Child Forensic Interviews After *Crawford v. Washington:* Testimonial or Not?

Allie Phillips, JD

With the issuance of *Crawford v. Washington*[1] by the United States Supreme Court on March 8, 2004, widespread confusion and concern swept through the child protection communities in regard to one issue: **Are forensic interviews of children "testimonial statements" according to *Crawford*, thus requiring the child to take the witness stand?**

This article will address:

- whether forensic interviews are testimonial statements under the new rule set forth in *Crawford*;
- how courts across the country are analyzing *Crawford* in relation to child forensic interviews;
- arguments prosecutors can make to have forensic interviews declared non-testimonial, and
- how to avoid having forensic interviews deemed testimonial.

Crawford and the Forensic Interview

In *Crawford*, the primary issue was whether a tape-recorded custodial statement made by the defendant's wife could be admitted as substantive evidence against the defendant when the wife did not testify at trial as a result of invoking the marital privilege. The prosecutor in *Crawford* was permitted to introduce the audio tape at trial since statements made by the defendant's wife were statements against her penal interest. The United States Supreme Court overturned the conviction in *Crawford* and set forth a new rule regarding the admission of hearsay testimony when the witness is unavailable to testify. **The new rule provides: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation."[2]** Thus, if an out-of-court statement by a witness is deemed testimonial, the Sixth Amendment Confrontation Clause requires that the witness testify and be subject to confrontation or cross-examination before admitting any out-of-court statements.

Before *Crawford*, courts would revert to the rules of evidence and a line of cases stemming from *Ohio v. Roberts*[3] to assess whether out-of-court hearsay statements would be admissible at trial. The *Crawford* Court overturned *Roberts* and set forth a new rule that requires witnesses to testify at trial, and be subject to cross-examination, before admitting any out-of-court testimonial hearsay statements from that witness. Unfortunately, the Supreme Court chose not to provide a solid definition of "testimonial statement" except to say that it includes, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations."[4] Other courts have subsequently held that testimonial statements also include "extrajudicial statements contained in formalized testimonial materials," such as testimony from a preliminary hearing,[5] before a grand jury,[6] at a deposition,[7] or at a former trial;[8] confessions to police;[9] responses to police interrogation; and plea allocutions of co-defendants that implicate other defendants.[10] If an out-of-court statement is taken by a government agent[11] (e.g., police officer, prosecutor, or child protective services (CPS) worker employed by the state), the statement will be considered testimonial so long as the witness reasonably could expect that statement to be used at a later trial. So the question becomes: Can a child reasonably understand and expect that his or her statements made during a forensic interview could later be used in court?

How Courts Are Interpreting *Crawford* in Relation to Forensic Interviews

Crawford sets forth two factors to consider when determining whether an out-of-court hearsay statement of a non-testifying witness is testimonial. **First, is a government officer involved in the production of the testimony/statement? And second, would the declarant reasonably expect the statement, when made, to be used prosecutorially?** Courts have primarily focused on the first prong of the analysis and have spent little time addressing pertinent child development research and whether young children can reasonably understand that their statements might be used in trial. Many courts have focused solely on whether the interviewer is a governmental agent and, if so, have declared the interview testimonial solely on that factor.

The cases cited below relate to child abuse prosecutions that proceeded to trial without the child's testimony. These cases are outlined to demonstrate how courts are addressing the governmental agent factor yet are not fully addressing the child's reasonable expectation factor. When children are available and testify at trial, *Crawford* does not bar admitting videotaped forensic interviews or other admissible hearsay statements.[12] If the child freezes on the witness stand or has lack of memory to all the details of the abuse, some courts have ruled that the presence of the child on the witness stand, and the availability for cross-examination, though limited, satisfies confrontation and *Crawford*.[13] The new rule of *Crawford* only applies if the child is not available to testify at trial.

In *State v. Mack*,[14] the court ruled that a social worker, who took over a forensic interview started by a police officer, was a governmental agent and was serving as a proxy for the police when finishing the interview. A three-year-old witness was the subject of the forensic interview. In a pre-trial ruling several days after the issuance of the *Crawford* decision, the trial court found that the child was incompetent to testify. The court further found that the social worker was eliciting statements from the child so that the police could videotape the interview for the investigation. As a result, the forensic interview was declared testimonial and was not admissible due to the child's incompetency to testify. On appeal, the prosecution asked the court to look at the child's intent in making statements during the forensic interview. Unfortunately, the child's intent in making statements is not the factor outlined in *Crawford*; rather, whether the child could reasonably expect her statements to later be used in court. Thus, the court failed to address whether the three-year-old child understood that the statements might later be utilized prosecutorially.

