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NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE

Update

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The National Center for Prosecution of Child Abuse and the Violence Against Women Program at the American Prosecutors Research Institute are compiling motions, briefs, transcripts, court rulings and general materials regarding the effect of *Crawford v Washington.* We intend to serve as a central clearinghouse for prosecutors on this opinion and its impact on domestic violence and child abuse prosecutions.

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Keeping the Balance True: Admitting Child Hearsay in the Wake of Crawford v. Washington

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"But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."
—Justice Benjamin N. Cardozo[2]

Introduction

In a decision widely characterized as "highly favorable" to criminal defendants,[3] the United States Supreme Court has interpreted the 6th amendment confrontation clause[4] in such a manner as to undermine the ability of prosecutors to admit child hearsay statements when the child is unavailable for testimony.

In *Crawford v. Washington,*[5] the U.S. Supreme Court held that when hearsay statements of an unavailable witness are "testimonial," the 6th amendment requires that the accused be afforded a prior opportunity to cross-examine the witness.

Crawford overrules the decision in *Ohio v. Roberts*[6] in which the Supreme Court found that the admission of hearsay statements could withstand a confrontation clause challenge if the statement bears adequate "indicia of reliability."[7] Reliability was inferred if the statement fell within a "firmly rooted" exception to the hearsay rule.[8]

The decision in *Crawford* also calls into question the Court's decision in *Idaho v. Wright*[9] which relied on the *Roberts* analysis in ruling that child hearsay statements admitted under residual exceptions to the hearsay rule could withstand a challenge under the confrontation clause if the witness is unavailable and the statements have "particularized guarantees of trustworthiness" that are shown from "the totality of the circumstances" surrounding the making of the statement.[10]

Cases to which *Crawford* does not apply

Although *Crawford* is a watershed decision, it may not impact most child abuse cases. Specifically, the case does not apply to the following:

Civil child protection proceedings. The confrontation clause applies to "criminal prosecutions."[11] In most states, child hearsay statements are admitted in civil child protection proceedings under both firmly rooted as well as residual exceptions to the hearsay rule.[12] Although the due process clause of the 14th amendment accords parents a right to confront accusatory witnesses, confrontation rights under the due process clause "are not as extensive as rights guaranteed by the Sixth Amendment."[13] Accordingly, states should be permitted to admit child hearsay statements in civil child protection trials without regard to whether the prior statements are "testimonial."

Criminal proceedings in which the child will testify. The Court in *Crawford* specifically stated that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."[14] Accordingly, in any criminal child abuse case in which the child testifies, the child's hearsay statements may be admitted under firmly rooted or residual exceptions even if the prior statements are "testimonial."

Cases to which *Crawford* does apply: Defining "testimonial" statements

In a criminal case of child abuse in which the child is unavailable to testify, *Crawford* bars the admission of hearsay statements that are "testimonial" unless the defendant was afforded an opportunity of prior cross-examination of the witness. Unfortunately, the *Crawford* Court chose to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[15]

The Court did, however, provide some clues as to hearsay statements that will be deemed "testimonial." The Court cited an 1828 Webster's dictionary definition of testimony as being a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[16] The Court went on to explain that an "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."[17]

The Court also gave specific examples of statements that are testimonial. The Court cited "extrajudicial statements… contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[18] The Court also suggested testimonial statements include those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[19] In applying these definitions, the Court said statements "taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive."[20]

Crawford's applicability to firmly rooted hearsay exceptions

Crawford may apply to child statements admitted under firmly rooted hearsay exceptions such as excited utterances or statements for purposes of medical diagnosis. Indeed, the Court specifically referenced *White v. Illinois*,[21] a case in which child hearsay statements were admitted under these very exceptions, and questioned whether the statements admitted in *White* could survive the Court's new confrontation clause analysis.[22]

Whether or not *Crawford* applies in a given case depends on the circumstances surrounding the statement. A child blurting out a statement to a parent, teacher or friend is likely making a "casual remark" and thus is not appreciative that the statement might be available at a trial. Statements made to a doctor may be viewed, if anything, as statements for purposes of treatment and not for trial. If so, the statements should be admissible under traditional hearsay rules even if the child does not testify.

The issue becomes more complex if the child's statement is made to a government official such as a police officer. *Crawford* specifically called into question the excited utterances made to a police officer in *White v. Illinois* that were in response to questioning.[23] Keep in mind, though, that this language in *Crawford* is merely dicta. Prosecutors

must be prepared to argue in future cases that a particular child did not appreciate that his statements would be used for testimonial purposes—whether or not the statement was made to an investigator.

***Crawford's* applicability to forensic interviews admitted under residual hearsay exceptions**

In cases in which the child is unavailable for trial, defendants may challenge the admissibility of forensic interviews under residual exceptions[24] to the hearsay rule on the basis these statements are "testimonial" in nature. In response to this challenge, prosecutors have several arguments at their disposal.

First, forensic interviews are not primarily for the purpose of criminal litigation. If done as part of a multi-disciplinary response to the possibility of abuse, the interview serves the needs of the physicians who may treat the child, the therapists who may deal with the child's emotional needs, and the civil child protection professionals who may seek to prevent further abuse and even work toward the preservation of the family.

Although the statement may also serve the purposes of the prosecutor at a criminal trial, the interview itself is not to focus exclusively or even primarily on the needs of investigators or prosecutors. States following the *CornerHouse/ Finding Words* protocol for interviewing children can cite the "child first doctrine" upon which the interview is based. Pursuant to this doctrine, the "child is our first priority. Not the needs of the family. Not the child's 'story.' Not the evidence. **Not the needs of the courts. Not the needs of the police, child protection, attorneys, etc. The child is our first priority"** (emphasis added).[25]

Moreover, forensic interviewers are specifically taught not to focus only on the possibility a child was abused by a given person. For example, forensic interviewers trained through *CornerHouse* or *Finding Words* are taught to explore "alternative hypotheses" including an innocent explanation for a child's account of genital touching, or to identify a perpetrator other than one named by the child.[26]

These and other safeguards distinguish forensic interviews from the "formalized testimonial materials" for criminal trials cited by the Court in *Crawford*.

