

**CASE NOTE: CRIMINAL LAW—CONFLICTING VALUES:
CONFRONTATION RIGHTS IN SEXUAL ABUSE CASES
INVOLVING THE YOUNGEST OF VICTIMS—
*STATE V. BOBADILLA***

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I. INTRODUCTION

The right of an accused to confront the witnesses against him or her is among the most basic protections guaranteed by the United States Constitution.¹ But under certain circumstances, the

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1. See U.S. CONST. amend. VI. In *United States v. Burr*, Chief Justice John

constitutional right to cross-examine one's accuser conflicts with other valuable societal interests. In *State v. Bobadilla*,² the Minnesota Supreme Court confronted just such a situation. Faced with the prospect of creating substantial barriers to the prosecution of child sexual abuse,³ the Minnesota Supreme Court narrowly interpreted the recent United States Supreme Court decision in *Crawford v. Washington*⁴ to allow the introduction of certain hearsay statements made by young children to child protection workers.⁵ By permitting the use of such statements, the court undercut the basic principles of the Sixth Amendment as defined in *Crawford*.

This case note first explores the changing constitutional standards by which courts approach the Confrontation Clause, with particular emphasis on the theory underlying the right of confrontation.⁶ It then details the facts and procedural history of *Bobadilla*,⁷ and highlights a number of inadequacies in the court's reasoning.⁸ Next, it argues that *Bobadilla* establishes a framework that is inconsistent with *Crawford*.⁹ This note then suggests an alternative approach that courts should utilize when considering the admissibility of statements made during child assessment interviews.¹⁰ Finally, this note briefly considers the possibility that factors other than legal precedent may have motivated the court's decision.¹¹

II. HISTORY

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions . . . the accused shall

Marshall, then presiding over a Federal court in the state of Virginia, wrote in reference to the right of confrontation, "I know of no principle in the preservation of which all are more concerned." 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694).

2. 709 N.W.2d 243 (Minn. 2006).

3. See Matthew M. Staab, Comment, *Child's Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 108 W. VA. L. REV. 501, 503 (2005) (noting that successful sexual abuse prosecutions often require admission of a child's out-of-court statements).

4. 541 U.S. 36 (2004).

5. *Bobadilla*, 709 N.W.2d at 257.

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part IV.A.

9. See *infra* Part IV.B.

10. See *infra* Part IV.B.3.

11. See *id.*

enjoy the right . . . to be confronted with the witnesses against him.”¹² The United States Supreme Court has repeatedly interpreted the Sixth Amendment as expressing a preference for face-to-face confrontation through the right of cross-examination.¹³ As early as 1895, the Court spoke of “compelling [a witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor . . . whether he is worthy of belief.”¹⁴ The Court also noted that “general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.”¹⁵ Indeed, the Court has recognized that an absolute bar to admission of hearsay evidence, absent confrontation, could seriously impede governments’ ability to promote public safety and effective law enforcement.¹⁶

A. *Pre-Crawford Case Law*

Courts have been forced to confront the inherent conflict between the plain language of the Sixth Amendment and the practical difficulties associated with rigid adherence to the

12. U.S. CONST. amend. VI.

13. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 847–48 (1990) (recognizing that although out-of-court statements may be admitted against a defendant, there has always been a preference to provide the accused an opportunity to confront the declarant at trial); *see also Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (stating that “[w]e have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact”).

14. *Mattox v. United States*, 156 U.S. 237, 242–43 (1895). The Court noted that the primary object of the Confrontation Clause was to prevent the use of depositions and *ex parte* affidavits against criminal defendants in lieu of personal examination and cross-examination. *Id.* at 259.

15. *Id.* More recently, the Court noted that “in certain narrow circumstances, ‘competing interests, “if closely examined,” may warrant dispensing with confrontation at trial.” *Craig*, 497 U.S. 836, 848 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 64 (1980)).

16. *See Roberts*, 448 U.S. at 64 (noting that the strong interest in effective law enforcement and precise evidentiary rules may warrant dispensing with confrontation at trial in certain circumstances). *See also Idaho v. Wright*, 497 U.S. 805, 813–14 (1990) (recognizing that the Confrontation Clause has never been strictly interpreted as barring all hearsay statements); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (stating that “the right to confront and to cross-examine may . . . bow to accommodate other legitimate interests in the criminal trial process”); *Crawford v. Washington*, 541 U.S. 36, 75 (2004) (Rehnquist, C.J., dissenting) (arguing that the rights of the public should not be sacrificed to give an incidental benefit to the accused).

Confrontation Clause. Prior to *Crawford*, such questions were controlled by the framework established in *Ohio v. Roberts*,¹⁷ which laid out two general restrictions on the admission of out-of-court statements used against a criminal defendant.¹⁸ First, the *Roberts* standard usually required that prosecutors produce a witness for trial or demonstrate the unavailability of the witness.¹⁹ Second, the unavailable witness's statement must possess sufficient "indicia of reliability."²⁰ The Court said statements either falling within a firmly rooted hearsay exception²¹ or containing "particularized guarantees of trustworthiness" were reliable.²²

The Court elaborated further on the "particularized guarantees of trustworthiness" standard in *Idaho v. Wright*,²³ which involved statements made by a two-and-a-half-year-old child to a pediatrician relating to alleged sexual abuse.²⁴ In holding the child's statements not to be "particularly trustworthy," the Court rejected the trial court's partial reliance on factors extraneous to the making of the statement, such as physical evidence of the alleged abuse.²⁵ Instead, the Court said the "relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief."²⁶ In order to satisfy this test, it must be "so clear" that the declarant's statement was truthful that the test of cross-examination "would be of marginal utility."²⁷

17. 448 U.S. 56 (1980).

18. *Id.* at 65.

19. *Id.*

20. *Id.*

21. "Firmly rooted" exceptions must be long-standing and have such special guarantees of credibility as to be "essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony." *Lilly v. Virginia*, 527 U.S. 116, 126 (1999).

22. *Roberts*, 448 U.S. at 66.

23. 497 U.S. 805 (1990).

24. *Id.* at 808–09.

25. *Id.* at 826. The Court expressed concern that the use of corroborating evidence to support a hearsay statement could lead to admission of unreliable statements by "bootstrapping on the trustworthiness of other evidence . . ." *Id.* at 823.

26. *Id.* at 819. Justice Kennedy argued in dissent that "[i]t is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence." *Id.* at 828 (Kennedy, J., dissenting).

27. *Id.* at 820. The Court also rejected the defendant's contention that a victim's out-of-court statements are *per se* unreliable if the victim has been found incompetent to testify at trial. *Id.* at 824. Although the Court said such a finding

Applying this rationale in *White v. Illinois*,²⁸ the Court held that a child's out-of-court statements made to a police officer and doctor about alleged sexual abuse, which fell within Illinois's medical diagnosis and spontaneous declaration hearsay exceptions, were admissible even if the child was available to testify.²⁹ The Court said that because the statements qualified for admission under a "firmly rooted" hearsay exception, cross-examination was unlikely to add to the reliability of the testimony.³⁰ Specifically, the Court noted that statements made in the course of receiving medical care provide substantial guarantees of trustworthiness that are unlikely to be replicated by courtroom testimony.³¹ According to the Court, an unavailability rule would "do little to improve the accuracy of fact-finding" while "significantly burdening the fact-finding process."³² The Court said that "exclud[ing] such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the 'integrity of the factfinding process.'"³³

is relevant to whether a hearsay statement possesses particularized guarantees of trustworthiness, a *per se* rule of exclusion would frustrate the truth-seeking purpose behind the Confrontation Clause. *Id.* at 825.

28. 502 U.S. 346 (1992).

29. *See id.* at 356.

30. *Id.* at 357 (quoting *Idaho v. Wright*, 497 U.S. 805, 821 (1990)).

