Crawford v. Washington— Charting New Territory Under the Confrontation Clause: Implications for Child Abuse Litigation

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Children disclose abuse to relatives, friends, and professionals. Following disclosure, legal proceedings may be commenced in criminal court, juvenile court, or family court. During court proceedings, one or more of the adults to whom the child disclosed may be called as a witness and asked to repeat the child's earlier statements. When this occurs, however, the attorney representing the accused is likely to make a hearsay objection. A child's words are hearsay when the words are repeated in court by someone who heard the child speak.[1] By making a hearsay objection, the defense attorney seeks to prevent the witness from repeating the child's words.

Consider an example: Sally, age five, tells her preschool teacher that she is being touched inappropriately at home. The teacher files a report, and a CPS social worker interviews Sally later that day. Sally repeats her description of abuse to the social worker. The next day, Sally is interviewed briefly by a police officer. Again, Sally describes the abuse. A week later, Sally is interviewed at a child advocacy center, where she repeats her description of the abuse on videotape. Criminal charges are filed against an adult living in Sally's home. At trial, the prosecutor calls the teacher, the social worker, and the police officer as witnesses and asks them to repeat what Sally said. The defense attorney makes a hearsay objection. Is the defense attorney right? Yes. Sally's description was given prior to the court proceeding, and the adults are asked to repeat Sally's words to prove that Sally was abused. Sally's words are hearsay. Next, the prosecutor offers the videotaped interview into evidence. Again, the defense attorney objects, and again the defense attorney is right. The videotape is hearsay.

If the prosecutor hopes to get Sally's hearsay statements into evidence, the prosecutor must overcome two obstacles: first, the rule against hearsay and, second, the Confrontation Clause of the U.S. Constitution. As for the hearsay rule, the law excludes hearsay unless the particular hearsay statement meets the requirements of an exception to the rule against hearsay. There are numerous exceptions to the rule against hearsay. The exceptions allow use in court of hearsay that is considered reliable. In child abuse cases, the exceptions that play the largest role are the "excited utterance" exception, the "medical diagnosis or treatment" exception, and "child hearsay" exceptions that allow any reliable hearsay describing abuse.

An excited utterance is a hearsay statement that is made shortly following a startling or traumatic event. A statement for purposes of medical diagnosis or treatment is a hearsay statement made to a nurse or doctor during the course of diagnosis or treatment. The child hearsay exception allows use in court of hearsay statements that do not fit into traditional exceptions like excited utterances, but that are judged to be reliable. Reliability is determined by a judge, after the judge considers all factors bearing on the accuracy of the statement.

The Confrontation Clause and Hearsay

Although the hearsay exceptions are important, the exceptions are not the focus of the present article. This article focuses on the second obstacle to using hearsay in court: the Confrontation Clause of the U.S. Constitution, located in the Sixth Amendment. It provides, "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." It is the Confron-

Footnotes (from pg 3) - Keeping the Balance True

[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 that the purposes 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.

tation Clause that gives defendants the right to face their accusers (including children) in court. In addition to guaranteeing face-to-face confrontation, the Confrontation Clause limits the use of hearsay against defendants in criminal cases.

Prior to March 8, 2004, the impact of the Confrontation Clause on hearsay was limited. In a series of decisions dating back to 1980, the U.S. Supreme Court interpreted the Confrontation Clause so that when a person's hearsay statement satisfied the requirements of a hearsay exception (e.g., excited utterance), the statement nearly always satisfied the requirements of the Confrontation Clause. The result was that the Confrontation Clause seldom stood in the way of using children's hearsay in criminal cases. On March 8th, however, the Supreme Court dramatically altered its interpretation of the Confrontation Clause.

The Story of *Michael Crawford Versus the State of Washington*

Michael Crawford came to believe that his wife Sylvia had been the victim of attempted rape by Kenneth Lee. Michael and Sylvia went looking for Kenneth and tracked him to his apartment. A fight broke out, and Michael stabbed Kenneth in the chest. Later that night, the police arrested Michael. The police gave Michael and Sylvia *Miranda* warnings and proceeded to interrogate them. Michael admitted the stabbing, but said he had acted in self-defense when Kenneth pulled a weapon. During Sylvia's interview, which was videotaped, she corroborated Michael's version of events, except Sylvia said Kenneth did not have a weapon. Michael was charged with assault and attempted murder.

At Michael's trial, he claimed self-defense. Sylvia refused to testify against her husband. (In Washington and most other states, one spouse can refuse to testify against the other.) The prosecutor offered the videotape of Sylvia's police interview in which she said Kenneth was unarmed. The defense attorney objected that Sylvia's interview was hearsay. The prosecutor responded that the interview satisfied the requirements of the hearsay exception for statements against penal interest. Next, the defense attorney argued that admitting the videotaped interview violated Michael's rights under the Confrontation Clause. The judge rejected both defense objections and allowed the videotape to be played for the jury.