The employment status of a police officer was addressed in *People v. R.F.*[15] This case involved a three-year-old victim who was interviewed by a police officer subsequent to making disclosures of sexual abuse to her mom and grandmother. At trial, all statements made by the child were admitted without the child testifying. These statements were admitted before the decision in *Crawford* was announced. The defendant was convicted and on appeal he raised a *Crawford* violation. Although the court ruled that statements made to family were non-testimonial, the court found that the forensic interview was testimonial because the officer "was acting in an investigative capacity for the purpose of producing evidence in anticipation of a

criminal prosecution." The appeal court noted the language regarding the reasonable expectations of the declarant when making out-of-court statements, yet failed to analyze this issue in relation to the three-year-old victim. The defendant's conviction was upheld in spite of the violation that was deemed harmless error in light of other evidence of his guilt.

In *State v. Bobadilla*,[16] a three-year-old victim disclosed penetration by the defendant to his mother. At a forensic interview with a CPS worker and police officer, the child also disclosed penetration. At a competency hearing, the three-year-old was declared incompetent to testify. At trial, and prior to the decision in *Crawford*, the prosecutor admitted all the child's statements, including the videotaped forensic interview. The Minnesota Court of Appeals subsequently applied *Crawford* and declared the forensic interview to be testimonial and not admissible because the "…child-protection worker interviewed [the child] in the presence of [the] Detective. She asked [the child] whether anyone had hurt him, who hurt him, and how he was hurt. These circumstances clearly indicate that the interview was conducted for the purpose of developing a case against Bobadilla, and therefore, the answers elicited were testimonial in nature." However, the child's statement to his mother was not testimonial because the mother questioned the child about the redness around his anus out of concern for his health, not because she expected to develop a case against Bobadilla. The Minnesota Court of Appeals failed to address the reasonable expectation factor.[17]

T.P. v. State[18] addressed Alabama's Tender Years statute, which provides for hearsay statements of children under age 12 to be admitted at trial if the child testifies or if the child is found to be unavailable. The eight-year-old child victim was deemed unavailable to testify due to a finding of emotional trauma by the court. Statements by the child during an interview conducted by a police investigator and witnessed by a social services worker as part of a criminal investigation were admitted at trial. The defendant was convicted and while his appeal was pending, the *Crawford* decision was issued. The appeals court found that the forensic interview was intended as an investigative tool for a potential criminal prosecution, thus being similar to a police interrogation, and therefore fell within the definition of "testimonial." Again, the court did not address whether the eight-year-old child reasonably expected that his statement could later be used in court.

In *People ex rel. R.A.S.*,[19] a juvenile defendant was convicted of molesting a four-year-old child. The child disclosed to his mother and then during a videotaped forensic interview with a trained police officer. At trial, the child was to go through a competency hearing, but the hearing was not held. Instead, the child's statements to his mother were admitted at trial, as well as the videotaped forensic interview. The court did not make a conclusion about the child's unavailability since the prosecutor and defense attorney agreed that the child did not meet the competency requirements. On appeal, the *Crawford* decision was rendered; the court applied *Crawford* and found that the statements by the child to the police officer were testimonial and investigative in nature. The court did not address whether the child victim could reasonably expect her statements to later be used in court. Although the juvenile defendant stipulated that the child was incompetent to testify, the defendant did not waive his confrontation rights. The court found that the defendant only waived unavailability of the child to testify and did not waive the right to confront the child. The hearsay statements to the mother were not addressed on appeal. The conviction in this case was reversed and the case was remanded for a new trial in light of *Crawford*.

In addressing interviewers who are employed for privately funded child welfare centers, the court in *People v. Geno*[20] held that the director of a non-governmental Children's Assessment Center was not a governmental employee. Although Child Protective Services, a state agency, arranged for the interview, this did not impact on the court's decision. "At the interview, the victim asked the interviewer to accompany her to the bathroom. The interviewer noticed blood in the child's pull-up and asked the child if she 'had an owie?' The child answered, 'yes, [the defendant] hurts me here,' pointing to her vaginal area." The court held that "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.'"

One case that addressed whether a young child could reasonably understand that statements made in the forensic interview would be used in trial is *People v. Vigil*.[21] The defendant was charged and convicted of having sexually assaulted the seven-year-old son of a co-worker in the co-worker's home. At trial, the child's father testified that he witnessed the defendant leaning over his child and both were partially undressed. When the defendant fled the home, the child was frightened and confused but disclosed anal penetration. The child also disclosed to his father's friend that his "butt hurt." A police officer completed a videotaped interview with the child. Portions of the videotaped interviewed were played at trial after the child was found incompetent to testify. The Colorado Court of Appeals overturned the conviction and ruled that the videotaped statement by the child was testimonial and violated *Crawford*.