31. *Id.* at 356. Commentators have criticized the admission of a young child's statements under the medical diagnosis exception on the ground that young patients often fail to understand the physician's role and thus do not appreciate the importance of being truthful. Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 233-34 (1995). Since the rationale behind the medical diagnosis exception is the declarant's self-interest in receiving appropriate medical care, a declarant's inability to comprehend the purpose of a statement to a medical professional would negate the inherent reliability of the statement. *Id.* *See also* Krista MacNevin Jee, Comment, *Hearsay Exceptions in Child Abuse Cases: Have the Courts and Legislatures Really Considered the Child?*, 19 WHITTIER L. REV. 559, 569 (1998) (arguing that because a child may not appreciate the consequences of a false statement to a doctor, it cannot be assumed that the medical diagnosis exception applies to all children).

32. *White*, 502 U.S. at 355. The Court noted that an unavailability rule would require prosecutors to continuously locate and keep available each declarant, even when neither party has an interest in calling the witness to the stand. *Id.*

33. *Id.* at 356-57 (citing *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988)). The Court also rejected an argument advanced by the United States as *amicus curiae* that the Confrontation Clause was designed primarily to prevent the prosecution of defendants through the presentation of *ex parte* affidavits. *Id.* at 352. Under such a theory, the Confrontation Clause would only apply to "those few cases where the statement sought to be admitted was in the character of an *ex parte* affidavit, *i.e.*,

B. *Tender-Year Statutes*

Around the time the Supreme Court decided *Roberts*, the problem of child sexual abuse began to receive increased public attention.³⁴ Citizens demanded legislative reforms designed to protect children and lock up those who perpetrate sexual abuse.³⁵ Many state legislatures responded by passing tender-year statutory hearsay exceptions, which provided for the admission of certain hearsay statements made by children in sexual abuse cases.³⁶ Consistent with *Roberts*, most tender-year statutes conditioned the admission of otherwise inadmissible hearsay on a finding that statements possessed sufficient “indicia of reliability,” and many required corroborative evidence of the act.³⁷

Minnesota’s tender-year statute permits the introduction of out-of-court statements made by children under the age of ten relating to acts of sexual or physical abuse if certain requirements

where the circumstances surrounding the out-of-court statement’s utterance suggest that the statement has been made for the principal purpose of accusing or incriminating the defendant.” *Id.* According to the Court, the government’s view, which would essentially eliminate the Sixth Amendment’s role in restricting the admission of hearsay testimony, “is foreclosed by . . . prior cases” and “comes too late in the day to warrant reexamination of this approach.” *Id.* at 352–53. Justice Thomas’s concurrence suggested that “[t]his interpretation is in some ways more consistent with the test and history of the Clause than our current jurisprudence,” but cautioned that “[a]ttempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties.” *Id.* at 364.

34. See Terese L. Fitzpatrick, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175, 178–79 (1991) (describing a “public outcry for legislative reforms” with regard to child sexual abuse in the late 1970s and early 1980s). Public attention was, and still is, much needed. Experts estimate that twelve percent of the 100,000 to 500,000 cases of child abuse that occur each year involve sexual abuse. *Id.* at 178.

35. *Id.* at 178–79.

36. Marks, *supra* note 31, at 236–37.

37. *Id.* at 241–42. Most states that passed statutory tender-year exceptions permitted the introduction of a child’s otherwise inadmissible hearsay statements if: (1) the child was under a particular age, usually ten to thirteen years old; (2) the adverse party had notice; and (3) the child either (a) testified or (b) was unavailable and there was corroborative evidence of the act. *Id.* at 238–40. See, e.g., WASH. REV. CODE ANN. § 9A.44.120 (2004). A few states required that the child: (1) be available to testify; or (2) was subject to cross-examination at the time he or she made the statement. Marks, *supra* note 31, at 239. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon 2005) (tender-year exception applicable only if the child testified or was available to testify).

are satisfied.³⁸ First, the child must either testify at the proceeding, or the child must be unavailable to testify while corroborative evidence is available to support the allegation.³⁹ Second, the court must hold a hearing and find that the circumstances of the child's statements offer "sufficient indicia of reliability."⁴⁰ The statute also expressly states that video, audio, or other recorded statements are admissible if the other requirements of the statute are satisfied.⁴¹

Thus, prior to *Crawford*, a child's statements implicating a defendant in a sexual abuse case were often admissible if the statements either fell within a "firmly rooted" hearsay exception or possessed some "indicia of reliability."⁴² Although such a minimal standard alarmed some legal commentators,⁴³ the approach lessened the burden on prosecutors.⁴⁴ Even if a child was declared incompetent to testify, the child's statements were usually admissible if prosecutors could show the statements fell within a "firmly rooted" hearsay exception or possessed "indicia of reliability."⁴⁵

C. *A New Standard: Crawford v. Washington*

The United States Supreme Court's decision in *Crawford v. Washington*⁴⁶ dramatically changed the constitutional standard by which courts view the admission of out-of-court statements.⁴⁷ In *Crawford*, the State of Washington introduced out-of-court

38. MINN. STAT. § 595.02, subdiv. 3 (2004).

39. *See id.* at subdiv. 3(b).

40. *See id.* at subdiv. 3(a). The statute specifies that "the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made" must "provide sufficient indicia of reliability." *Id.* This standard is consistent with the constitutional standard explained in *Idaho v. Wright*. *See* 497 U.S. 805, 813–15 (1990).

41. MINN. STAT. § 595.02, subdiv. 3 (2004). Prosecutors must also give notice of intent to offer the statement so as to provide the defendant an "opportunity to prepare to meet the statement." *See id.* at subdiv. 3(c).

42. *See* Staab, *supra* note 3, at 507.

43. *See, e.g.*, Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 693 (1993); Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1260 (2003).

44. *See* Staab, *supra* note 3, at 507; *see also* Marks, *supra* note 31, at 216 (arguing that prosecutors often prefer to use hearsay evidence because juries may be more willing to accept a child's out-of-court statements as true).

45. Staab, *supra* note 3, at 507.

46. 541 U.S. 36 (2004).

47. Staab, *supra* note 3, at 501–02.

statements made by the defendant's wife that tended to contradict the defendant's self-defense claim.⁴⁸ The Court reversed the defendant's conviction, and in the process overturned the previous *Roberts* regime.⁴⁹ The Court rejected *Roberts*'s focus on the reliability of a statement, saying that the Confrontation Clause is a "procedural rather than a substantive guarantee."⁵⁰ As such, the Clause "commands, not that evidence be reliable, but that reliability be assessed . . . by testing in the crucible of cross-examination."⁵¹

The Court indicated that the history and plain language of the Confrontation Clause implied a heightened concern with out-of-court statements that are "testimonial" in nature.⁵² The Court held such statements were admissible only if the declarant was unavailable to testify and the defendant had a prior opportunity to cross-examine.⁵³ As for nontestimonial statements, the Court was initially unclear,⁵⁴ although subsequent case law indicates that nontestimonial hearsay is not subject to any constitutional restrictions.⁵⁵

48. 541 U.S. at 40. The defendant's wife was unavailable to testify because of Washington's marital privilege. *Id.* The trial court permitted the prosecution to introduce the wife's tape-recorded statements after holding that the statements bore "particularized guarantees of trustworthiness." *Id.* The Washington Court of Appeals reversed the conviction after concluding that the statements failed to offer sufficient guarantees of trustworthiness. *Id.* at 41. The Washington Supreme Court reinstated the conviction, saying that the statements did in fact contain "guarantees of trustworthiness." *Id.*

49. *Id.* at 66, 68–69.

50. *Id.* at 61.

51. *Id.* The Court also noted that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62.

52. *Id.* at 51.

53. *Id.* at 61.

