

# The Turbulent Aftermath of *Crawford v. Washington*: Where Do Child Abuse Victims' Statements Stand?

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## I. Introduction

The Supreme Court in *Crawford v. Washington* clarified the meaning of the Confrontation Clause and set forth a new bright line rule regarding the requirement of cross-examination for testimonial statements.<sup>1</sup> Because of this new rule, many, if not all, child abuse victims' statements are potentially inadmissible in court. This note addresses the changes of the evidentiary analysis in the wake of *Crawford*, some potential interpretations of the decision, and alternative methods to admit these crucial witness and victim statements into court.

## II. Purposes and Interpretations of the Confrontation Clause

The Sixth Amendment, although deceptively simple, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>2</sup> This clause has traditionally conferred two important rights upon the

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1. *Crawford v. Washington*, 541 U.S. 36 (2004); see *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005) (holding that *Crawford* is a new “watershed rule,” and is thus, retroactive), but see *Murillo v. Frank*, 402 F.3d 786 (7th Cir. 2005) (holding that *Crawford* did not apply retroactively on collateral attack).

2. U.S. CONST. amend. VI.

defendant—the right to be present in the courtroom during trial and the right to require prosecution witnesses to testify directly in defendant’s presence.<sup>3</sup>

The confrontation requirement of the Sixth Amendment has multiple goals, including: (1) discouraging deliberate perjury by prosecution witnesses by requiring testimony in public; (2) allowing an innocent defendant, in good faith, to correct any misconceptions or mistestimony upon hearing the witness’ story in public; and (3) through cross-examination, defendant can discover gaps and weaknesses in witness’ testimony, thereby allowing an opportunity for the witness to correct or clarify the testimony.<sup>4</sup> The Clause, which has the weight of history behind it, eliminates the need for intermediaries to testify and advances a symbolic purpose, as human nature regards face-to-face confrontation between the accused and accuser to be essential to a fair criminal prosecution.<sup>5</sup>

#### A. *Roberts* test of reliability

Prior to the surprising *Crawford* decision in 2004, the standard for addressing the admissibility of hearsay evidence was a two-prong test set forth in *Ohio v. Roberts*.<sup>6</sup> The first prong required the prosecution to demonstrate the unavailability of the witness intended to testify against the defendant.<sup>7</sup> For the second prong, the court would apply a test of reliability to determine if the evidence fell within a “firmly rooted hearsay exception” or demonstrated “particularized guarantees of trustworthiness.”<sup>8</sup> Although firmly rooted hearsay exceptions appeared relatively straightforward<sup>9</sup>, the scope of the *Roberts* doctrine, including the vague outlines of what constituted “particularized guarantees of trustworthiness,” was

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3. Carole A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1006 (2003); see *Reynolds v. U.S.*, 98 U.S. 145, 158 (1878).

4. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 688-89 (1996) [hereinafter *Sixth Amendment*].

5. Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 441-43 (2004) [hereinafter *Confrontation Clause Re-Rooted*] (stating that for many centuries, accused persons have had the right to confront the accuser and thus, it is important to continue to support such a right).

6. *Ohio v. Roberts*, 448 U.S. 56 (1980).

7. *Id.* at 65.

8. *Id.* at 66.

9. See, e.g., *White v. Illinois*, 502 U.S. 346 (1992) (explaining that firmly rooted hearsay exceptions include spontaneous declarations, statements made in the course of receiving medical treatment because of “at least two centuries” of acceptance for exceptions).

incredibly broad and proved to be unmanageable.<sup>10</sup>

The *Roberts* test diverted from the focus and purpose of the Confrontation Clause, and was plainly ineffective. First, the *Roberts* test categorized statements by hearsay exceptions, whereas the Confrontation Clause does not address hearsay directly.<sup>11</sup> Hearsay statements, the out of court statements offered for the truth of the matter asserted, do not always effect the right of the defendant to be confronted by his/her accusers, causing the *Roberts* test to be overbroad.<sup>12</sup> Second, reliability is not the appropriate standard for Confrontation Clause analysis because the trier of fact is responsible for judging witness reliability. The fact that a statement falls within a “firmly rooted hearsay exception” does not necessarily make it more reliable.<sup>13</sup> Even if a statement did not fit within a firmly rooted hearsay exception, the statement could be admissible, under *Roberts*, if it satisfied the “particularized guarantees of truthworthiness” test.<sup>14</sup> This reliability test was unpredictable because it depended heavily upon factors each specific judge considered and the weight he/she apportioned to each.<sup>15</sup> There was little guidance to investigators and prosecutors as to what statements would be admissible, and even less consistency in light of the text of the Confrontation Clause—which *only* addresses the right of the accused to be confronted, and does not cover reliability or the judicially-constructed hearsay exceptions.