> We conclude that the videotaped statement given by the child to the police officer in this case was "testimonial" under the *Crawford* formulations of that concept. In so concluding, we reject the People's argument that the statement could not be considered testimonial because it was not made during the course of police interrogation and because a seven-year-old child would not reasonably expect his statements to be used prosecutorially. … The police officer who conducted the interview had had extensive training in the particular interrogation techniques required for interviewing children. At the outset of the interview, she told the child she was a police officer, and, after ascertaining that the child knew the difference between being truthful and lying, she told him he needed to tell the truth. Thus, the absence of an oath, which in any event is not a requirement under *Crawford* for police interrogations, did not preclude the child's statements from being testimonial. … Nor can the statements be characterized as non-testimonial on the basis that a seven-year-old child would not reasonably expect them to be used prosecutorially. During the interview, the police officer asked the child what should happen to the defendant, and the child replied that the defendant should go to jail. The officer then told the child that he would need to talk to "a friend" of hers who worked for the district attorney and who was going to try to put defendant "in jail for a long, long time." This discussion, together with the interviewer's emphasis at the outset regarding the need to be truthful, would indicate to an objective person in the child's position that the statements were intended for use at a later proceeding that would lead to punishment of defendant.[22]

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In *Snowden v. State*,[23] the Maryland Supreme Court ruled that forensic interviews of children ages eight and 10, conducted by a CPS worker, were testimonial and would require testimony by the children at trial in order to admit the videotaped forensic interview. In its opinion, the court found that the CPS worker was a governmental agent, and that although young, the child victims were aware that their statements were being taken because the police were involved. The Maryland Supreme Court imposed an objective ordinary person standard on these child victims, pointed out that the interviews were conducted at a county-owned facility, and that the purpose of the CPS worker conducting the interview was to gather evidence for prosecution. However, the court did acknowledge that some children may not understand the purpose of a forensic interview and said, "Although we recognize that there may be situations where a child may be so young or immature that he or she would be unable to understand the testimonial nature of his or her statements, we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants."

To date, few courts have addressed whether young children can reasonably expect statements made at a forensic interview could later be used in court. The following information is provided to assist prosecutors and allied professionals in this regard.

Arguments That Forensic Interviews Are Not Testimonial

Employment Status of Interviewers

In *Crawford*, the Court took aim at witness statements made to "government officers in the production of testimony with an eye toward trial." The Court noted that casual remarks made by a witness to a friend or family member are far different than a witness making a formalized statement to a police officer regarding a criminal investigation. Many forensic interviewers are now concerned that the status of their employment with a state or governmental agency may automatically label their forensic interview as "testimonial." For instance, if police officers or state-employed CPS workers are trained forensic interviewers, does the status of their employment by a governmental unit automatically deem their forensic interviews as testimonial? Since the government-agent factor is one prong in determining whether a statement is deemed testimonial, it is fair to say that police officers, prosecutors, and state-employed CPS workers are governmental agents. Likewise, interviewers who are employed by a privately owned facility can argue that they are not governmental agents.[24] However, the analysis does not end there. The next factor to consider is: Did the young children during the forensic interview reasonably expect their statements would later be used in court?

Young Children Cannot Reasonably Expect Their Statements Will Be Used in Court

The *Crawford* factor that has been least addressed by courts in determining whether a statement is testimonial is: Would the declarant reasonably expect the statement to be used prosecutorially? In essence, does a child understand that during a forensic interview, the statements he or she makes might later be used in a criminal prosecution? Research has shown that young children do not understand what "court" is and, therefore, are unable to understand that statements made in a forensic interview could be used in that forum. "Testifying is anxiety-producing for most adult witnesses. Adults, however, are sufficiently knowledgeable about the legal system to place their testimony in context. In general terms, adults understand what happens in court and what is expected of them. This knowledge helps adults manage the stress of testifying. By contrast, many children have little idea of what to expect in court. Some young children believe that they will go to jail if they give the 'wrong answer,' or that the defendant will yell at them."[25] Following are six of the foremost studies regarding children's understanding of court.

1989 Saywitz Study: "Children's Conceptions of the Legal System"

Dr. Karen Saywitz published a study in 1989 that focused on developmental differences in children's understanding of the legal system and what contributes to that understanding.[26] Children ages four to 14 were divided into age groups.[27] Half of the children were actively involved in court cases. The study focused on eight court-related concepts: "court," "jury," "judge," "witness," "lawyer," "bailiff," "court clerk," and "court reporter." All the children were asked questions and shown illustrations of these eight concepts and asked to tell what they knew about the concept. The terms "bailiff," "court clerk" and "court reporter" were removed from the final results as the children in all age groups did not understand those concepts. Surprisingly, children with more actual court experience demonstrated less accurate and less complete knowledge than children with no court experience. The researchers surmised this could be for two reasons. First, children who were involved in court cases may have emotional difficulties that interfere with cognitive abilities because they were from dysfunctional families; and second, actual court experience for children may be confusing and chaotic, thus making accurate knowledge of the system more difficult. The chart below demonstrates the percentage of children in each age group that showed accurate understanding of each of the eight concepts:

Concept	Age Group 4-7 years	Age Group 8-11 years	Age Group 12-14 years
Court	0.06% accurate	74% accurate	100%accurate
Jury	0% accurate	21% accurate	73% accurate
Judge	0.06% accurate	93% accurate	91% accurate
Witness	0.11% accurate	86% accurate	100% accurate
Lawyer	0% accurate	93% accurate	100% accurate
Bailiff	0.06% accurate	0% accurate	0.09% accurate
Court Clerk	0% accurate	0% accurate	0.18% accurate
Court Reporter	0% accurate	50% accurate	64% accurate

Children between the ages of eight and 11 begin to have a more accurate understanding of the court system and the primary people involved (e.g., jury, judge, witness, and lawyer). However, children in the younger age group have little to no understanding of the court system's players much less the actual processes contemplated at the time of a forensic interview. Therefore, under the formulation set forth in *Crawford*, children in this age grouping could not reasonably expect that statements made during a forensic interview could later be used prosecutorially.

Additional concepts were tested in this study that further demonstrate when children understand court-related concepts. First, all children were asked: "What makes a jury/judge believe a witness?"

The children in the older age group were able to identify factors used by judges and juries to determine credibility of witnesses, whereas the four- to seven-year-old group assumed witnesses always tell the truth and are believed. Whether the children were in the experienced or non-experienced court group did not affect this result. Second, all children were asked: "How do they [judge/jury] decide who wins the case in court?" The majority of eight- to 14-year-olds were inaccurate in their overall understanding. They generally believed that judge and jury decision making are dependent on each other. Some children in this age group believed that the judge and jury discuss the case together and that the judge can change the jury's verdict. Only three children (in the 12-14 age group) understood that the judge and jury were independent from each other. Third, all children were asked the following questions: "What happens when people tell the truth in court? What happens when people tell a lie in court? Why is it important that people tell the truth in court?" Here, awareness was significantly different across age groups, but not across levels of court experience. A majority of the four- to seven-year-olds could not demonstrate any awareness of the court processes of gathering and determining the truth of evidence. Many of these children believed that the court's goal was to "punish the criminal or give the child to one of his parents," rather than understanding the actual goals of collecting, presenting, and evaluating evidence. Further, these children held the naïve view that evidence would magically present itself and be automatically believed.

Overall, this study demonstrated the following for each age group:

(**1) Four- to Seven-Year-Olds:** As a result of their egocentric view of the world, this group of children understood some features of the legal system, but not any definable features. For instance, some children understood that a judge is there to talk and listen, but did not understand that a judge is in charge of the courtroom or determines a sentence. This group was unable to meet the criteria of accuracy for any of the concepts listed above. These children could describe court-related personnel as sitting, talking, and helping but could not say how these people perform their roles nor differentiate between these varied roles. For example, the children interchanged the roles of court, police, and prison and were confused as to whether judges remain judges when they go home at night. This group also understood that witnesses had to tell the truth, but only thought that witnesses did so to avoid being punished. Additionally, these children believed that all evidence was necessarily true. The children had blind faith that witnesses tell the truth and, if witnesses themselves, would be surprised by a confrontational cross-examination or repeated interviews which are not consistent with that blind faith. These children further believed that the court process ultimately led to jail and the children could only describe court from the point of view of someone who was in trouble.

(2) Eight- to 11-Year-Olds: Children of this group were able to view court as a place to work out disagreements, but still struggled with defining features between juries and judges. However, these children were better able to understand that judges determine guilt or innocence and decide punishment. They also viewed court similar to church ("You have to be quiet and serious"), and that lawyers help people, are on your side (which shows some understanding of the adversarial process), and stand up for you in court (which shows representational awareness). This group of children showed increased understanding of the differing roles of court-related people, the court process and its function. These children were less likely to confuse the roles of the court and the police. Under the age of 10, children do not understand what a jury does and they still confuse the word with similar sounding words. Between ages eight and 11, the children studied did not understand that impartial people sit as jurors and instead believed that victims, witnesses, and the defendant's friends are on the jury. This group did not understand that the jury decides the outcome of the case.

(3) 12- to 14-Year-Olds: This group was able to understand the court process and place it in context with the overall government. At this age, these children became aware of the function of juries, but are still confused about the role of the jury in making decisions. Some children believe that the judge and jury work together to make a decision. This demonstrates that children do not understand the need to communicate to the jury rather than the judge. The children in this group could understand factors that would be considered when determining credibility (e.g., facial expressions, reputation, personality, and comparison with corroborating evidence).