54. The Court wrote, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 68.

55. Although the constitutional standard applied to nontestimonial statements was initially uncertain, the United States Supreme Court in *Davis v. Washington* indicated that the Sixth Amendment no longer restricted the use of nontestimonial hearsay at trial. 126 S.Ct. 2266, 2274–75 (2006). Specifically, the Court wrote, "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.* at 2273. After noting that the Confrontation Clause is concerned with testimonial hearsay, the Court wrote that "[a] limitation so clearly reflected in the text of the constitutional provision must

The *Crawford* Court declined to precisely define what constitutes a testimonial statement.⁵⁶ The Court did say that, at a minimum, testimonial statements included prior formal testimony and police interrogations.⁵⁷ It added that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”⁵⁸ *Crawford* also stressed the concern held by the Framers of the Constitution regarding statements made with the “[i]nvolvement of government officers in the production of testimony with an eye toward trial,”⁵⁹ which present a “unique potential for prosecutorial abuse.”⁶⁰ The lack of a precise

fairly be said to mark out not merely its ‘core,’ but its perimeter.” *Id.* at 2274. In other words, nontestimonial statements fall outside the “perimeter” of the Confrontation Clause. Consequently, Sixth Amendment restrictions do not apply to them. James J. Duane, *The Cryptographic Coroner’s Report on Ohio v. Roberts*, CRIM. JUST., Fall 2006, at 37–38. Despite this language, a number of courts have continued to apply *Roberts* to nontestimonial hearsay. *Id.* See, e.g., *State v. Blue*, 717 N.W.2d 558, 565 (N.D. 2006) (arguing that “[t]he reliability and trustworthiness factors are still to be used for nontestimonial statements”). Other courts have recognized that nontestimonial statements are no longer subject to the *Roberts* reliability test. See, e.g., *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006) (stating, in dicta, that *Davis* appears to “[hold] that nontestimonial hearsay is not subject to the Confrontation Clause”).

56. 454 F.3d at 665 n.2. Justice Thomas’s concurring opinion in *White v. Illinois* indicated that courts may have difficulty articulating a precise definition of which statements are made in contemplation of a legal proceedings. 502 U.S. 346, 364 (1992) (Thomas, J., concurring). In *White*, Justice Thomas wrote:

Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically characterized as within or without the reach of a defendant’s confrontation rights. Not even statements made to the police or government officials could be deemed automatically subject to the right of confrontation (imagine a victim who blurts out an accusation to a passing police officer, or the unsuspecting social-services worker who is told of possible child abuse).

Id.

57. *Crawford v. Washington*, 541 U.S. 36, 52 (2004). The Court indicated that various definitions of “testimonial statements” exist. One is “*ex parte* in-court testimony or its functional equivalent.” *Id.* at 51. Another is “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *Id.* at 51–52 (quoting *White*, 502 U.S. 346, 365). Yet another is “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 52.

58. *Id.* at 51.

59. 541 U.S. at 56 n.7.

60. *Id.*

definition has left lower courts with the task of deciding which statements qualify as testimonial.

D. Minnesota Case Law

The Minnesota Supreme Court first considered the question in *State v. Wright*,⁶¹ which involved statements made by two domestic abuse victims to a 911 operator and responding police officers.⁶² The court provided a non-exclusive list of factors to weigh in determining whether a statement made to law enforcement is testimonial, including the purpose for making the statement, law enforcement's intention in speaking with the declarant, and the level of formality associated with the conversation.⁶³ In applying these factors, the court noted that the responding police officers interviewed the declarants shortly after the incident, and at a time when police were still ascertaining exactly what happened and whether there was still danger.⁶⁴ Although the police officers took

61. 701 N.W.2d 802 (Minn. 2005), *cert. granted*, 126 S.Ct. 2979 (2006). Shortly after the Minnesota Supreme Court issued its decision in *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006), the United States Supreme Court vacated *Wright* and remanded to the Minnesota Supreme Court for further consideration in light of *Davis v. Washington*, 126 S.Ct. 2979 (2006). In *Davis*, the defendant's girlfriend called 911 to report that the defendant was physically attacking her. 126 S.Ct. 2266, 2271 (2006). The defendant fled the scene shortly after the call began, and the operator continued asking the caller questions about the defendant's identify. *Id.* The Court noted that once the defendant left the scene, the emergency apparently ended. *Id.* at 2277. The Court held that any statements made by the caller to the 911 operator after the defendant fled "were testimonial, not unlike the 'structured police questioning' that occurred in *Crawford*." *Id.* The Court considered those statements made before the defendant fled the scene, and hence while there was still an ongoing emergency, to be nontestimonial. *Id.* Along with *Davis*, the Court also decided a companion case, discussed *infra* note 122, involving statements made by domestic abuse victims to law enforcement.

62. 701 N.W.2d at 806-08.

63. *Id.* at 812-13. Specifically, the considerations articulated by the court in determining whether a statement is testimonial are:

- (1) whether the declarant was a victim or an observer;
- (2) the declarant's purpose in speaking with the officer (e.g., to obtain assistance);
- (3) whether it was the police or the declarant who initiated the conversation;
- (4) the location where the statements were made (e.g., the declarant's home, a squad car, or the police station);
- (5) the declarant's emotional state when the statements were made;
- (6) the level of formality and structure of the conversation between the officer and declarant;
- (7) the officers' purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence); and
- (8) if and how the statements were recorded.

Id.

64. *Id.* at 813-14.

notes of the interview and used those notes to refresh their recollections at trial, the court held the statements were nontestimonial, saying that a reasonable person in similar circumstances “would not make statements in contemplation of a trial.”⁶⁵

In *State v. Scacchetti*,⁶⁶ the Minnesota Court of Appeals considered statements made by a three-year-old child to a nurse practitioner without law enforcement involvement.⁶⁷ The court held the child’s statements were made for purposes of medical diagnosis, and thus were nontestimonial.⁶⁸ Similarly, in *State v. Krasky*,⁶⁹ the Minnesota Court of Appeals reversed a district court order suppressing statements made by a seven-year-old child to a nurse practitioner.⁷⁰ Although a police detective observed the interview, the court held that a reasonable child of the victim’s age would not believe the statements would be available for trial, and thus the statements were nontestimonial.⁷¹

E. Other Jurisdictions

Other jurisdictions have also recognized that certain statements made by young children relating to sexual abuse are nontestimonial. The Supreme Court of Nebraska held that a four-year-old child’s statement to a physician indicating that the defendant molested her was nontestimonial.⁷² The court based its holding largely on the medical purpose of the physician’s interview with the child and the lack of government involvement in the initiation or course of the examination.⁷³ The decision also rested

65. *Id.* at 814.

66. 690 N.W.2d 393 (Minn. Ct. App. 2005), *aff’d*, 711 N.W.2d 508 (Minn. 2006).

67. *Id.* at 394.

68. *Id.* at 396.

69. 696 N.W.2d 816 (Minn. Ct. App. 2005), *rev’d on remand*, 721 N.W.2d 916 (Minn. App. 2006).

70. *Id.* at 820. Eight months after the Minnesota Supreme Court decided *Bobadilla*, the court of appeals reconsidered *Krasky* and concluded the statements were testimonial. 721 N.W.2d at 924. The court cited subsequent state and federal case law in justifying its holding and noted that the nurse practitioner was “acting in concert” with government investigators when conducting the interview. *Id.* at 923.

71. *Krasky*, 696 N.W.2d 816, 820 (Minn. Ct. App. 2005), *rev’d on remand*, 721 N.W.2d 916.

72. *State v. Vaught*, 682 N.W.2d 284, 293 (Neb. 2004).