### **B. New *Crawford* test for “testimonial statements”**

To eliminate the standardless discretion given to courts to determine and weigh the “indicia of reliability” individually in each case<sup>16</sup>, the Court made clear in *Crawford v. Washington* that the

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10. Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, \*5-6 (2004) [hereinafter *Adjusting to Crawford*] (stating that overbreadth and vagueness of *Roberts* doctrine made Confrontation Clause amorphous and manipulable because no clear standards set); *Crawford v. Washington*, 541 U.S. 36, 63 (2004) (describing that for the unpredictable *Roberts* standard, determination of reliability depended on which factors the judge considers and the weight given to each).

11. Friedman, *Adjusting to Crawford*, *supra* note 10, at \*5.

12. *See id.*

13. *Id.* at \*5-6. Friedman notes that hearsay exceptions do not necessarily sort reliable from unreliable evidence. For example, statements, such as dying declarations, might not be any more reliable just because one is about to meet his/her death, but falls within a long-held hearsay exception and has been stringently protected by the Court.

14. *Id.* at \*6.

15. *Crawford*, 541 U.S. at 63.

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

principle focus of the Confrontation Clause is testimonial statements.<sup>17</sup> Michael Crawford was convicted of assault and attempted murder.<sup>18</sup> At issue in the appeal of his conviction was a tape recording of a custodial interrogation of Crawford's wife, Sylvia.<sup>19</sup> The prosecution played the tape to refute Crawford's claim of self-defense, and the tape was admissible under the hearsay exception for declarations against penal interest; Sylvia was still a suspect at the time of questioning. The statement bore guarantees of trustworthiness because Sylvia's statement was "interlocked" with Michael's statement, thus making it reliable.<sup>20</sup> The tape-recorded interview was admitted even though Sylvia was unavailable to testify at trial after invoking the marital privilege, and defendant Crawford had no opportunity to cross-examine his wife about her out-of-court statement.<sup>21</sup> Crawford appealed his conviction and the admission of Sylvia's statement, arguing that it violated his rights under the Confrontation Clause. The Supreme Court agreed, reversing Crawford's conviction and altering previous confrontation analysis.<sup>22</sup>

The Court in *Crawford* articulated a new test to determine the admissibility of evidence offered against the accused, closely following the explicit text of the Confrontation Clause. If (1) the declarant is legally unavailable to testify at trial and (2) the prior statement is testimonial in nature, then testimony is not admissible unless the defendant had a prior opportunity to cross-examine the witness.<sup>23</sup> The witness is not required to be subject to cross-examination at the time the statement was made or directly at trial.<sup>24</sup> The witness, simply, must have been subject to cross-examination at some earlier time.<sup>25</sup> However, in 2004, a District Court of Appeal in Florida held that a discovery deposition is not considered a prior opportunity for cross-examination under the *Crawford* analysis.<sup>26</sup> The *Lopez* court stated that a discovery deposition is not used to

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17. 541 U.S. at 68; Friedman, *Adjusting to Crawford*, *supra* note 10, at \*7.

18. *Crawford*, 541 U.S. at 38.

19. *Id.*

20. *Id.* at 38-42.

21. *Id.* at 40.

22. *See generally Crawford*, 541 U.S. 36 (2004).

23. *Crawford*, 541 U.S. at 59.

24. *Blanton v. State*, 880 So. 2d 798, 801 (Fla. Dist. Ct. App. 2004).

25. *Id.*

26. *Lopez v. State*, 888 So.2d 693 (Fla. Dist. Ct. App. Nov. 17, 2004).

perpetuate testimony and the defendant is not entitled to be present.<sup>27</sup> Therefore, as shown by the court in *Lopez*, it is unclear whether prior testimony in the form of a deposition fulfills the requisites of *Crawford* depending on the jurisdiction's jurisprudence.