1990 Saywitz Study: "Children's Knowledge of Legal Terminology"

Dr. Saywitz conducted a second study that analyzed whether age- and grade-related patterns would be found when testing children on commonly used court terms.[28] Children were grouped according to school grades, given a list of 35 legal terms and asked to tell everything they knew about each word. The study showed that some legal terms had significant grade-related trends. Some terms, which were accurately defined by the sixth graders, were largely inaccurate for the kindergartners, such as: "oath," "deny," "lawyer," "date," "sworn," "case," "jury," "witness," "judge," "attorney," "testify," and "evidence." On the other hand, some legal terms did not have grade-related trends because children in all three groups equally understood or misunderstood the term. Terms that were easy for all groups of children to describe accurately were: "lie," "police," "remember," "truth," "promise," and "seated." Terms that were difficult for all groups of children to describe accurately were: "charges," "defendant," "minor," "motion," "competence," "petition," "allegation," "hearing," and "strike."

The study also considered if the age of the children contributed to whether an unfamiliar word was mistaken for a similar sounding word (e.g., jury was mistaken for jewelry) or whether a word had another meaning outside the court system (e.g., "motion is like waving your arms"). These two types of errors were found to be grade-related insofar as the sixth graders made significantly fewer of these errors than the third graders or kindergartners. For example, 19 of 20 kindergartners and 18 of 20 third graders erred with the word "hearing," whereas only seven of 20 sixth graders made the same error. This demonstrated that the older children were able to understand that familiar words may have a different meaning in the court system.

This study demonstrated that "a majority of legal terms tested were not accurately defined until the age of 10."[29] Of interest is that younger children admitted lack of knowledge or unfamiliarity with a legal term more frequently than older children. Thus, older children may answer a question concerning a court term, yet not understand the term or the question. On the other hand, younger children may think that they understand the meaning of the term and may testify accordingly, when in fact they have a different meaning in their mind than the adult does. The younger children's resistance to the prompt, "Could it mean anything else in a court of

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law?" suggests that they had limited metacognitive ability to foresee that a term would mean something else in a different, potentially unfamiliar, context. Moreover, it may be difficult for them to shift from one context to another or to continue to generate alternate solutions.[30] However, by third grade, children may be able to fit familiar terms into a different context, such as a court setting.

To summarize, even if a child within the age-frame of this study is informed during a forensic interview that his or her statements may be used in a court proceeding, this does not necessarily mean that the child understands what court is or what the purpose of court is. On the other hand, if such information is not provided to a child during a forensic interview, it is not fair to expect the child intuitively to understand the function of court or that the interview may be used in a criminal prosecution.

1989 Warren-Leubecker Study: "What Do Children Know About the Legal System and When Do They Know It?"

This study from Australia researched the developmental trends in children's perceptions of the legal system, court-related personnel, reasons for going to court, and how decisions are made.[31] The study involved children ranging from two years and nine months to 14 years in age. The children were asked 23 questions, six of which are included below:

1. Do you know what a courtroom is? 18% of three-year-olds, 40% of six-year-olds, 85% of seven-year-olds, and up to 100% of 13-year-olds answered "yes."
2. Who is in charge of the courtroom? 82% of the three-year-olds indicated they did not know and the remaining 18% answered incorrectly (e.g., a doctor). Answering the judge was in charge of a courtroom were 15% of four-year-olds, 25% of five-year-olds, 56% of six-year-olds, 73% of seven-year-olds, and 92% of eight-year-olds.
3. Who else is in the courtroom (besides the judge)? The chart below demonstrates the percentage of correct answers according to age.

	Age in Years/ Percentage Correct										
	3	4	5	6	7	8	9	10	11	12	13
Jury	0	0	3	4	8	13	19	28	38	38	40
Lawyer	0	0	3	0	8	15	31	44	36	40	20
Witness	0	11	3	0	0	28	23	20	16	19	39
Police	0	11	10	26	15	36	26	17	23	34	30
Defendant	0	7	0	0	8	15	19	28	27	21	20
Plaintiff	0	0	0	0	4	8	10	15	19	17	20
Audience	9	0	0	4	4	3	2	4	7	2	20
Bailiff	0	0	0	4	4	0	4	6	9	15	0
Court Clerk/ Reporter	0	0	0	0	0	3	3	14	15	9	0

4. What does a lawyer do? Children under the age of seven did not know what a lawyer does. When children reached age 10 they began to distinguish between attorneys who prosecute or defend others.
5. What is the jury and what do they do? A large number of children mistook the word "jury" for "jewelry" and were unable to answer this question. In general, it was not until age 10 that a significant number of children could understand that a jury is involved in decision-making. However, at age 12, 30% of these children still did not understand the role of a jury in court.
6. Why do people go to court? A significant number of younger children did not know or were not able to provide a reason as shown by these percentages: 91% of three-year-olds; 75% of four-year-olds; 62% of five-year-olds; 43% of six-year-olds; 27% of seven-year-olds; 15% of eight-year-olds; and not until age 13 were all children able to provide an answer.

