Court not only adopted a different test, it explicitly declined to rule on whether statements made to non-law enforcement personnel can ever be “testimonial.”

Why is this important in child abuse cases? Most child sexual abuse victims do not report the abuse to the police. To the extent they ever disclose abuse, they do so to family members or other trusted adults. These adults, in turn, report to the police (though surprisingly less frequently than one would hope). Thereafter, the child may recount the abuse to medical personnel, social workers, or others before statements are made by the child (if ever) directly to the police. If these statements to non-law enforcement necessarily cannot be “testimonial,” a core class of statements remains available in prosecutions where the child is too young or too traumatized to testify. Indeed, a number of lower courts have concluded that statements to non-law enforcement personnel or agents cannot be testimonial, though the decisions are not unanimous.

Some scholars and at least one court have suggested, however, that *Davis*’s brief discussion of the 1779 *King v. Brasier* case hints that the Confrontation Clause should cover statements made to non-government individuals. In *Brasier*, a five year old girl told her mother and another woman living in the home that the defendant had raped her. At trial, the mother and the other woman testified as to what the child had said because the child had been presumed incompetent and was not produced to testify at trial. The defendant was convicted. On appeal, the court overturned the conviction stating “no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath” The court concluded, therefore, “that the evidence of the information which the infant had give to her mother and the other witness, ought not to have been received.”

Responding to petitioner *Davis*’s arguments that *Brasier* supported treating the victim’s statements to the 911 operator as testimonial, the Court said that *Brasier* “would be helpful to *Davis* if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.” One possible inference from this characterization is that *Brasier* suggests that the

young victim's statements were "testimonial" even though made to non-law enforcement. That inference, however, is unwarranted.

First, the *Brasier* decision contains only a few paragraphs of discussion, and can be misleading when divorced from its procedural and historical context. When reviewed in context, the decision is not a case about confrontation at all, but rather, about the competency of child witnesses and (implicitly) the rule of best evidence, which, according to leading scholars from the period, was the guiding principle of evidence at the time.

Before *Brasier*, young children were presumed by law to be incompetent to give sworn testimony in court. As a result, children who might otherwise be available to testify were not permitted to do so. Courts, however, often permitted prosecutions based on out-of-court statements made by "incompetent" children to adults concerning sexual abuse. Indeed, the Old Bailey Proceedings, considered the best accounts of criminal trials during the eighteenth century, report numerous cases where family members were permitted to testify about what children had told them regarding alleged sexual abuse. In light of this practice, Sir Matthew Hale, a prominent legal scholar, had suggested that courts might as well hear also directly from the child victims, even if these children were incompetent to take the oath. Hale reasoned that "if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself" particularly because abuse usually occurred in secret and only the child could provide a first-hand account of the abuse. Although the *Brasier* decision does not explicitly discuss this issue, the trial court raised a question about the conviction's validity, citing to the very page of Hale's treatise that advocated allowing child victims to testify unsworn. This indicates that a principal issue in *Brasier* was whether, under Hale's theory, the child should have been allowed to testify unsworn. This, then, explains the holding in *Brasier* that "no testimony whatever can be legally received except upon oath." The court was rejecting Hale's view that children should be permitted to testify unsworn, and was *not* characterizing the child's out-of-court statements to the mother and friend as "testimony." The *Brasier* court, however, went one step further and addressed the broader question of whether children, like the victim in the case, should be presumed incompetent based solely on their age. The court found they should not be presumed incompetent and that children under seven years old could be sworn if they possessed sufficient knowledge of the nature and consequences of the oath.

Thus, *Brasier* was a landmark case because of its holding on child competency. The competency determinations, in conjunction with the rule of best evidence, influenced the court's ruling on the inadmissibility of the statements of the mother and friend. If the child in *Brasier* was found competent to testify, her testimony would have been the best evidence available, as compared to the child's out-of-court statements provided by the witnesses. Because the lower court did not determine whether the child was competent to testify, the court overturned the conviction. *Brasier* thus did *not* decide whether the

mother and friend would have been able to testify about what they were told about the abuse had the child been found incompetent to testify.

Second, any inference that the Court’s discussion of *Brasier* suggests that statements to non-government individuals can be testimonial is offset by the Court’s reference in *Crawford* and *Davis* to its pre-*Crawford* decision in *White v. Illinois*. In *White*, the Court allowed an abused child’s mother, babysitter, emergency room nurse, doctor, and an investigating officer to recount the child’s out-of-court statements, even though the child did not testify herself. In a footnote in *Crawford* (referenced in *Davis*), the Court questioned whether the investigating officer’s testimony in *White* should have been admitted, but did not question the admissibility of the non-government witnesses’ testimony. Finally, *Davis*’s recognition that “formality is indeed essential to testimonial utterance[s]” further offsets any inference that the Court’s reference to *Brasier* supports a finding that statements to non-law enforcement are testimonial. Statements to family members or others with no connection to the police suggest care-giving, not formality. In short, given the Court’s express statement that it was not deciding the law enforcement issue, assigning weight to the Court’s off-hand characterization of *Brasier* is suspect.

III. UNANSWERED QUESTIONS

What child abuse-related issues were left unanswered by *Davis*? Nearly all of them. *Davis* simply did not mention the key post-*Crawford* questions still plaguing lower courts. And again, to be fair, the Court had no reason to. So, it is the *status quo* on issues such as how to determine if a social worker, doctor, or teacher is acting as an agent of law enforcement; whether mandatory reporting laws influence the agency analysis; the interrelation between competency laws and the unavailability requirement or the forfeiture doctrine; and even a threshold question raised by some of the leading scholars in the area: should the statements of certain children, particularly very young children, fall outside the Confrontation Clause? True, the Court’s discussion of forfeiture is encouraging for child sexual abuse prosecutions because the nature of the crime and threats and intimidation by perpetrators coerces silence in young victims. But even then, the devil may be in the details. All that can be said with certainty about *Davis* is that it did not address or provide significant insight into the many Confrontation Clause issues in child abuse cases.

CONCLUSION

In the end, *Davis* likely will become a footnote in child abuse prosecutions. It leaves many—if not most—of the issues surrounding child abuse cases on the table. In post-*Crawford* tradition, many undoubtedly will glean importance and draw inferences from stray sentences or omissions in the decision. True clarity, however, must await “another day.”