To clarify, the ruling in *Crawford* only affects those statements that are admitted for the truth of the matter asserted.<sup>28</sup> If the statement is not admitted for the truth of the matter asserted, but instead is being used for purposes such as impeachment or bias, the statement is not subject to the rigid Confrontation Clause requirements as fear of the statement being used improperly is diminished. In *Crawford*, the Supreme Court did not explicitly state the test to be applied to the admission of non-testimonial statements. Thus, most jurisdictions have been applying the *Roberts* test of reliability to non-testimonial statements.<sup>29</sup>

Although the *Crawford* holding appears to be a bright line rule consistent with the requisites of the Confrontation Clause<sup>30</sup>, the Court left little guidance as to the definition of a "testimonial statement."<sup>31</sup> The Court declined to provide an explicit definition of "testimonial," choosing instead to highlight three "core class[es] of 'testimonial' statements" including:

'*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'; 'extrajudicial statements... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'; "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."<sup>32</sup>

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27. *Id.* at 700-01.

28. Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 516 (2005).

29. *State v. Staten*, 610 S.E.2d 823, 836 (S.C. Ct. App. Mar. 7, 2005).

30. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1030 (1998) (Confrontation Clause should be viewed as creating a bright-line rule, not a presumptive rule subject to a balancing test which might allow evidence admitted over a defendant's right of confrontation).

31. *Mosteller, supra* note 28, at 526.

32. *Crawford*, 541 U.S. at 51-52 (2004) (internal citations omitted).

The Court did note that whatever the term “testimonial statement” refers to, it applies, at a minimum, to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>33</sup>

Several definitions for testimonial statements have been proposed, but none has been definitively accepted. This lack of a clear definition has led to varying rulings by lower courts. However, one definition has gained increasing interpretation and attention.<sup>34</sup> In an *Amici Curiae* Brief and thereafter quoted in the majority’s opinion in *Crawford*, whether a statement was testimonial would depend on the viewpoint and intention of the declarant; covered statements would include those “made under circumstances which would lead an objective witness reasonably to believe that statement would be available for use at a later trial.”<sup>35</sup> The Court has not explicitly adopted this definition, with some lower courts rejecting this definition or combining it with other elements.<sup>36</sup> However, it is clear that before a testimonial statement can be admitted under the *Crawford* test, two conditions must be fulfilled: (1) the declarant is unavailable to testify at trial and (2) there was a prior opportunity for cross-examination.

#### *Unavailable to testify at trial*

Federal Rule of Evidence 804(a) defines the situations wherein a witness is considered unavailable, which include when the witness (1) is precluded from testifying due to privilege; (2) refuses to testify despite an order of the court to do so; (3) testifies as to lack of memory of the subject matter of declarant’s statement; (4) is unable to testify due to death or physical or mental illness; or (5) is absent from the hearing and attendance has not been able to be procured.<sup>37</sup>

Prior to *Crawford*, the Supreme Court articulated a clear

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33. *Id.* at 68.

34. See Mosteller, *supra* note 28, at 530 (two other possible definitions for testimonial include: (1) “*ex parte* in-court testimony or its functional equivalent;” (2) “extrajudicial statements . . . contained in formalized materials” (quoting *Crawford*, 541 U.S. at 51-52)).

35. *Crawford*, 541 U.S. at 52 (quoting Brief of Amici Curiae National Association of Criminal Defense Lawyers et al.).

36. See *State v. Staten*, 610 S.E.2d 823, 829-30 (S.C. Ct. App. Mar. 7, 2005) (articulating a two-prong test for courts to use when applying the *Crawford* test: “(1) Was the statement made to a governmental agent (or in response to questioning from a governmental agent)? (2) Would the declarant expect his/her statement later to be used at trial?”), see also, *infra* Section V(e) for discussion on this possible definition for testimonial statements.

37. FED. R. EVID. 804(a).

limitation on the unavailability requirement by stating that the *Roberts* standard only required an unavailability analysis when the challenged out of court statements were made in the course of a prior judicial proceeding.<sup>38</sup> The Court minimized the unavailability determination, reasoning that the burdens on the prosecution to prove unavailability outweigh any minor benefit of doing so.<sup>39</sup> The Court believed that either proving that the hearsay statement had sufficient guarantees of truthworthiness or that the statement fell within a firmly rooted hearsay exception satisfied the Confrontation Clause, and no further inquiry into the status of the declarant would provide a greater benefit.<sup>40</sup> However, the Court in *Crawford* reinvigorated the unavailability requirement. Under current case law, when the Confrontation Clause is triggered by a testimonial statement, that statement is inadmissible unless there was a prior opportunity for cross-examination *and* the witness is unavailable.<sup>41</sup> The unavailability analysis is now an essential step in determining if an out of court statement is admissible under the requisites of *Crawford*.

