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

The 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.  

INTRODUCTION

The Confrontation Clause of the Sixth Amendment embodies the adversarial system of justice that defines American jurisprudence. 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. 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. 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.

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

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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.”).


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).

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).


\(^10\) 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).


\(^12\) 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{17} This coordinated response lessens the number of interviews a child must sit through in an effort to reduce any additional trial-related trauma.\textsuperscript{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.\textsuperscript{19}

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

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

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


\textsuperscript{17} \textit{See infra Part III.B.2 (explaining MDT approach with focus on Massachusetts).}

\textsuperscript{18} \textit{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.}


\textsuperscript{20} \textit{541 U.S. 36 (2004).}

\textsuperscript{21} \textit{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. 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. 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. 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. More specifically, this Note analyzes possible

Id. 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...
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 confrontion right); Lowy & Dudich, supra note 6, at 7-8 (attributing Crawford holding to Court’s dissatisfaction with Roberts decision).
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.\footnote{44} Recognizing its limitations, however, Justice Scalia next conceded that the clause is not applicable to all forms of hearsay.\footnote{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.\footnote{46}

The second “principal evil” acknowledges exceptions, or the lack thereof, to the constitutional ban of testimonial hearsay.\footnote{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.\footnote{48} Therefore, only those exceptions existing at the time of the founding, which were unavailability and a prior opportunity to cross-examine, are recognized.\footnote{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.\footnote{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

\footnote{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 . . . .”).

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

\footnote{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.

\footnote{47} See id. at 53-56 (explaining second proposition derived from historical record).

\footnote{48} Id. at 54 (basing conclusion on historical and textual analysis of Sixth Amendment).

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

\footnote{50} Crawford, 541 U.S. at 53-54.
meaning of the Sixth Amendment. 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. Despite the significant ramifications this classification implicates, the Crawford Court withheld a comprehensive definition of the term testimonial. Instead, the Court identified three separate formulations of the term.

The first formulation the Court acknowledged included “ex parte in-court testimony or its functional equivalent.” The second formulation concerned formalized materials typically used at trial. 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.

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.”

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.” 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.” 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. 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.

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

Attempting to establish a more precise definition of testimonial, in Commonwealth v. Gonsalves, the Supreme Judicial Court of Massachusetts (“SJC”) identified and defined two classes of testimonial statements: “per se testimonial” and “testimonial in fact.” 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. 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. 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.

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.” Such investigative interrogations may be conducted by “police, prosecutors, or others acting directly on their behalf.” 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. 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.

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)).

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

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

See 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).

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

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. 2002)) (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).

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. 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. In articulating this standard, the SJC attempted to expand and develop Crawford by providing a comprehensive definition of testimonial.

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. In Davis v. Washington, the Supreme Court, in a consolidated opinion authored by Justice Scalia, incrementally spelled out the consequences of Crawford. 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 & Didich, supra note 6, at 12-13 (opining need for clarification on key Confrontation Clause issues cannot be overstated).


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

Statements are nontestimonial when the interrogation’s primary purpose “is to enable police assistance to meet an ongoing emergency.” 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. 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.

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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.”).


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.\textsuperscript{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.\textsuperscript{84} In Hammon, the Court held that the victim’s written statements, contained in an affidavit given to the police, were testimonial.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{87}
D. THE CORE CLASS REVISITED: Melendez-Diaz v. Massachusetts

In Melendez-Diaz v. Massachusetts, the Supreme Court held that laboratory test results, contained in certificates of analysis, constitute testimonial evidence for confrontation purposes. 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." 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."

III. DEFINING TESTIMONIAL IN THE CHILD CONTEXT

A. THE CHILD DECLARANT: Commonwealth v. DeOliveira

In Commonwealth v. DeOliveira, the SJC faced the issue of whether a CSA victim’s statements to an emergency room pediatrician were testimonial under Crawford. 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. The court then held that the statements were not testimonial in the context of admitting child sexual abuse statements.