Second, young children are unlikely to comprehend that a forensic interview may be used at trial. Again, *Crawford* suggested a testimonial statement is one "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[27] As one commentator notes, young children making a statement to the authorities may not understand that sexual abuse is wrong or that a perpetrator is subject to punishment as a result.[28] If so, "it seems dubious to say that the children acting in these cases were acting as witnesses."[29]

Third, even older children may not understand that a forensic interview may be used for testimonial purposes. Studies indicate that many children do not understand the roles of police officers, judges or lawyers in handling a case of child abuse—or any other case for that matter.[30] Even children as old as eleven "remain confused about what goes on in Court."[31] This is why there is a plethora of written material to help professionals explain the Court process to children.[32] Obviously, if children cannot understand even the purposes of a trial, it is ludicrous to suggest they understand that a neutral, fact finding forensic interview would, in the words of *Crawford,* "be available for use at a later trial."

Fourth, Crawford does not apply if the defendant's conduct made the child unavailable for trial. The Court in *Crawford* said "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims…"[33] As stated by one legal scholar, the right to confront witnesses is forfeited if "the accused's own wrongful conduct is responsible for the inability of the witness to testify under the conditions ordinarily required…(t)he forfeiture principle remains applicable even when the conduct that allegedly rendered the witness unavailable to testify is the same criminal conduct for which the accused is now on trial."[34]

If, then, the trial Court determines the defendant's abuse of the child has rendered the child unavailable for cross-examination, the defendant has forfeited his right to confront the child at trial. As one commentator notes, "(s)uppose that it appears the child may have been intimidated, either by the abusive conduct itself or by a threatening statement—'Don't tell anyone!'—that accompanied or followed the conduct. In such a case, it may be appropriate to apply the forfeiture principle."[35]

Conclusion

Although *Crawford* is a seminal 6th amendment case, it may not impact most child abuse trials. This is because the case only applies to criminal cases in which the child victim will *not* testify. Even when the case is invoked by defendants objecting to the admission of child hearsay, prosecutors have a number of arguments to distinguish child hearsay statements from the solemn, formalized statements discussed in *Crawford.* Finally, since many child abuse victims are unavailable for trial *because* of the abuse, these offenders may have forfeited their right to confront the children they have harmed.

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2 *Snyder v. Massachusetts,* 291 U.S. 97 (1934).

3 Linda Greenhouse, *Court Alters Rule on Statements of Unavailable Witnesses,* NEW YORK TIMES, Tuesday, March 9, 2004.

4 This clause provides that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." UNITED STATES CONSTITUTION, SIXTH AMENDMENT. This procedural guarantee applies to both federal and state prosecutions. *Crawford v. Washington*, 2004 U.S. Lexis 1838 at *12.

5 *Crawford,* 2004 Lexis 1838.

6 448 U.S. 56 (1980).

7 *Id*. at 66.

8 *Id*. Firmly rooted exceptions to the hearsay rule include statements for the purposes of medical diagnosis and excited utterances.

9 497 U.S. 805 (1990).

10 *Id*. at 819.

11 UNITED STATES CONSTITUTION, SIXTH AMENDMENT

12 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES section 7.50 (1997 & 2003 supp).

13 *Id.*

14 *Crawford*, 2004 LEXIS 1838, *37 footnote 9, citing *California v. Green*, 399 U.S. 149, 162 (1970).

15 *Id*. at *50.

16 *Id.* at *27.

17 *Id.* at *27-*28.

18 *Id*. at *28.

19 *Id*.

20 *Id.* at *29.

21 502 U.S. 346 (1992).

22 *Crawford* at *36.

23 *Id*.

24 A majority of states have statutory exceptions that admit child hearsay statements that are deemed reliable or they follow the federal rules of evidence which provide that statements not admitted under firmly rooted hearsay exceptions may nonetheless be admitted as evidence if the statements have "equivalent guarantees of trustworthiness." FED. R. EVID. 807.

25 *Finding Words* training manual at 2 (2003) quoting Ann Ahlquist and Bob Ryan.

26 *Id*. at 13. Other aspects of the CornerHouse/Finding Words protocol refute any claim the purpose of the forensic interview is testimonial. For example, the protocol does not have a truth/lie inquiry. CornerHouse and APRI maintain that such an inquiry is a matter of competency for trial and is irrelevant for an interview. *See generally,* Lori S. Holmes & Victor I. Vieth, *Finding Words/Half a Nation: The Forensic Interviewing Program of CornerHouse and APRI's National Center for Prosecution of Child Abuse,* 15(1) APSAC ADVISOR (Winter 2003)

27 Crawford at *28.

28 Richard D. Friedman, *Children as Victims and Witnesses in the Criminal Trial Process: The Conundrum of Children, Confrontation, and Hearsay,* 65 LAW & CONTEMP. PROB. 243, 250 (2002).

29 *Id*.

30 John E.B. Myers, Karen J. Saywitz & Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony,* 28 PACIFIC L. JOURNAL 1, 68-69 (1996) (citations omitted).

31 *Id.*

32 *See e.g.,* LYNN COPEN, PREPARING CHILDREN FOR COURT (2000).

33 *Crawford* at *42.

34 Friedman, *supra* note 28 at 252.

35 *Id.* at 253.

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