#### *Prior opportunity for cross-examination*

The Court in *Crawford* repeatedly mentions that the defendant must have had “a prior *opportunity* to cross-examine” the witness who made the statement in order for the statement to be admitted.<sup>42</sup> This opportunity for cross-examination is defined as one that is “fairly contemporaneous with a ‘direct examination’”, and need not take place in the presence of the trier of fact.<sup>43</sup> The proximity of the cross-examination to the direct examination should have no effect on how the fact finder evaluates the statements once admitted.<sup>44</sup> This requirement of an opportunity for cross-examination furthers the goals of the Confrontation Clause—to prevent the admission of

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38. *White v. Illinois*, 502 U.S. 346, 354 (1992).

39. *Id.* at 354-55.

40. *See id.* (stating that once a statement qualifies for admission under a firmly rooted hearsay exception, little can be added to booster its reliability and establishing that the unavailability rule would only impose pointless litigation costs with few benefits to the truth-seeking function).

41. *Crawford*, 541 U.S. at 53-54.

42. *Id.* at 68. (emphasis added).

43. *Blanton v. State*, 880 So.2d 798, 801 (Fla. Dist. Ct. App. 2004), *but see Lopez v. State*, 888 So.2d 693 (Fla. Dist. Ct. App. Nov. 17, 2004) (holding that a discovery deposition did not qualify as prior opportunity for cross examination).

44. *Blanton*, 880 So.2d at 801.

statements that have not been tested through the adversarial process.<sup>45</sup> The court, in *Blanton v. State*, noted that only the *opportunity* for cross must be protected, and the court should not evaluate the zealotry with which a defendant seized that opportunity.<sup>46</sup>

Similarly, the Confrontation Clause does not “bar admission of a statement so long as the declarant is present at trial to defend or explain it.”<sup>47</sup> If the declarant is available and testifies in court, the Confrontation Clause is not implicated because the Clause is only concerned with the unavailable declarant.<sup>48</sup> The Confrontation Clause only assures an *opportunity* for cross-examination and does not rate its overall effectiveness.<sup>49</sup> The opportunity for cross-examination, as interpreted to be a requisite of the Confrontation Clause, allows triers of fact to evaluate witness credibility, demeanor, and provide defendants with an opportunity to test witness’ statements.<sup>50</sup>

### III. Impact on Child Abuse Reporting

The restrictive ruling in *Crawford* regarding the breadth of the Confrontation Clause appears to devastate the usability of child abuse reports and child witness statements due, in part, to the uniqueness of the child declarant. Child abuse allegations will be most effected because often the only witnesses in these cases are the alleged victims and professionals who treat them, making the victim’s statements critical to any prosecution of the suspect.<sup>51</sup> Secondly, the cases often involve witnesses who initially pursue prosecution but later withdraw any active involvement, out of fear of retribution from the suspect or disinterest in pressing charges.<sup>52</sup> Lastly, child abuse reports frequently have an issue with witness unavailability.<sup>53</sup> Unavailability occurs when, because of age or intellect, the child is

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45. *Id.*

46. *Id.* at 802.

47. *Crawford*, 541 U.S. at 59, n.9.

48. *See generally, id.*

49. *United States v. Owens*, 484 U.S. 554, 559 (1988).

50. *Amar, Sixth Amendment, supra* note 4, at 688-89.

51. Sherrie Bourg Carter & Bruce M. Lyons, *The Potential Impact of Crawford v. Washington on Child Abuse, Elderly Abuse and Domestic Violence Litigation*, 28 CHAMPION 21, \*21-22 (2004).

52. *Id.*

53. *Id.*



incompetent to testify.<sup>54</sup> The child can be “emotionally unavailable” to testify because the defendant is in the courtroom, or, alternatively, the child can be lacking in knowledge or intellect.<sup>55</sup> Correlated to this point, the state has a responsibility to protect children from unnecessary trauma caused by appearing on the witness stand.<sup>56</sup>

In the wake of the Court’s decision in *Crawford*, the near majority of statements from children about abuse have been classified as testimonial and excluded except where there was an opportunity for cross-examination. Because of the classification as testimonial statements, the reporting child will be required to take the witness stand at trial, and potentially come face-to-face with the defendant.<sup>57</sup>

#### IV. Examples of Testimonial Statements

Reviewing courts have been placing statements with certain characteristics firmly within the realm of testimonial statements, and thus, subjecting the statements to the more stringent *Crawford* test. Factors leading to a classification of a testimonial statement include: the presence of a government agent, structured questioning, a formal interview process, and statements made with the direct purpose of aiding and furthering an investigation or criminal prosecution. I will address these various factors and recent case law decisions regarding interviews and 911 calls in light of their impact on child abuse reporting.