73. *Id.* at 291.

upon the lack of any indication of a purpose to develop testimony for trial.⁷⁴

The Washington Court of Appeals similarly held that statements made by a four-year-old child to a family physician were nontestimonial.⁷⁵ The court said there was no indication of a purpose to prepare testimony for trial, and it also noted that the circumstances would not lead a reasonable observer to conclude the physician was attempting to elicit statements for use at trial.⁷⁶

But the Maryland Court of Appeals held that statements made by an eight-year-old and a ten-year-old to a social worker were testimonial, partly because the social worker took the statements in the course of a joint investigation with local law enforcement.⁷⁷ A police detective was present at each of the two interviews, and both children indicated their knowledge that the interview resulted from accusations against the defendant.⁷⁸ In determining that the statements were testimonial, the court asked whether an objective declarant would reasonably believe her statements would be available for use at trial.⁷⁹

Although courts must decide each case on its own facts, before *Bobadilla*, the Minnesota Supreme Court had not yet addressed the impact of *Crawford* on prosecutors' attempts to introduce statements made by young children. The atmosphere was ripe for a decision considering when a young sexual abuse victim's statements are testimonial.

III. THE *BOBADILLA* DECISION

A. *Facts and Procedural History*

On the evening of May 4, 2003, three-year-old T.B. returned to his mother's care after spending a weekend with his father, who resided with twenty-three-year-old defendant Orlando Bobadilla.⁸⁰ Upon noticing redness on T.B.'s buttocks, T.B.'s mother asked T.B.

74. *Id.*

75. *State v. Fisher*, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005).

76. *Id.*

77. *State v. Snowden*, 867 A.2d 314, 325 (Md. 2005).

78. *Id.*

79. *Id.*

80. *State v. Bobadilla*, 709 N.W.2d 243, 246 (Minn. 2006). T.B.'s father is Orlando Bobadilla's brother. *Id.*

about the cause of the discoloration.⁸¹ T.B. initially hesitated, but eventually he stated that “Uncle Orlando” had inserted his finger into T.B.’s “booty.”⁸²

T.B.’s parents brought him to the hospital where an emergency room physician noted abnormal erythema, or redness, around T.B.’s rectum, which was consistent with the events T.B. described.⁸³ The Willmar Police Department took an assault report at the hospital and forwarded the report to the Kandiyohi County Family Service Department.⁸⁴ A child protection worker from Kandiyohi County attempted to contact T.B.’s mother over the next several days by telephone but did not reach her until five days later.⁸⁵ The child protection worker arranged to interview T.B. at the local law enforcement center.⁸⁶

The child protection worker and an out-of-uniform Willmar Police detective met with T.B. and his family later that day at the law enforcement center.⁸⁷ The meeting took place in a “child-friendly” room equipped with a video camera that recorded the interview from behind a one-way mirror.⁸⁸ The child protection worker conducted the interview while the police detective observed from across the room.⁸⁹ The child protection worker used an interviewing technique known as the “CornerHouse protocol,” which was developed specifically to interview children who have been victims of sexual abuse.⁹⁰ The CornerHouse protocol is designed to elicit accurate information about alleged abuse by directing interviewers to ask nonleading questions in a nonsuggestive manner.⁹¹

After asking several preliminary questions, the child protection worker specifically asked T.B. if anybody hurt his body, to which

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 246–47.

85. *Id.* at 247.

86. *Id.*

87. *Id.* The interview took place on May 9, 2003. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* The CornerHouse protocol requires the interviewer to establish rapport with the child, determine the child’s terms for parts of the anatomy, ascertain whether abuse occurred, and close with a safety message. *Id.* The interview is to progress quickly due to the short attention span of most children. *Id.*

T.B. responded affirmatively.⁹² When asked who hurt his body, T.B. stated, "Orlando did."⁹³ Further questioning revealed that Bobadilla penetrated his finger into T.B.'s buttocks.⁹⁴ T.B. indicated the alleged abuse occurred in his father's bedroom while his father was downstairs, although later in the interview T.B. responded "yeah" when asked if his father witnessed the abuse.⁹⁵ The child protection worker also asked T.B. to show her what happened using an anatomically correct doll.⁹⁶ Although T.B. indicated he would, he ultimately failed to use the doll to demonstrate what occurred.⁹⁷

Bobadilla was charged with first- and second-degree criminal sexual conduct.⁹⁸ At trial, the district court found T.B. incompetent to testify but permitted T.B.'s mother and the child protection worker to testify about T.B.'s statements implicating Bobadilla.⁹⁹ The court also allowed the state to introduce the videotape of T.B.'s interview.¹⁰⁰ Based on these statements and the testimony of the emergency room physician, the jury convicted Bobadilla of first-degree criminal sexual conduct.¹⁰¹

Bobadilla argued on appeal that admission of the statements made to the child protection worker violated his constitutional right of confrontation.¹⁰² The Minnesota Court of Appeals agreed that T.B.'s statements to the child protection worker were

92. *Id.* The child protection worker first asked T.B. about his parents, and then had T.B. identify his names for various parts of the anatomy using a diagram of a male. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 248. First-degree criminal sexual conduct involves sexual penetration with another person less than thirteen years of age when the actor is more than thirty-six months older than the complainant. MINN. STAT. § 609.342, subdiv. 1(a) (2004). Second-degree criminal sexual conduct involves sexual contact with another person less than thirteen years old when the actor is more than thirty-six months older than the complainant. MINN. STAT. § 609.343, subdiv. 1(a) (2004).

99. *Bobadilla*, 709 N.W.2d at 248. The court found that the statements were sufficiently reliable to permit their admission as substantive evidence under Minnesota's tender-year hearsay exception, which is codified at Minnesota Statutes section 595.02, subdivision 3 (2004). *Id.*

100. *Id.*

101. *Id.* The district court sentenced Bobadilla to 144 months. *Id.*

102. *Id.* The United States Supreme Court decided *Crawford* while Bobadilla's appeal was pending before the Minnesota Court of Appeals. *Id.*

testimonial and reversed Bobadilla's conviction.¹⁰³ The court expressly found that the interview was conducted to develop a case against Bobadilla, and thus T.B.'s answers were testimonial.¹⁰⁴

B. The Minnesota Supreme Court Decision

The Minnesota Supreme Court held that T.B.'s statements were nontestimonial.¹⁰⁵ The court based its holding mainly on its conclusion that T.B.'s statements were not made primarily to preserve testimony for trial.¹⁰⁶ Consistent with the underlying theme of *State v. Wright*,¹⁰⁷ the court found the key to determining whether a statement is testimonial rests on whether the declarant or government questioner was acting, to a substantial degree, to produce a statement for trial.¹⁰⁸

The court concluded that the primary purpose of T.B.'s interview was to establish whether abuse occurred and the steps necessary to protect T.B.'s welfare.¹⁰⁹ In reaching this conclusion, the court relied upon the "clearly delineated purpose" behind the statutory scheme controlling the sexual abuse investigation, which the majority said was to protect the health and welfare of children.¹¹⁰ The court also said that producing statements for future use at trial was incidental to determining whether abuse occurred and that T.B.'s young age made it doubtful he understood that prosecutors might use his statements against the defendant.¹¹¹

IV. ANALYSIS

A. Incomplete Reasoning and Misconstrued Facts

Although *Bobadilla*'s standard for considering the admissibility of T.B.'s statements was generally consistent with post-*Crawford* case

103. *Id.*

104. *State v. Bobadilla*, 690 N.W.2d 345, 349 (Minn. Ct. App. 2004), *rev'd*, 709 N.W.2d 243 (Minn. 2006).

105. *Bobadilla*, 709 N.W.2d at 256.

106. *Id.* at 255–56.

107. *State v. Wright*, 701 N.W.2d 802 (Minn. 2005), *vacated*, 126 S. Ct. 2979 (2006).

108. *Bobadilla*, 709 N.W.2d at 252–53.

109. *Id.* at 255–56.

110. *Id.* at 254–55.