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"interrogation" definition).
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."
91 Melendez-Diaz, 129 S. Ct. at 2532 (quoting Davis, 547 U.S. at 830 (2006)) (emphasis omitted in original).
92 Id. at 2532 (quoting Crawford, 541 U.S. at 52) (acknowledging sole purpose of certificates is to provide prima facie evidence of analyzed substance).
93 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).
94 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

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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.\textsuperscript{101} Following this initial report, a mandated reporter must file, within forty-eight hours, a written report (“51A report”) detailing the suspected abuse.\textsuperscript{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.\textsuperscript{103} If accepted, either a Child Protective Services (“CPS”) Investigation or Assessment Response is assigned to the report.\textsuperscript{104}

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

Cases of sexual or serious physical abuse typically receive a CPS Investigation Response. 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. If “early evidence” indicates such a belief, however, DCF must notify the appropriate district attorney and local law enforcement immediately, notwithstanding the incomplete investigation. When making a referral, DCF must provide the district attorney and law enforcement agency with copies of the 51A and 51B reports.

2. The Multidisciplinary Team

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. 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. 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. If available, the

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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).
interviews are generally held at a Children’s Advocacy Center (“CAC”).

CACs provide a safe and child-friendly environment for the interviewing process. 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. 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.

C. THE INVESTIGATOR: Commonwealth v. Howard

In Commonwealth v. Howard, 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. 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).

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).

See generally MACA, supra note 112 (ensuring “therapeutically and forensically sound” evaluations by MDT members).

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

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.

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. Moraes, 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. 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.


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. 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. The proponent

interview was voluntary). The DCF investigator did not, however, inform the defendant that his words could be used in future court proceedings. 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. See Howard, supra note 106-08 and accompanying text (discussing mandatory DCF referrals).

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)).

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.

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).

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 223, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{125}

To date, the SJC has not determined the constitutionality of the child hearsay exception.\textsuperscript{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.\textsuperscript{127}

\textsuperscript{81}(a).

\textsuperscript{123} See ch. 233, § 81(b) (requiring proponent to show “diligent and good faith effort” to produce child and prove unavailability); \textit{Colin C.}, 643 N.E.2d at 25 (quoting \textit{Commonwealth v. Bergstrom, 524 N.E.2d 366, 376 (Mass. 1988)} (applying \textit{Bergstrom} necessity requirement for admission of videotaped testimony to admission of child hearsay). In \textit{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. \textit{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.” \textit{Id.} at 376.

\textsuperscript{124} \textit{Colin C.}, 643 N.E.2d at 24 (quoting \textit{Bergstrom, 524 N.E.2d at 373}) (quoting \textit{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.

\textit{Id.}

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

\textsuperscript{126} See \textit{Colin C.}, 643 N.E.2d at 23 (resolving case without ruling on statute’s constitutionality).

\textsuperscript{127} See, e.g., \textit{Colin C.}, 643 N.E.2d at 23 (reaching conclusion without determining admissibility of statements under child hearsay exception); \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{132}

\textsuperscript{128} See supra note 126 and accompanying text (noting SJC’s failure to address exception’s constitutionality).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.” 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. 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.


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. 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. 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. Thus, the forensic interviewer is merely a proxy for all interested parties; she is a law enforcement agent under Massachusetts law. To hold otherwise would ignore the constitutional ramifications of the questioning, perpetrating the very evil the Confrontation Clause seeks to eradicate from American jurisprudence.

The Crawford Court affirmed that the historical abhorrence of pretrial inquisitorial practices exercised by government officials is the crux of the constitutional analysis: “The Sixth Amendment must be interpreted with this focus in mind.” 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). 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).

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).

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


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.

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.\footnote{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.\footnote{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.\footnote{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.\footnote{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.\footnote{146} Recognizing an exception, both tests classify statements as nontestimonial where the primary purpose is to assess the need for emergency assistance.\footnote{147} If the exception applies,
the statement is nontestimonial under Davis and the constitutional analysis ends.\textsuperscript{148} Under Gonsalves, however, the statement may still be testimonial in fact.\textsuperscript{149} Where the two tests diverge, Davis controls.\textsuperscript{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.\textsuperscript{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.\textsuperscript{152} Accordingly, an interviewer’s purpose for questioning an alleged child victim should dictate the primary purpose of an MDT interview.\textsuperscript{153} Several jurisdictions have already adopted this line of reasoning when determining whether CSA victims’ statements to police officers or MDT members are testimonial.\textsuperscript{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.\textsuperscript{155} Stated differently, a forensic interviewer’s questions are

\textsuperscript{148} See supra text accompanying note 80 (stating Davis emergency questioning exception).
\textsuperscript{149} See supra text accompanying note 72 (noting Gonsalves two-step testimonial analysis).
\textsuperscript{150} See Lowy & Dudich, supra note 6, at 16-17 (suggesting Gonsalves testimonial in fact analysis still controls Article 12 confrontation challenges).
\textsuperscript{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.