##### A. Involvement of a government actor

*Crawford* explicitly provides that a formal statement given to a government officer is testimonial.<sup>58</sup> Most courts, however, have expanded this characteristic of testimonial statements to any situation in which the declarant knows that he or she is talking to a government agent.<sup>59</sup> *Crawford* refers to interrogation in the colloquial, not legal sense, because a police officer’s duties are to investigate and

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54. *Id.*

55. *Id.* at \*22 (quoting *Maryland v. Craig*, 497 U.S. 836 (1990)).

56. *See Maryland v. Craig*, 497 U.S. at 836 (1990) (state’s interest in protecting minor victims of sex crimes is a compelling one); *see infra* Section V(f).

57. *See Crawford*, 541 U.S. at 36 (2004) (when testimonial evidence is at issue, admissibility depends on unavailability of witness and prior opportunity for cross examination); *see infra* Section VI (alternatives for avoiding face-to-face confrontation, such as closed circuit television, shielding, and videotaped interviews).

58. *Crawford*, 541 U.S. at 51.

59. *Mosteller*, *supra* note 28, at 532-33.

prosecute crimes.<sup>60</sup> Therefore, because the police officer's duty is to prosecute crimes, an objective witness would reasonably believe that the statement given to the police officer would be available for later use at trial.<sup>61</sup>

In *People v. Vigil*, a police officer interviewed a child sexual assault victim about the alleged assaults, and portions of the videotaped interview were shown to the jury because the child, having been found incompetent, did not testify.<sup>62</sup> The court, in holding the child's statements to be testimonial and inadmissible without a prior opportunity for cross-examination, overlooked many factors which would likely point to the admission of the statement, including a relaxed atmosphere for investigation, open-ended, non-leading questions, and no recitation of an oath.<sup>63</sup> Instead, the court focused on the strong importance of police officer presence, especially an officer who had been duly trained in interrogation techniques, and the determination that the child knew the difference between truthfulness and lying.<sup>64</sup> Because the defendant had no opportunity to cross-examine the child about the statements made to an interviewing officer—statements given in a situation which would lead an objective person in child's position to believe that the statements would be used at a later time to punish the defendant—the introduction of the child's statements at trial violated defendant's right to confront those witnesses against him.<sup>65</sup>

The court in *In re T.T.* differentiated a statement made by a child victim of assault to a Department of Children and Family Services' ("DCFS") agent with a statement made to a doctor.<sup>66</sup> The court held that the statement made to the DCFS agent was made in response to structured questioning with the intention of pursuing legal avenues, and thus, was testimonial.<sup>67</sup> However, statements made to a treating

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60. *In re T.T.*, 815 N.E.2d 789, 800 (Ill. App. Ct. 2004) (citing *Crawford*, 541 U.S. 53 n.4).

61. See *In re T.T.*, 815 N.E.2d at 799.

62. *People v. Vigil*, No. 104 P.3d 258, 261 (Colo. Ct. App. June 17, 2004).

63. *Id.* at 262-63.

64. *Id.*

65. *Id.* at 263.

66. *In re T.T.*, 815 N.E.2d at 801-03 (Ill. Ct. App. 2004).

67. *Id.* at 802, but see *State v. Lackey*, 120 P.3d 332, 345 (Kan. 2005) (analyzing that although the admission of testimonial statements violated defendant's Sixth Amendment rights, the court held the admission to be harmless error). See *infra* Section IV(a)(1) and V(d) for discussion on role of administrative agencies, such as Department of Child and Family Services, with regards to eliciting statements from children and as an extension of

physician describing the symptoms, pain, or general nature of the assault are not testimonial, as held in this case, if they do not accuse or identify the perpetrator of the assault.<sup>68</sup>