111. *Id.* at 255–56.

law,¹¹² the court ultimately erred in finding that the statements were nontestimonial. The general approach, reflected in Minnesota and national case law, is to consider whether law enforcement was involved in the interview, as well as the intention of both the questioner and declarant.¹¹³ After reaffirming this standard,¹¹⁴ the court misconstrued the significance of certain factors surrounding T.B.'s statements to the social worker and police detective. The ultimate result in *Bobadilla* established precedent that jeopardizes the fairness of future sexual abuse prosecutions.¹¹⁵

1. *Application of Minnesota Statutory Scheme*

The court based its conclusion that T.B.'s statements were nontestimonial in part on a statutory scheme that had a "clearly delineated purpose . . . to protect the health and welfare of children."¹¹⁶ According to the majority, the statute supported a finding that government officials obtained T.B.'s statements to protect his welfare, rather than to further criminal prosecution.¹¹⁷

But contrary to the majority's contention, the statutory scheme indicated that T.B.'s statements were testimonial. The scheme provided that law enforcement and local welfare agencies were to coordinate the execution of their investigative and assessment efforts.¹¹⁸ It further required that law enforcement prepare a report of the results of its investigation.¹¹⁹ Thus, the statutory scheme mandated that government officials conduct the interview with T.B. as part of a law enforcement investigation, albeit a joint investigation with child welfare officials.¹²⁰ The statute essentially dictated the "[i]nvolvement of government officers . . . with an eye toward trial."¹²¹ Statements taken under such circumstances fall within the class of statements that *Crawford* deemed testimonial.¹²²

112. See *supra* Part II.D–E.

113. See *supra* Part II.D–E.

114. See *State v. Bobadilla*, 709 N.W.2d 243, 253–54 (Minn. 2006).

115. *Id.* at 257.

116. *Id.* at 254–55.

117. *Id.*

118. MINN. STAT. § 626.556, subdiv. 10(a)(4) (2004).

119. *Id.*

120. *Id.*

121. See *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

122. *Id.* at 53. The post-*Bobadilla* U.S. Supreme Court decision in *Hammon v. Indiana*, which was decided in tandem with *Davis v. Washington*, 126 S. Ct. 2271 (2006), further indicates that T.B.'s statements were testimonial. In *Hammon*, the Court held that statements made by a domestic abuse victim to police officers

A police detective, who generally has an eye towards trial,¹²³ was present throughout T.B.'s interview, which took place at a police station.¹²⁴ Although not actively participating, the detective observed the interview¹²⁵ and was statutorily required to prepare a report of the results of his investigation.¹²⁶ Thus, one of the two government officials present for T.B.'s interview was gathering facts for the purpose of building a criminal case. But the majority failed to consider the detective when it said that "neither the child-protection worker nor the child declarant, T.B., were acting, to a substantial degree, in order to produce a statement for trial."¹²⁷

2. *Bobadilla and Snowden*

The majority went on to distinguish *Bobadilla* from *Snowden v. State*,¹²⁸ a Maryland case involving a "statutory interviewing scheme . . . designed with the express purpose of facilitating the creation of

minutes after an alleged assault were testimonial. *Id.* at 2280. The Court noted that the victim made the statements in response to specific police questions regarding potential past criminal events. *Id.* at 2278. *Davis* involved statements made by a domestic abuse victim during a 911 call. *Id.* at 2270–71. The Court held that statements made while the perpetrator was present, and hence while there was an ongoing emergency, were nontestimonial. *Id.* at 2277. The Court concluded that those statements made after the perpetrator fled and the immediate emergency ended were testimonial. *Id.* In discussing the impact of *Davis* on *Bobadilla*, the Minnesota Court of Appeals noted that, under the analysis presented in *Davis*,

the statutory policy for a mandatory 'investigation' of child-abuse reports takes on added importance. It becomes significant that the statute requires the coordination of investigative efforts with police authorities, the taking of a single statement in a joint effort of police and other responsible agencies, and the preservation of a record of the child's statements.

State v. Krasky, 721 N.W.2d 916, 922 (Minn. Ct. App. 2006).

123. See Stephanie McMahon, Note, *The Turbulent Aftermath of Crawford v. Washington: Where Do Child Abuse Victims' Statements Stand?*, 33 HASTINGS CONST. L.Q. 361, 370 (2006) (noting that a police officer's duty is to investigate crimes for later prosecution).

124. See *supra* Part III.A.

125. See *supra* Part III.B.

126. MINN. STAT. § 626.556, subdiv. 10(4) (2004).

127. *State v. Bobadilla*, 709 N.W.2d 243, 254 (Minn. 2006). The majority's conclusion is also directly contradictory to the Minnesota Court of Appeals' finding that the circumstances surrounding the interview "clearly indicate that the interview was conducted for purpose [sic] of developing a case against Bobadilla." *State v. Bobadilla*, 690 N.W.2d 345, 349 (Minn. Ct. App. 2004), *rev'd*, 709 N.W.2d 243 (Minn. 2006).

128. *Snowden v. State*, 846 A.2d 36, 39 (Md. Ct. Spec. App. 2004), *aff'd*, *State v. Snowden*, 867 A.2d 314 (Md. 2005).

out-of-court statements for a future trial.”¹²⁹ This, according to the majority, stood “in contrast” to Minnesota’s statutory interviewing scheme, which has as a primary purpose the protection of children.¹³⁰ The majority’s reasoning, however, misconstrued the nature of the statutory schemes involved in *Bobadilla* and *Snowden*.

The majority’s characterization of the Maryland statute as being a “statutory interviewing scheme”¹³¹ was misleading. This supposed “statutory interviewing scheme” was simply Maryland’s tender-year statute,¹³² which provided for the admission of statements about alleged sexual abuse made by children to various education and social welfare professionals.¹³³ The statute made no mention of an interview or the means by which authorities were to investigate child sexual abuse.¹³⁴ The majority’s description of the statute as being a “statutory interviewing scheme” wrongly implied that the scheme controlled how authorities were to interview sexual abuse victims. Instead, the statute merely established a hearsay exception for certain statements made by young children relating to alleged sexual abuse.¹³⁵

The majority compared Maryland’s tender-year statute to the statutory scheme controlling the investigation in *Bobadilla*.¹³⁶ But the two statutes served entirely different functions in each case. The court should have compared the statutory scheme controlling the investigation in *Bobadilla* with the statutory scheme controlling the investigation in *Snowden*.

The sexual abuse investigation in *Snowden* was controlled in part by a statutory scheme found in the Maryland Family Code.¹³⁷ The scheme required that local child welfare agencies and law enforcement implement a procedure for conducting joint investigations of sexual abuse.¹³⁸ Although the scheme did not require authorities to record any interviews, it did mandate that child protection agencies and law enforcement coordinate their

129. *Bobadilla*, 709 N.W.2d at 255.

130. *Id.* at 254–55.

131. *See id.* at 255.

132. *Snowden*, 846 A.2d at 39, *aff’d*, *Snowden*, 867 A.2d 314.

133. MD. CODE ANN., CRIM PROC. § 11-304 (2004). Specifically, the statute permits introduction of certain out-of-court statements made to physicians, psychologists, nurses, social workers, or educators. *Id.* § 11-304(c).

134. *Id.* § 11-304.

135. *Id.*

136. *State v. Bobadilla*, 709 N.W.2d 243, 255 (Minn. 2006).

137. *See* MD. CODE ANN., FAM. LAW §§ 5-701–714 (2004).

