

EXAMINERS' ANALYSIS OF QUESTION NO. 13

1. The Supreme Court in *Crawford v Washington*, 541 US 36 (2004), and its progeny, fully delineates the evidence classifiable as testimonial. However, as stated in *Crawford* and its progeny, ". . . it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 US at 68 (emphasis added). It is this last stated genre of testimonial statements that has received the most analysis and is applicable here.

However, through *Crawford* and its progeny, a "primary purpose" test for out-of-court statements sought to be used against the accused has developed.

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to alter criminal prosecution. [*Ohio v Clark*, 576 U.S. ___, 135 S Ct 2173, 2179 - 80 (2015) citing *Davis v Washington* and *Hammon v Indiana*, 547 U.S. 813, 822 (2006). See also *Michigan v Bryant*, 562 U.S. 344 (2011).]

Accordingly, it is by this metric that out-of-court statements are analyzed so as to determine whether they are testimonial. The "primary purpose" test remains salient in answering that inquiry.

2. U.S. Constitution Am VI, made applicable to the states in *Pointer v Texas*, 380 U.S. 400, 400 - 401 (1965), states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." Known as the "Confrontation Clause," it enshrines the accused's right -- at the very least -- to the opportunity to cross-examine the witnesses against him, an

opportunity not presented if the statement-maker never testifies but his out-of-court statements are introduced.

However, for the dictates of the clause to apply, the out-of-court statements must be considered testimonial. As stated in *Crawford*, 541 US at 68, "Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States" the development of rules of evidence pertaining to hearsay. However, "[w]here testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment's* protection to the vagaries of the rules of evidence" *Id.* at 61 (emphasis in original).

The significance, therefore, of classifying the out-of-court statements of Babe as testimonial or not is that, without such a classification, U.S. Constitution Am VI is inapplicable; only the rules of evidence are. Determining whether the disputed evidence is testimonial is therefore the threshold in determining whether the clause must be satisfied: by confrontation.

3. In *Ohio v Clark*, 576 U.S. ___, 135 S Ct 2173 (2015), the Court visited the primary purpose test on a scenario where the statements were made to school teachers, not police officers. The Court rejected a categorical approach that such statements could simply not be considered testimonial. Rather, the Court adhered to the approach that all relevant circumstances are to be considered in determining the primary purpose of the teacher's inquiries and Babe's responses.

While other touchstones necessary for the application of the confrontation right are present (i.e. this was a criminal case; Babe was unavailable; and no prior opportunity to cross examine is noted), whether Dante's right to confrontation was violated ends where it began: whether Babe's statements are testimonial hearsay. Using the primary purpose test, they are not for the following reasons.

The primary purpose of school personnel's inquiry was not to gather facts to be used to prosecute Dante'. The school had a little boy who was suspected of being abused in their midst and their first concern was tending to his safety. School officials needed to know how he was injured, and, if it was abuse, who had abused Babe, not so that person could be arrested

but rather so as to determine how to protect Babe from further abuse. Certainly, school personnel in charge of the safety and well-being of small children would be motivated by that desire and not -- in contrast to police officers -- ascertaining the identity of the wrongdoer for his prosecution. Choosing between the differing purposes, it is much easier to conclude that school officials were focused on protecting Babe in an emergency situation where he had been abused, rather than to create evidence that would serve as proof of guilt in a trial. Moreover, that school officials were statutorily obligated to contact Child Protective Services and that prosecution could ensue, does not itself transform school personnel into police agents nor color the purpose of their inquiries.

Babe's intent, to the extent it can be gleaned, is also an analytical component. At three, his intent or purpose for speaking is not clear. He probably had little or even any knowledge of the criminal prosecution process. It is highly unlikely he spoke to get Dante' in trouble as opposed to getting himself safe. However, viewing his intent through the prism of the primary purpose test yields the conclusion that that purpose was not to advance criminal prosecution. It must be remembered, he spoke to his teachers, on whom he is totally reliant in school, a familiar and comfortable location, and seemed to be seeking to make things better.

Finally, and relatedly, the lack of formality in the location, as well as the questioning, is as well a factor, among others, suggesting Babe's statements were not prompted by a desire to marshal facts for prosecution.

The admission at Dante's trial of Babe's unfronted statements did not violate his right to confrontation because, employing the primary purpose test, Babe's statements were not testimonial, as that term is understood from *Crawford* and its progeny and, therefore, not embraced by the U.S. Constitution Am VI Confrontation Clause.