The results of this study clearly demonstrate that a majority of children between three and four years old do not understand court-related terms, the players involved in court proceedings, the purpose of court proceedings, or the most basic level of the purpose of court. Again, this study is consistent with the above-mentioned prior studies in showing that children under the age of 10 do not understand the court process objectively and consequently cannot understand that their out-of-court statements may be used in court.

1989 Flin Study: "Children's Knowledge of Court Proceedings"

A study from the United Kingdom replicated the findings in the studies above.[32] Children ages six, eight, and 10 were given 20 legal terms, as well as questions regarding court procedures. Consistent with other studies, the 10-year-old children understood more legal terms than the younger children. Only four terms (i.e., "policeman," "rule," "promise," and "truth") did not show a significant difference in accuracy among the age groups. However, terms such as "going to court," "evidence," "jury," "lawyer," "prosecute," "trial," and "witness" were clearly not understood by the six- and eight-year-old children and only nominally by the 10-year-olds. When asked what kind of people go to court, children ages six and eight did not know or believed that only bad people went to court. However, by age 10, these children understood that all types of people could be involved in court proceedings.

1997 Aldridge Study: "Children's Understanding of Legal Terminology"

A study of British children ages five to 10 focused on child witnesses' understanding of the legal system.[33] This study found that children do not begin to understand what a witness is or what a judge is/or does until age 10; none of the children in the study had ever heard the word "prosecution," except for one child who said "prosecution's when you die. You get hanged or something awful like that." In defining what court is, the children studied had the following answers: One five-year-old stated that "a court is a sort of jail"; one seven-year-old said that witnesses "whip people when they are naughty"; another seven-year-old said "the police think that witnesses have done something naughty"; and one seven-year-old described a judge as "someone who gets money, like at a pet show."

1998 Berti Study: "Developing Knowledge of the Judicial System"

Similar results as the Saywitz (1989), Warren-Leubecker (1989), and Flin (1989) studies were found in an Italian study from 1998.[34]

Of particular interest were the student responses to the question about what court is: 75% of first graders (mean age 6.7) did not know; 45% of third graders (mean age 8.6) did not know; 15% of fifth graders (mean age 10.7) did not know; and 5% of eighth graders (mean age 13.8) did not know. In response to describing a public prosecutor, all first and third graders either did not know or had never heard of a prosecutor; only one of 20 fifth graders and four of 20 eighth graders accurately described a prosecutor. The younger children similarly had difficulty understanding or describing a judge, witness, lawyer, or jury. None of the first and third graders understood that a judge must study law to be a judge, whereas 18% of fifth graders and 94% of eighth graders understood this concept. Therefore, young child witnesses or victims may not understand the role of a judge when testifying.

Overall, results of these six research studies are similar: Each indicates that children under the age of 10 do not comprehend legal terms, the nature or process of court proceedings, or the individuals involved in court proceedings. As such, how can young children independently appreciate that statements made during a forensic interview would later be introduced in a court proceeding? These studies demonstrate that an objective person standard cannot be applied to young children under the age of 10. Instead, the above research amply supports the creation of a "reasonable child" standard in determining whether out-of-court statements by children are testimonial in light of the *Crawford* decision.

Pitfalls to Avoid in Forensic Interviews

Truth/Lie Tasks

Many protocols and jurisdictions incorporate a truth/lie task as part of every forensic interview to determine if the child understands the need to be truthful. Although there are many pros and cons regarding the use of truth/lie tasks in forensic interviews (a discussion far beyond the scope of this article), be aware that performing this task could be a factor in determining whether a forensic interview is testimonial. Because a truth/lie determination is required of young children prior to testifying in court, a judge may rule that the use of a similar task in a forensic interview incorporates a courtroom oath into the interview setting, thus making the forensic interview anticipatory of litigation or trial. This issue has only been addressed in one post-*Crawford* case to date. In *People v. Vigil*,[35] the Colorado Court of Appeals noted that "the interviewer's emphasis at the outset regarding the need to be truthful would indicate to an objective person in the child's position that the statements were intended for use at a later proceeding that would lead to punishment of defendant."

Many forensic interviewers wonder about the legitimacy of forensic interviews if a truth/lie test is not conducted with the child. The RATAC Protocol[36] developed by CornerHouse in Minneapolis, Minnesota, and taught as part of APRI's Finding Words forensic interview training, avoids this concern by teaching interviewers how to assess competency during a forensic interview, as well as training members of the multidisciplinary team (MDT) to take every aspect of the child's statements and corroborate with independent evidence whenever possible. For instance, if the child discloses that she remembers the first incident of abuse because she missed four days of school immediately afterward, members of the MDT should contact the child's school and locate school attendance records that would support the child's statement. By corroborating the child's forensic interview statements in this manner, a truth/lie test during the interview is not needed because independent evidence validates the child's statements.