Michael was convicted of assault. Michael appealed to the Washington Court of Appeals and won. The prosecution then appealed to the Washington Supreme Court, where the prosecutor won. Finally, Michael appealed to the U.S. Supreme Court, arguing that playing Sylvia's videotaped hearsay statement violated the Confrontation Clause. In a decision that took the legal community by surprise, the Supreme Court sided with Michael. The Supreme Court's decision in *Crawford v. Washington*[2] dramatically changed the effect of the Confrontation Clause on the admissibility of hearsay.

Matters *Not* Affected by *Crawford*

Before discussing the change wrought by *Crawford*, it is important to note what *Crawford* did not do:

Confrontation satisfied when hearsay speaker testifies. *Crawford* did not alter the long-standing rule that when the person who made a hearsay statement testifies in court and can be cross-examined about the hearsay, the Confrontation Clause is satisfied and poses no barrier to admissibility.[3] Recall five-year-old Sally, discussed above. If Sally is able to testify in court and be questioned about her hearsay statements to the teacher, social worker, police officer, and child advocacy center interviewer, then the Confrontation Clause is satisfied. The prosecutor will have to find hearsay exceptions for Sally's statements, but the Confrontation Clause will not bar admission.

Crawford *does not apply in civil cases.* The Confrontation Clause of the Sixth Amendment applies only in criminal prosecutions. The Confrontation Clause, and its attendant restrictions on hearsay, does not apply in civil litigation.[4] Thus, *Crawford* does not govern hearsay in protective proceedings in juvenile court, which are civil. Nor does *Crawford* apply to proceedings in family court or to proceedings to terminate parental rights.

The Confrontation Clause applies only to hearsay offered against the defendant. In criminal cases, the Confrontation Clause applies only when the prosecution offers hearsay against the defendant. The Clause is not applicable when the defendant offers hearsay against the prosecution. The Confrontation Clause does not apply when the prosecutor offers the defendant's own words (party admissions) against the defendant.

Crawford's New Rule—Testimonial Hearsay

Prior to *Crawford*, hearsay that fit within an exception nearly always satisfied the Confrontation Clause. After *Crawford*, a number of hearsay statements that fit within exceptions will violate the Confrontation Clause and be inadmissible. The net effect of *Crawford* is that some hearsay statements that were admissible prior to the Supreme Court's decision are no longer admissible.

In *Crawford*, the Supreme Court created a new rule to govern the admission of hearsay statements by individuals who are not available to be cross-examined about their hearsay. When a hearsay speaker (called a declarant) is unavailable at trial, the judge must determine whether the hearsay is "testimonial." If the hearsay is testimonial, then it is only admissible if the defendant had a prior opportunity to cross-examine the declarant.[5] If, on the other hand, the hearsay is not testimonial, then the hearsay may be admitted without affront to the Confrontation Clause, provided it is sufficiently reliable.

Thus, the critical question becomes, when is hearsay "testimonial"? The Supreme Court declined to provide a definitive definition of *testimonial*, preferring to leave development of the concept to case-by-case analysis. The Court did, however, provide the following examples of testimonial hearsay:

(1) a formal declaration made for the purpose of proving a fact;
(2) prior testimony (including grand jury testimony) that the defendant could not cross-examine;
(3) an affidavit;
(4) a statement by a person in police custody in response to formal police interrogation; and
(5) hearsay statements that the declarant would reasonably expect to be used in later court proceedings.

It is clear from these examples, and from the Court's reasoning, that the principal goal of the Supreme Court in *Crawford* was to limit the admissibility of hearsay generated by government officials with an eye toward prosecution.

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When is hearsay non-testimonial? The Supreme Court mentioned as an example an off-hand, casual remark to a friend or family member.[6] Thus, a child's hearsay statement to a parent, babysitter, or friend is probably non-testimonial.[7] In *People v. Compan*,[8] the adult victim was physically assaulted by her husband. The victim called a friend and asked the friend to come pick her up. The friend drove to the victim's house and picked her up. During the ride to the friend's house, the victim described how her husband assaulted her. At the husband's trial for domestic assault, the victim did not testify, and the prosecutor put the friend on the witness stand to repeat the victim's hearsay statements on the day of the assault. On appeal from his conviction, the husband argued that the victim's hearsay was testimonial. The Colorado Court of Appeals rejected this argument, writing, "Here, we conclude that the victim's statements are not testimonial within the meaning of *Crawford*. The statements were made to the victim's friend, not to a law enforcement or judicial officer. Although the statements were not 'casual or off-hand' because the victim was distraught, they do not qualify as the kind of 'solemn or formal' declarations that the *Crawford* majority associated with testimonial statements. The victim's statements were not made for the purpose of establishing facts in a subsequent proceeding."