\textsuperscript{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).
\textsuperscript{153} See supra note 151 and accompanying text.
\textsuperscript{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).
\textsuperscript{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.\textsuperscript{156} Considering the third factor
outlined in \textit{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.\textsuperscript{157}

3. There is No On-Going Emergency Based on a Consideration of
the \textit{Davis} Factors

The Supreme Court, through its analysis in \textit{Davis}, outlined four
factors courts should consider when determining whether an interrogation’s
primary purpose is to address an “ongoing emergency.”\textsuperscript{158} As the
Massachusetts community caretaking exception is akin to but less strict
than the \textit{Davis} exception, the admissibility of CSA victim’s statements
made during MDT interviews must be analyzed under \textit{Davis}.\textsuperscript{159}
Collectively, consideration of the \textit{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.\textsuperscript{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 \textit{after} the incident has already ended.\textsuperscript{161} It is nearly impossible,
however, for a law enforcement agent to elicit statements from a child

\begin{footnotes}
\item[156] See supra notes 133-34 (highlighting investigatory purposes of MDT interviews).
\item[157] See infra Part V.A.3 (concluding absence of emergency based on consideration of \textit{Davis}
factors); see also supra note 82 (listing \textit{Davis} factors).
\item[158] See \textit{Davis v. Washington}, 547 U.S. 813, 822 (2006); supra note 82 (outlining four factors
considered in \textit{Davis}).
\item[159] Compare supra notes 80-82 and accompanying text (summarizing federal emergency
questioning exception under \textit{Davis}), with supra notes 70-71 and accompanying text (summarizing
Massachusetts emergency questioning exception under \textit{Gonsalves}).
\item[160] See supra note 82 (outlining four factors indicative of formal interrogation). The logic
behind the \textit{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.
\item[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
(concluding statements elicited during CPS interview approximately five months after alleged
statements elicited during CPS interview two months after alleged incident testimonial).
\end{footnotes}
while the abuse “[w]as actually happening.” Consequendy, the temporal relationship between the incident and the MDT interview is an unpersuasive factor in child abuse cases and is arguably irrelevant. The second factor considers whether a child is in imminent danger during an MDT interview. This determination rests upon whether the interview is conducted in the presence of the alleged perpetrator. 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.

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. 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. Thus, under Davis’ third factor, the backward-looking nature of an MDT interviewer’s questioning denotes the testimonial nature of the child’s statements.

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. Emergency response questioning must be conducted within

162 Davis, 547 U.S. at 827.
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. If interviewed within this time frame, statements referring to the child’s safety may be nontestimonial and therefore admissible under Davis. 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.

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. First, a forensic interviewer, specially trained in communicating with children, conducts the interview. 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.

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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 McM anus, supra note 103, at §§ 2.4, 2.2 (defining “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. Whether an interview is recorded may influence a court’s determination on the interview’s degree of formality. 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. 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.” 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.

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. Reconciling Davis with Melendez-Diaz, the primary purpose test is applicable in cases that involve questioning by law enforcement, or agents thereof. If law enforcement is not involved, then, under Melendez-Diaz...
courts may apply an objective witness standard. The Massachusetts standard established in Gonsalves as the testimonial in fact analysis, aligns with Crawford’s third formulation of testimonial statements. 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. 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.

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. If the Davis primary purpose test is applied in

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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’ testimonial in fact analysis).


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)).
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.\footnote{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.").}

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.\footnote{See id. at 970-75 (articulating mixed-purpose category of statements and suggesting non-categorical limitations on such statements).} 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.\footnote{See id. at 974 (opining articulation of non-investigatory purpose of MDT interview is “an avoidance strategy”).}

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
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. 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).