138. *Id.* § 5-706(e).

respective investigations so as to minimize harm to the child.¹³⁹ More significantly, the express purpose of the scheme was “to protect children who have been the subject of abuse.”¹⁴⁰

Thus, the investigations in both *Snowden* and *Bobadilla* were controlled by a statutory framework with an express purpose of protecting children, which negates the majority’s claim that Minnesota’s interviewing scheme stood in contrast to the “statutory interviewing scheme” involved in *Snowden*.¹⁴¹ Additionally, the *Bobadilla* majority failed to consider that the trial court admitted T.B.’s statements pursuant to Minnesota’s tender-year statute.¹⁴² The statements in *Snowden* were similarly admitted pursuant to Maryland’s tender-year statute,¹⁴³ which the *Bobadilla* majority said “was designed with the express purpose of facilitating . . . statements for a future trial.”¹⁴⁴ If the majority had compared the statute under which the statements were admitted in *Snowden* (Maryland’s tender-year statute) with the statute under which T.B.’s statements were admitted (Minnesota’s tender-year statute), the court would have recognized that T.B.’s statements were admitted under a statute designed with the express purpose of facilitating the introduction of statements at trial. In focusing on Maryland’s tender-year statute and Minnesota’s child abuse investigation procedures, the majority effectively cherry-picked the relevant statutory schemes to fit its conclusion that T.B.’s statements were nontestimonial.¹⁴⁵

Ultimately, there are several facts that distinguish *Snowden* and *Bobadilla*. The children in *Snowden* were older¹⁴⁶ and indicated an understanding that officials could use their statements in a testimonial manner.¹⁴⁷ The trial court in *Snowden* also expressly found the child welfare officer conducted the interview to preserve statements for trial.¹⁴⁸ Rather than follow the Maryland court’s model and carefully weigh the circumstances surrounding T.B.’s

139. *Id.* § 5-706(f)(2)(ii).

140. *Id.* § 5-702.

141. *Bobadilla*, 709 N.W.2d at 255.

142. *Id.* at 248.

143. *Snowden v. State*, 846 A.2d 36, 41–42 (Md. Ct. Spec. App. 2004), *aff’d*, *State v. Snowden*, 867 A.2d 314 (Md. 2005).

144. *Bobadilla*, 709 N.W.2d at 255.

145. *Id.* at 254.

146. *Snowden*, 867 A.2d at 316. The children in *Snowden* were eight and ten years old. *Id.*

147. *Id.* at 326.

148. *Id.*

statements, the majority in *Bobadilla* based its conclusion, in part, on a statutory scheme that does not directly bear on the critical issue: why did this specific child welfare officer and police detective interview T.B.?

3. *Bobadilla and Wright*

Beyond the “clearly delineated purpose” of the statutory interviewing scheme, the majority supported its holding by alluding to *State v. Wright*,¹⁴⁹ which involved statements made during a 911 call and to responding officers.¹⁵⁰ The majority in *Bobadilla* argued the statements at issue in both *Wright* and *Bobadilla* “represent[ed] a response to a call for assistance and preliminary determination of ‘what happened’ and whether there was immediate danger.”¹⁵¹ The circumstances of the statements in *Wright*, however, are significantly different than those of *Bobadilla*. In *Wright*, the court noted the statements made to responding officers were “nearly contemporaneous” with an emergency call for help.¹⁵² The responding officers also lacked details about the emergency situation.¹⁵³

In *Bobadilla*, on the other hand, T.B.’s statements were made five days after authorities received the initial sexual abuse report,¹⁵⁴ which is significantly later than the “nearly contemporaneous” statements in *Wright*. The police took the preliminary report when T.B.’s mother initially brought him to the emergency room, and this report was forwarded to the police detective and child

149. 701 N.W.2d 802 (Minn. 2005), *vacated*, 126 S. Ct. 2979 (2006). *See supra* note 61.

150. *Bobadilla*, 709 N.W.2d at 254.

151. *Id.*, 709 N.W.2d at 255 (quoting *State v. Wright*, 701 N.W.2d 802, 813–14 (Minn. 2005)).

152. *Wright*, 701 N.W.2d at 813. The analysis in *Davis v. Washington*, 126 S. Ct. 2266 (2006), suggests that statements made to the responding police officers in *Wright* may be testimonial. *See supra* note 122. In *Davis*, the Court placed great importance on the fact that the declarant was describing past events to law enforcement about an alleged domestic assault. 126 S. Ct. at 2274. Even though the events took place just minutes earlier and police had to prevent the defendant from interfering with the discussion between police and the declarant (*id.* at 2272), the Court held the statements were not given under circumstances exhibiting an immediate danger. *Id.* at 2278. Instead, the declarant was describing past events, indicating that police were not seeking to determine “‘what is happening,’ but rather ‘what happened.’” *Id.* Statements taken by law enforcement under these circumstances are testimonial. *Id.*

153. *Id.*

154. *See supra* note 85 and accompanying text.

protective officer.¹⁵⁵ Thus, contrary to the majority's contention, the interview with T.B. did not represent a preliminary determination of what happened. Both the police detective and child protection worker already had a preliminary report, which had been produced by a police officer five days earlier. Unlike *Wright*, the interview with T.B. was a formal, structured examination conducted by government officials in response to an initial report of abuse perpetrated by a specific individual.¹⁵⁶

B. *Implications of Bobadilla*

Bobadilla established a framework in which defendants are largely denied the ability to confront statements made under circumstances that call for close scrutiny by a finder of fact. At the same time, the decision encourages investigators to manipulate interviewing conditions to create a nontestimonial appearance so that prosecutors can use the interview for testimonial purposes. The ultimate result in *Bobadilla* established precedent that endangers the confrontation rights of those accused of sexually abusing children.

1. *The Need to Scrutinize Child Interview Statements*

The *Bobadilla* majority focused extensively on the need for investigators to conduct a single child-assessment interview.¹⁵⁷ In doing so, the majority failed to acknowledge the defendant's equally compelling, constitutionally dictated interest in confrontation.¹⁵⁸ Indeed, the very reason children often cannot testify reveals the dangers of admitting a child's out-of-court statements.¹⁵⁹ Commentators have repeatedly recognized the

155. See *supra* note 84 and accompanying text.

156. The Appellate Court of Illinois held that statements were testimonial in a similar case involving an interview with a seven-year-old sexual abuse victim. *In re Rolandis G.*, 817 N.E.2d 183, 188 (Ill. App. Ct. 2004). The interview took place at a child advocacy center one week after the alleged incident. *Id.* at 186. A social worker conducted the interview while a police officer observed through a two-way mirror. *Id.* The court said the child's statements were "in response to formal questioning, with a police officer watching through a two-way mirror," and thus were testimonial. *Id.* at 188.

157. *State v. Bobadilla*, 709 N.W.2d 243, 255 (2006). The court indicated that avoiding multiple interviews with children reduces trauma for the child and decreases the chance the child will be confused by suggestive questions. *Id.*

158. See U.S. CONST. amend. VI.

159. See William O'Donohue et al., *Forensic Interviews with Children: Lying is Not*

inherent problems associated with over-reliance on a child's statements.¹⁶⁰ Studies indicate children are susceptible to suggestive questioning and often incorporate misleading information into their recollection of an event.¹⁶¹ Many young children consider the "correct" answer to be the response that pleases an adult,¹⁶² which can lead to false reports of abuse if an interviewer is overzealous in his or her questioning.¹⁶³ A child's suggestibility indicates a greater need to scrutinize the testimony, particularly when government officers are involved in procuring the statements.

The need for scrutiny is further intensified when a child has

the Major Problem, NEV. LAWYER, Oct. 2005, at 28, 32 (discussing the highly suggestible nature of children and their tendency to give erroneous answers in response to leading questions).

160. Fitzpatrick, *supra* note 34, at 200–01; see also Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 185–90 (1986) (arguing that children can accurately recall events but often inaccurately report information or falsely incorporate details suggested by interviewers); Marks, *supra* note 31, at 221–22 (noting that a child's out-of-court statements "are particularly susceptible to problems of untrustworthiness").