Be sure to educate forensic interviewers regarding possible *Crawford*-related concerns if incorporating a truth/lie protocol during the interview.[37] Each jurisdiction should decide how to handle a truth/lie component in a forensic interview and should comply with applicable laws and mandates.

Avoid Seeking the Child's Input Regarding the Investigation

Most protocols and forensic interview guidelines do not ask a child during a forensic interview what he or she would like to happen with the investigation and/or to the suspect. Imposing a burden on the child to provide a response to these questions is unfair given the possible trauma the child has already experienced. Further, the interviewer is not necessarily in a position to honor the child's requests should the child wish to be reunited with the abuser. For example, if an abused child informs an interviewer that he or she wants to return to the home where the suspect resides, would the interviewer follow the child's wishes? If the child informed the interviewer that he or she did not want the abuser to be criminally prosecuted, would the interviewer comply with this request? Asking the child what he or she would like to see happen is not only inappropriate, but it can lead to legal consequences in relation to *Crawford*, as the court may label the forensic interview statements as testimonial. As explained in *People v. Vigil*,[38] these questions bring possible court action to the child's attention, negating any argument that the child could not reasonably comprehend that the forensic interview could later be used in court. Educating forensic interviewers to avoid these questions during the forensic interview will not only protect the interview process, but also protect the child.

Conclusion

As courts continue to struggle to define which out-of-court hearsay statements are "testimonial," the legal implications for child abuse investigations and prosecutions will continue to change. Although some guidance can be drawn from cases that interpret *Crawford*, it is expected that courts across the country will provide conflicting opinions given that the new rule regarding "testimonial statements" was not fully defined in *Crawford*. As the legal landscape of hearsay statements and forensic interviews changes to accommodate the *Crawford* decision, the American Prosecutors Research Institute will provide additional articles and suggestions. To receive continuing updates on post-*Crawford* cases, please contact APRI at (703) 549-4253 or visit our Web site at www.ndaa-apri.org.

About the Author

Allie Phillips is a senior attorney with APRI's National Child Protection Training Center and National Center for Prosecution of Child Abuse in Alexandria, Virginia. The author wishes to thank Jodi Furness, former staff attorney, and Naomi Meyer, executive assistant with the National Child Protection Training Center; Taya Moxley-Goldsmith, staff attorney with the National Center for Prosecution of Child Abuse; and Jennifer Anderson with CornerHouse Interagency Child Abuse Evaluation and Training Center in Minneapolis, for their assistance with this article.

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Notes

1. 514 U.S. 36 (2004).

2. *Id*. at 54.

3. 448 U.S. 56 (1980). The *Roberts* Court held that if a witness becomes unavailable at trial, the prosecutor has the burden to prove unavailability of that witness and that the hearsay statement fell into a firmly rooted exception, or has "indicia of reliability" or trustworthiness.

4. *Crawford*, 514 U.S. at 54.

5. *State v. Young*, 87 P.3d 308 (Kan. 2004); *People v. Steward*, 2004 Mich. App. LEXIS 2110 (2004).

6. *People v. Patterson*, 808 N.E.2d 1159 (Kan. 2004) (grand jury testimony generally not subject to cross-examination and therefore not allowed at trial).

7. *Liggins v. Graves*, 2004 U.S. Dist. LEXIS 4889 (S.D. Iowa 2004).

8. *United States v. Avants*, 367 F.3d 433 (5th Cir. 2004).

9. *State v. Pullen*, 594 S.E.2d 248 (N.C. Ct. App. 2004) (co-defendant confession is testimonial and cannot be admitted against a defendant unless the co-defendant testifies and is subject to cross-examination); *State v. Cutlip*, 2004 Ohio 2120 (2004); *Brooks v. State*, 132 S.W.3d 702 (Tex. App. 2004).

10. *United States v. Massino*, 319 F.Supp 2d 295 (E.D.NY 2004).

11. *United States v. Mikos*, 2004 U.S. Dist. LEXIS 13650 (N.D. Ill. 2004) (United States Health and Human Services agents).

12. See, *Idaho v. Wright*, 497 U.S. 805 (1990); *People v. Argomaniz-Ramirez*, 102 P.3d 1015 (2004) ("prior recorded statements made by children to law enforcement officials may be introduced into evidence when the children testify at trial"); *Somervell v. State*, 29 Fla. L. Weekly D 1739 (Fla. Dist. Ct. App. 5th Dist 2004) (a videotaped forensic interview, conducted by a police officer, of the eight-year-old victim was properly admitted at trial after the child victim had already testified).