Are Hearsay Statements to the Police Testimonial?

Some hearsay in response to police questioning is clearly testimonial. But are all hearsay statements to the police testimonial? The answer is important for the future of child abuse litigation because children often disclose abuse to police officers. *Crawford* did not answer the question. We do know from *Crawford* that hearsay uttered in response to formal police interrogation is testimonial. Often, however, children disclose abuse to police officers in circumstances that bear little resemblance to formal interrogation.[9] Suppose, for example, that someone calls 911 to report abuse. The responding police officer arrives at the home and asks some questions. The child discloses. Is the child's hearsay statement to the police officer testimonial? If so, and the child cannot testify at trial, then the statement will not be admissible in court because the defendant had no opportunity to cross-examine the child. Such scenarios arise every day.

Although *Crawford* did not determine whether all statements to police are testimonial, it hinted in that direction. The Court stated more than once that hearsay statements in response to police interrogation are testimonial. Yet, the Court did not define *interrogation*, prompting one to ask, Does interrogation embrace only formal interrogation, typically at a police station? Or does interrogation include all questioning by the police regardless of setting, formality, or purpose? A footnote in *Crawford* indicates that some Justices of the Supreme Court are prepared to give a broad meaning to the word *interrogation.*[10] In the footnote, the Court referred to a 1992 child abuse case, *White v. Illinois*,[11] involving sexual assault on a four-year-old. In the middle of the night, the babysitter was awakened by the victim's screams. The babysitter saw the defendant leave the victim's bedroom. The police were called, and within forty-five minutes, a police officer questioned the child. In response to the officer's questions, the youngster disclosed sexual abuse. In the *Crawford* footnote, the Court stated that the child's statement to the police officer in *White* was testimonial. Although the *Crawford* Court's discussion of *White v. Illinois* was arguably dicta, if the Supreme Court adopts this broad interpretation of the word *interrogation,* then virtually everything crime victims say to police officers will be testimonial.

In *Cassidy v. State*,[12] the Texas Court of Appeals considered the hearsay statement of an assault victim to a police officer at the hospital where the victim was being treated for injuries. The court ruled that the police officer's interview of the victim did not constitute "interrogation" as that term was used in *Crawford*. Thus, the victim's statement was not testimonial.

In *State v. Forrest*,[13] the North Carolina Court of Appeals ruled that a kidnap victim's excited utterance to a police officer was not testimonial. The court wrote, "Just as with a 911 call, a spontaneous statement made to police immediately after a rescue can be considered 'part of the criminal incident itself, rather than as part of the prosecution that follows.' . . . Moore made spontaneous statements to the police immediately following a traumatic incident. She was not providing a formal statement, deposition, or affidavit, was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings. *Crawford* protects defendants from an absent witness's statements introduced after formal police interrogations in which the police are gathering additional information to further the prosecution of a defendant. *Crawford* does not prohibit spontaneous statements from an unavailable witness."[14]

In *Crawford*, the Supreme Court's chief concern was hearsay procured by the government for use in litigation. With this constitutional concern in mind, not all hearsay statements in response to police questioning should be testimonial.[15] The *Cassidy* and *Forrest* courts correctly held that statements to police officers in the field can be non-testimonial. Hopefully, as judges continue to grapple with this issue, they will take a case-by-case approach to the testimonial nature of statements to police.

Children's Hearsay Statements at Child Advocacy Centers

Since the mid-1980s, more than 300 child advocacy centers (CACs) have sprung up around the country to interview children in child abuse cases. Are children's statements during CAC interviews testimonial? CAC interviews serve several purposes:

(1) reduce the number of times children are interviewed,
(2) determine whether abuse occurred,
(3) gather forensic evidence,
(4) determine whether a child will be able to testify, and
(5) assess the child's mental health needs.

In the vast majority of CAC interviews, the forensic aspects of the interview predominate, and it is difficult to escape the conclusion that most CAC interviews are testimonial. Certainly this is so when a police officer conducts the interview to collect evidence. It is also true when a police officer or prosecutor observes the interview and suggests questions for the interviewer to put to the child.

Appellate courts are beginning to weigh in on whether CAC interviews are testimonial. In *People v. Geno*,[16] the Michigan Court of Appeals ruled that a CAC interview was not testimonial. The court wrote, "We conclude that the child's statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. The child's statement was made to the executive director of the Children's Advocacy Center, not to a government employee, and the child's answer to the question of

whether she had an 'owie' was not a statement in the nature of '*ex parte* in-court testimony or its functional equivalent.'"