161. See Goodman & Helgeson, *supra* note 160, at 187. See also Dana D. Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 1237–38 (1996) (discussing the need to ask "more direct, even slightly leading" questions to elicit information from children and the corresponding risk that such questioning will result in inaccurate reporting of sexual abuse).

162. *State v. Storch*, 612 N.E.2d 305, 309 (Ohio 1993) (recognizing that a child's conception of truth may be what pleases an adult questioner).

163. For an extreme example of how poor interviewing can lead to false reports of sexual abuse, see *State v. Michaels*, 642 A.2d 1372 (N.J. 1994). In *Michaels*, a day-care teacher was charged with 174 counts of sexual offenses involving twenty children. *Id.* at 1375. The investigation began after a three-year-old child had his temperature taken rectally and commented that his teacher did the same thing to him. *Id.* at 1374. Investigators with the local police and child welfare agency repeatedly interviewed a number of children at the day care, often asking leading questions and providing children details of allegations made by other children. *Id.* at 1379–81. The children ultimately reported that the teacher performed a number of bizarre sexual acts, many of which were largely unsupported by corroborating evidence. *Id.* at 1375. The Supreme Court of New Jersey, in affirming the Appellate Division's reversal of the defendant's conviction, criticized the interviewing techniques used on the children, saying investigators asked suggestive questions and frequently used positive and negative reinforcement to elicit desired responses. *Id.* at 1379–81. The court noted that interviewers vilified the defendant during interviews with children by saying that they needed help from "little detectives" to keep the teacher in jail. *Id.* at 1380. Some children were even given mock police badges for cooperating. *Id.* The court concluded that "the interrogations that occurred in this case were improper and there is a substantial likelihood that the evidence derived from them is unreliable." *Id.* at 1384.

been declared incompetent to testify. In Minnesota, a child is presumed competent to testify unless the judge concludes that “the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined.”¹⁶⁴ Considering the district court’s finding that T.B. was incompetent to testify and the role of government officers in obtaining his statements,¹⁶⁵ a jury should closely scrutinize T.B.’s testimony. The majority, in allowing for the admission of T.B.’s untested hearsay statements, failed to even acknowledge the inherent unreliability associated with such statements¹⁶⁶ or the corresponding risk that untrue statements will implicate an innocent defendant.

2. *Manipulation of Interviewing Conditions*

Bobadilla also established precedent that encourages government agents to manipulate their procedures to ensure statements taken during an interview are considered nontestimonial. Child welfare agencies and law enforcement officials will likely define their investigative procedures to guarantee any statements made by children are considered nontestimonial. The American Prosecutors Research Institute¹⁶⁷ recently noted, after discussing *Bobadilla*’s reliance on the nontestimonial purpose of the interview with T.B., that “[r]egardless of the forensic interviewing protocol utilized, forensic interviewing professionals should be cognizant of the Court’s language in holding that this interview was nontestimonial.”¹⁶⁸ The American Prosecutors Research Institute’s statement demonstrates that public authorities may tailor their interviewing procedures toward so-called nontestimonial purposes, with police simply

164. MINN. STAT. § 595.02(m) (2004).

165. See *supra* notes 87–100 and accompanying text.

166. Several of T.B.’s responses during the interview with the child protection worker demonstrate the importance of scrutinizing a young child’s statements. T.B. initially indicated that his father was not present when *Bobadilla* committed the abusive act. *State v. Bobadilla*, 709 N.W.2d 243, 247 (Minn. 2006). Later in the interview, T.B. responded “yeah” when asked if his father witnessed the abuse. *Id.* Although inconsistent responses of this nature do not indicate T.B.’s accusations are untrue, they do suggest that under certain circumstances, a child could provide erroneous information to investigators.

167. The American Prosecutors Research Institute filed an *amicus curiae* brief in favor of the State of Minnesota in *Bobadilla*. 709 N.W.2d at 245.

168. Allie Phillips, *A Ray of Hope in the Wake of Crawford v. Washington: An Analysis of Bobadilla v. Minnesota* (pt. 1), APRI UPDATE (Am. Prosecutors Res. Inst., Alexandria, Va.), Jan. 2006, at 1, 2.

observing and subtly recording statements for possible use at a later trial.

A recent Minnesota County Attorney's Association newsletter illustrates this outcome.¹⁶⁹ Kandiyohi County Attorney Boyd Beccue, in discussing the implications of *Bobadilla* upon future prosecutions, wrote:

Anyone advising social workers and law enforcement investigators must carefully review the decision and incorporate the court's guidance, giving particular attention to the discussion of M.S. § 626.556.

It is clear that not only should a police investigator never be present in the room where a child is being questioned, the assessment must be carefully designed to meet the purposes of M.S. § 626.556. . . . I am inclined to believe that it may even be wise to not have police officers nearby when the assessment is occurring. It is better to insure that child protection workers are well trained and understand the impact of *Bobadilla* on their investigations.¹⁷⁰

Prosecutors are discussing ways in which government agencies should conduct sexual abuse interviews so that statements made by victims will be admissible at trial.¹⁷¹ The mere fact that such discussions are occurring indicates that a primary purpose of many child assessment interviews is to develop statements for use at a later trial. Moreover, a prosecutor's attempt to hide the purpose of an interview implicates *Crawford's* concern about statements made with the "[i]nvolvement of government officers in the production of testimony with an eye toward trial" which present a "unique potential for prosecutorial abuse."¹⁷²

169. Boyd Beccue, *State v. Bobadilla: Comments from Kandiyohi County Attorney Boyd Beccue*, THE MONTHLY BRIEF (Minn. County Att'y Ass'n, St. Paul, Minn.), Mar. 2006, at 3, 3.

170. *Id.*

171. Manipulation of interviewing procedures was a fairly predictable outcome of the majority opinion, although one must ask whether government manipulation is a predictable by-product of *Crawford's* testimonial—nontestimonial distinction. Such a question, however, is beyond the scope of this case note.

172. See *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2003). The prospect of prosecutorial abuses is particularly apparent in child sexual abuse cases. District attorneys often tout successful child sexual abuse prosecutions as part of their political campaigns. See, e.g., Peter T. Wendel, *The Case Against Plea Bargaining Child Sexual Abuse Charges: Déjà Vu All Over Again*, 64 MO. L. REV. 317, 339–40 (1999) (describing how a district attorney used his prosecution of a "'sicko' who

The county attorney newsletter also indicates that a significant aspect of post-*Bobadilla* child sexual abuse investigations will be the intentional lack of law enforcement presence at interviews.¹⁷³ Effective criminal investigations usually involve investigators at least observing an interview with the victim.¹⁷⁴ Thus, *Bobadilla* not only created a framework that encourages government agents to manipulate their interviewing procedures, it also established a constitutional standard that promotes ineffective investigative procedures. Kandiyohi County Attorney Boyd Beccue acknowledged this point in his comments published in the Minnesota County Attorney newsletter, writing, “[*Bobadilla*] leads us to believe that the less law enforcement involvement with the assessment, the better. While this places an extra burden on the child protection worker and may be unsatisfactory to police investigators, the direction our court has taken regarding what constitutes a ‘testimonial’ statement compels this course.”¹⁷⁵

3. *An Alternative Approach*

Efforts to conceal the motivation underlying child interviews suggest that courts must carefully scrutinize the circumstances in which officials elicit information from children. Prosecutors have expressed the need to conduct interviews in a way that creates the appearance of a nontestimonial purpose so that prosecutors can use the child’s statements in a testimonial manner.¹⁷⁶ Child protection workers are essentially being asked to act as proxies for law enforcement to ensure a child’s statements are deemed nontestimonial.¹⁷⁷ Courts consequently cannot view the mere

sexually abuses children” as part of his reelection campaign).