13. In *People v. Phan*, 2004 Cal. App. Unpub. LEXIS 5047 (Cal. 2004), the child victim testified at trial concerning statements she made to police officers regarding sexual assault. At trial, the child victim had poor recollection regarding police interviews. In a *Crawford* analysis, the court found that confrontation was satisfied because the victim testified and was subject to cross-examination. The fact that the victim had poor memory and was not able to be cross-examined fully did not require reversal. Similarly, in *People v. Warner*, 199 Cal. App. 4th 331 (Cal. App. 3d Dist. 2004), the victim was three years old at the time of the abuse and four years old at the time of trial. In a forensic interview, the victim said the touching by her dad happened lots of times. The victim's mother telephoned defendant (her husband) in a phone sting and he admitted to touching the child. In an interrogation with the detective, the defendant admitted to three touches. At trial, the child did not recall the forensic interview and only admitted to one touching on the witness stand. The prosecutor moved to admit the defendant's statement regarding the additional touches and argued there was sufficient corpus from the victim's testimony to admit the statement of the defendant. The court found that since the victim testified at trial and was subject to cross-examination, in spite of her lack of memory, the defendant's statement could come in as there was sufficient corpus established and no *Crawford* violation.

14. 337 Or.586 (2004). See also, *People v. T.T. (In re T.T.)*, 815 N.E.2d 789 (Ill. App. Ct. 2004) (statements made by the child to a Illinois Department of Children and Family Services (DCFS) investigator and police officer were deemed testimonial due to their status as governmental agents).

15. 2005 Ill. App. LEXIS 98 (Ill. Ct. of App. 2005).

16. 690 N.W.2d 345 (2004).

17. The Minnesota Supreme Court has accepted this case for review and the American Prosecutors Research Institute filed an amicus brief addressing the child development research literature and requested the court to adopt a reasonable child standard.

18. 2004 Ala. Crim. App. LEXIS 236 (Ala. Crim. App. 2004).

19. 2004 Colo. App. LEXIS 1032 (2004).

20. 261 Mich. App. 624 (2004).

21. 104 P.3d 258 (Colo. 2004). The Supreme Court of Colorado has accepted this case on appeal.

22. *Id*. at 262-263.

23. 867 A.2d 314 (Md. Sup. Ct. 2005).

24. See, *People v. Geno*, 261 Mich. App. 624 (2004).

25. John E. B. Myers, Karen J. Saywitz, & Gail S. Goodman, "Symposium: Child Abuse: Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony," 23 *Pacific Law Journal* 3 (1996).

26. Karen Saywitz, "Children's Conceptions of the Legal System: Court Is a Place to Play Basketball," *Perspectives on Children's Testimony*, 131-157 (S.J. Ceci, D. F. Ross, & M. P Toglia, eds., 1989).

27. Group One (18 children age four to seven), Group Two (19 children age eight to 11) and Group Three (11 children age 12 to 14). The children were also divided into High-Legal-Experience Group (if they were actively involved in a court case by being a victim of abuse or being involved in a custody dispute) or Low-Legal-Experience Group (if they had not been involved in a court case).

28. Karen Saywitz, Carol Jaenicke, & Lorinda Camparo, "Children's Knowledge of Legal Terminology," 14 *L. & Hum. Behav.* 523 (1990).

29. *Id*. at 531.

30. *Id*. at 532.

31. Amye Warren-Leubecker, Carol S. Tate, Ivora D. Hinton, & Nicky Ozbek, "What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research," *Perspectives on Children's Testimony* 158-183 (S.J. Ceci, D.F. Ross & M.P Toglia, eds., 1989).

32. Rhona H. Flin, Yvonne Stevenson, & Graham M. Davies, "Children's Knowledge of Court Proceedings," 80 *British Journal of Psychology* 285-297 (1989).

33. Michelle Aldridge, Kathryn Timmins, & Joanne Wood, "Children's Understanding of Legal Terminology: Judges Get Money at Pet Shows, Don't They?" 6 *Child Abuse Rev*. 141-146 (1997).

34. Anna Emilia Berti & Elisa Ugolini, "Developing Knowledge of the Judicial System: A Domain-Specific Approach," 159(2) *Journal of Genetic Psychology*, 221-236 (1998).

35. 104 P.3d 258 (Colo. 2004).

36. The RATAC protocol was developed by CornerHouse Interagency Child Abuse Evaluation and Training Center in Minneapolis, Minnesota. RATAC stands for: Rapport, Anatomy Identification, Touch Inquiry, Abuse Scenario, and Closure.

37. In *People v. Vigil*, 104 P.3d 258 (Colo. 2004), a forensic interview of a seven-year-old victim was deemed testimonial and in doing so found the truth-lie component of the interview to be one of several factors by the court.

38. 104 P.3d 258 (Colo. 2004).

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