On the other hand, the California Court of Appeals ruled in *People v. Sisavath*[17] that a CAC interview was testimonial. The California court wrote:

> The [CAC] interview took place on June 12, 2002. By that time, the original complaint and information had been filed and a preliminary hearing had been held. The deputy district attorney who prosecuted the case was present at the interview, along with an investigator from the district attorney's office. The interview was conducted by a "forensic interview specialist." Under these circumstances, there is no serious question but that Victim 2's statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."
>
> The People argue that the statement was not testimonial because the interviewer was "not a government employee"; the [CAC] is a "neutral location"; the interview might have been intended for a therapeutic purpose or related to removal proceedings [in juvenile court] and not intended for a prosecutorial purpose; the interview was not prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and it was not a police interrogation. They suggest that we should either hold that the interview was not testimonial or remand for a finding on the purpose of the interview.
>
> There is no need for a remand on this issue. None of the People's arguments are persuasive. The pertinent question is whether an objective observer would reasonably expect the statement to be *available for use* in a prosecution. Victim 2's interview took place after a prosecution was initiated, was attended by the prosecutor and the prosecutor's investigator, and was conducted by a person trained in forensic interviewing. Under these circumstances, it does not matter what the government's actual intent was in setting up the interview, where the interview took place, or who employed the interviewer. It was eminently reasonable to expect that the interview would be available for use at trial. . . .
>
> We have no occasion here to hold, and do not hold, that statements made in every [CAC] interview are testimonial under *Crawford*. We hold only that Victim 2's statements at the [CAC] interview in this case were testimonial.[18]

Given the overriding forensic purpose of CAC interviews, courts are likely to conclude, along with the California Court of Appeals in *Sisavath*, that CAC interviews are testimonial. Return to five-year-old Sally, discussed above. Recall that Sally was interviewed at a CAC. It is highly likely the judge will rule that Sally's videotaped CAC interview is testimonial and inadmissible unless Sally is able to testify in court and be cross-examined.

Are Hearsay Statements to Medical and Mental Health Professionals Testimonial?

Children disclose abuse to paramedics, nurses, doctors, and other medical professionals. Such statements often fall within the hearsay exceptions for excited utterances or medical diagnosis or treatment. But are hearsay statements to medical personnel testimonial under *Crawford*? If the professional's primary motivation in questioning a child is diagnosis or treatment, the answer should be no. Moreover, the fact that a professional is aware of the forensic implications of communicating with children should not change the result.

New Life for an Old Doctrine? Fresh Complaint of Rape or Sexual Assault

Centuries ago, English judges developed a doctrine called "fresh complaint of rape." The fresh complaint doctrine applies in rape and sexual assault prosecutions. Under the doctrine, the victim's initial—"fresh"—disclosure of rape or sexual assault is admissible in court to support the victim's credibility. In most states, the victim's "fresh complaint" is not considered hearsay.[19] The fresh complaint doctrine applies to statements by child victims. The victim's fresh complaint is admissible when the victim testifies. In many states, the victim's fresh complaint is also admissible when the victim does not testify.

In the 1980s and 1990s, states enacted special child abuse hearsay exceptions for reliable hearsay statements by children. As "child hearsay exceptions" spread across the country, prosecutors relied less and less often on the "fresh complaint" doctrine to admit children's disclosure statements. Indeed, in many states, the fresh complaint doctrine was falling into disuse. After *Crawford*, however, some hearsay statements that were once admissible under child hearsay exceptions will be inadmissible because they are testimonial. Faced with this prospect, in cases where the child does not testify in court, prosecutors are likely to return to the fresh complaint doctrine as a vehicle to gain admission for children's disclosure statements. In doing so, prosecutors will argue that *Crawford* does not block admission because a fresh complaint is not hearsay. It remains to be seen whether courts will approve this strategy.

Conclusion

The Supreme Court's decision in *Crawford v. Washington* changed the legal landscape regarding the admission of children's hearsay statements in criminal cases. In some cases, *Crawford* will prevent the use of hearsay that was formerly admissible. On the other hand, *Crawford* provides important protections for individuals accused of crime, and the Court's new approach is defensible on constitutional as well a policy grounds. In the coming months and years, lower courts will flesh out the meanings of "testimonial" and will create a roadmap for the new terrain. In the long run, *Crawford* will not impede child protection.

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[1] Whether or not a child's words are hearsay is more complicated than the text indicates. For present purposes, however, the text is sufficient.

[2] 124 S. Ct. 1354 (2004).

[3] *See People v. Martinez*, 2004 WL 1078044 (Ill. Ct. App. 2004); *Cooley v. State*, 2004 WL 1175155 (Md. Ct. Special App. 2004).

[4] *See Commonwealth v. Given*, 808 N.E.2d 788, 794 n. 9 (Mass. 2004)(proceeding for civil commitment of sexually dangerous person; "The *Crawford* case has no direct bearing on this case, because, as we have made clear, the confrontation clause does not apply to civil commitment proceedings.").

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