173. Beccue, *supra* note 169, at 3.

174. JAMES W. OSTERBURG & RICHARD H. WARD, CRIMINAL INVESTIGATION: A METHOD FOR RECONSTRUCTING THE PAST 18, 238 (1992).

175. Beccue, *supra* note 169, at 3.

176. *Id.*; Phillips, *supra* note 168, at 1–2.

177. Justice Page, in dissent, noted that the social worker who interviewed T.B. was partly acting as a surrogate for the police detective, and suggested that T.B.’s statements fit well within *Crawford’s* judgment that statements made in the course of a police interrogation were testimonial. *State v. Bobadilla*, 709 N.W.2d 243, 257–58 (Minn. 2006) (Page, J., dissenting). Other jurisdictions have found statements to be testimonial because child protection workers acted as a proxy for law enforcement. The Illinois Appellate Court held that statements made by a seven-year-old child to a child-protection worker were testimonial, noting that “if the State could simply use the surrogate testimony of social workers . . . then prosecutors would have less motivation” to prepare a child to testify in court. *In re*

absence of law enforcement as objective evidence of an interview's purpose.

Instead, courts should consider whether investigators possessed sufficient facts to warrant the presence of law enforcement at an interview. In other words, did officials have information, prior to the interview, to justify a criminal investigation? If so, courts should infer the presence of a police detective at the interview. Courts must recognize that the lack of law enforcement at an interview with a sexual abuse victim may demonstrate forethought on the part of officials to ensure prosecutors can use the interview against the defendant at trial. Even under *Bobadilla's* narrow standard, statements taken by an interviewer with the intent to use them at a later trial are testimonial.¹⁷⁸

Vigorous scrutiny of the purpose behind child protection interviews will result in courts' admitting fewer out-of-court statements made by young children. It will not, however, completely foreclose the prosecution of child sexual abuse. Prosecutors can, for example, introduce nontestimonial statements made by children, which are no longer subject to any constitutional restrictions.¹⁷⁹ Other potential evidence may also be available, such

T.T., 815 N.E.2d 789, 802–03 (Ill. App. Ct. 2004). In *State v. Mack*, 101 P.3d 349 (Or. 2004), a child-protection worker took over an interview after police were unable to establish dialogue with a three-year-old child. *Id.* at 350. The child protection worker and police detective were investigating the murder of the child's two-year-old brother. *Id.* at 349–50. The child made statements to the child-protection worker implicating his mother's boyfriend in the murder, but the child was later declared incompetent to testify. *Id.* at 350. The Supreme Court of Oregon held that the child's statements were testimonial, saying the child protection worker was serving as a proxy for the police investigator. *Id.* at 352.

178. See *Bobadilla*, 709 N.W.2d at 253. *Davis v. Washington* reaffirmed the need to objectively consider the questioner's intent when weighing whether a statement is testimonial. 126 S. Ct. 2266, 2278 (2006).

179. See *supra* note 55 and accompanying text. Use of a child's out-of-court statements at trial is still subject to hearsay restrictions. Minnesota's statutory hearsay exception permits prosecutors to introduce many nontestimonial statements made by young children relating to sexual abuse. See *supra* notes 38–41 and accompanying text. Ironically, Minnesota's tender-year exception still includes a provision requiring that the statement possess sufficient "indicia of reliability," which essentially mirrors the previous *Roberts* standard. See *supra* text accompanying note 40. In light of precedent implying that nontestimonial statements are no longer subject to constitutional scrutiny, the legislature is free to remove the "indicia of reliability" requirement. See Laird Kirkpatrick, *Crawford: A Look Backward, A Look Forward*, CRIM. JUST., Summer 2005, at 6, 9–10 (noting that a decision removing nontestimonial statements from Sixth Amendment scrutiny would permit legislatures to rewrite hearsay exceptions without concern for

as testimony from health-care workers relating to physical symptoms of abuse or incriminating statements made by the defendant.¹⁸⁰

Officials involved in prosecuting child sexual abuse must also seek to increase the likelihood that a child is able to testify. Research indicates that simple steps, such as giving children courtroom tours and ensuring a support person remains in the courtroom, are associated with reduced stress while testifying.¹⁸¹ Allowing the child to testify on closed-circuit television also decreases anxiety by ensuring the child is not traumatized by encountering the defendant.¹⁸² For those children declared incompetent to testify, prosecutors must seek other means to prove sexual abuse. Although this will interfere with the ability to prosecute some abusers, admitting a young child's out-of-court testimonial statements not only degrades the Sixth Amendment,¹⁸³ but it also raises the prospect that juries will convict innocent defendants.

Unfortunately, a decision barring prosecutors from using statements made by children during assessment interviews would result in some abusers not receiving justice. Perhaps it was this underlying concern that prompted the court to hold that T.B.'s statements were nontestimonial. As written, the majority's

constitutional constraints imposed by *Roberts*).

180. In *Bobadilla*, for example, the prosecution could introduce T.B.'s statements to his mother and the emergency room physician. See *Bobadilla*, 709 N.W.2d at 246. The physician can also testify about the unusual redness on T.B.'s buttocks. See *id.*

181. Gail S. Goodman et al., *Innovations for Child Witnesses: A National Survey*, 5 PSYCHOL., PUB. POL'Y, & L. 255, 259 (1999). Among the factors associated with increased stress on child witnesses in sexual abuse cases are multiple pre-court interviews, lengthy delays, testimony in the defendant's presence, multiple testimonies, and lack of parental support. *Id.* at 258.

182. See *Maryland v. Craig*, 497 U.S. 836 (1990), holding that a child sexual abuse victim could testify via one-way closed circuit television without violating the Confrontation Clause. The prosecution and defense counsel conducted the examination in a separate room while the defendant and jury watched from the courtroom. *Id.* at 841. The defendant remained in electronic communication with defense counsel throughout the examination. *Id.* at 842. Several post-*Crawford* cases have upheld the constitutionality of closed-circuit television testimony. See *State v. Henriod*, 131 P.3d 232, 237–38 (Utah 2006); *State v. Blanchette*, 134 P.3d 19, 29 (Kan. Ct. App. 2006).

183. Justice Page, in dissent, acknowledged that the majority articulated the importance of protecting children, but recognized that, "[o]n the facts of this case, that important need conflicts with the Sixth Amendment, which, under our system of justice, must prevail." *Bobadilla*, 709 N.W.2d at 261 (Page, J., dissenting).

mischaracterization of the relevant statutory scheme and misapplication of the factual circumstances surrounding the interview with T.B. are unpersuasive. But considering the horrific nature of child sexual abuse, it is possible that many will find the majority's opinion quite persuasive.

V. CONCLUSION

The United States Constitution established a number of principles that are highly valued in our society. Among those is the right of a criminal defendant to confront his or her accuser.¹⁸⁴ *Bobadilla* presented a situation in which the right of confrontation conflicted with society's compelling interest in protecting children from unspeakable crimes. When such conflicts arise, it is the courts that are to ensure constitutional principles prevail.¹⁸⁵ But in *Bobadilla*, the Minnesota Supreme Court largely ignored the confrontation rights embodied in the Sixth Amendment, choosing instead to focus on the need to protect children from sexual abuse. In so doing, the court established precedent that jeopardizes the fairness of future sexual abuse prosecutions. Indeed, after *Bobadilla*, many sexual abuse trials will present statements made by young children implicating defendants who will lack any genuine opportunity to test the reliability of such damning evidence.

184. U.S. CONST. amend. VI.

185. Justice Marshall recognized the burden often associated with adhering to certain fundamental values, writing that "sometimes we must pay substantial social costs as a result of our commitment to the values we espouse." *United States v. Salerno*, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting). *See also* U.S. CONST. amend. VI; Marks, *supra* note 31, at 210 (noting that those accused of sexually abusing children "represent an insular minority whose rights must be protected against the majority").