*United States v. Bordeaux*, however, explicitly stated that even if statements have multiple purposes, they can still be classified as testimonial.<sup>69</sup> In *Bordeaux*, a female child was referred to a center for child evaluation after allegations of sexual assault by the defendant arose. The child victim was first questioned and videotaped by a forensic interviewer before being examined by a doctor, and a copy of the videotape was retained both as part of the patient's medical records and for law enforcement purposes.<sup>70</sup> The Eighth Circuit held that the statements were testimonial because they were elicited during a police investigation and the purpose of the interview was to collect information for law enforcement.<sup>71</sup> Further, a copy of the videotape was to be given to law enforcement, and the questioning used was formal and structured.<sup>72</sup> The court acknowledged that the victim's statements also had a medical purpose, but noted that *Crawford* did not indicate that "multipurpose statements cannot be testimonial."<sup>73</sup> This ruling implies that as long as one of the statement's purposes is to further a criminal investigation or will be used prosecutorially in the future, then the statement will be considered testimonial, even if the statement also has other, traditionally *non*-testimonial uses.

Not all statements made to police officers are testimonial in nature. *People v. Cage* contrasts a testimonial statement and a non-testimonial statement, both of which were given to a police officer.<sup>74</sup> In *Cage*, defendant was convicted of assaulting his 15-year-old son with a deadly weapon. In this case, defendant made three hearsay statements, two of which are relevant here—including (1) to a police

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the law enforcement community.

68. In re T.T., 815 N.E.2d at 803-04. See *infra* Section V(d) addressing the medical diagnosis and treatment exception to hearsay evidence.

69. *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005). *Bordeaux* also addresses the constitutionality of testimony made via closed circuit television, under the requirements of *Maryland v. Craig*. See *infra* Section VI regarding Alternatives to In Court Testimony. See also *United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2005) (holding statements of victim's brother to pediatrician to be non testimonial); see also Section V(d) regarding Statements Made to Medical Personnel and Social Workers.

70. *Bordeaux*, 400 F.3d at 555.

71. *Id.* at 556.

72. *Id.*

73. *Id.*

74. 15 Cal.Rptr.3d 846 (Cal. App. Ct. 2004).

officer at the hospital while defendant was waiting to be treated and (2) to a deputy while being interviewed and tape recorded at the police station after receiving treatment at the hospital.<sup>75</sup> The court held the first statement at the hospital was not testimonial in nature because there was no formalized interview process, no suspect was under arrest, no trial was contemplated, there was no structured questioning, and the deputy was still trying to determine if a crime had even been committed.<sup>76</sup> This statement, at the hospital, was the result of open-ended questions, and defendant would not believe that they would be used later. Although anyone who obtains information that is relevant to a criminal investigation might pass it along to police, testimonial statements are only those where declarants would reasonably expect the statements to be used prosecutorially in the future.<sup>77</sup>

The court in *Cage* did find that defendant's statement to the deputy at the police station was testimonial because it included structured police questioning and tape recording.<sup>78</sup> The court in *Cage* noted the emphasis of government involvement and projected future use of the testimony, because the 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."<sup>79</sup> *Cage* provides a rare holding that statements given to law enforcement officers might still be non-testimonial in nature, given circumstances where no formal investigation is underway, no suspect is articulated, and questioning is open-ended and unstructured.

Statements made to a family member might be deemed testimonial if that family member acts as a surrogate for law enforcement agencies. In an unusual holding, the court in *State v. Harr* held that statements by the victim to her mother and grandmother about gross sexual imposition were testimonial and therefore, their admission violated the Confrontation Clause.<sup>80</sup> The court noted, however, the extraordinary circumstances in this case as the mother confronted the child victim after being prompted by police authorities.<sup>81</sup> The child's statements in question about the

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75. *Id.* at 849-50.

76. *Id.* at 856-57.

77. *Id.* For discussion of the "reasonable person" standard, *see infra* Section V(e).

78. *Id.* at 854.

79. *Id.* at 854-55 (*quoting Crawford*, 541 U.S. at 51 (2004)).

80. 821 N.E.2d 1058, 1067-68 (Ohio Ct. App. Oct. 8, 2004).

81. *Id.* at 1067.

alleged sexual encounter occurred nearly two weeks after the event, thereby eliminating the ability to be considered an excited utterance, and were in response to leading questions by the mother.<sup>82</sup> This case, however, appears to be an exception; courts have almost universally considered any involvement by government actors to constitute a testimonial setting, while conversations with family members have been given greater deference and latitude.

### **B. Extension of the law enforcement community**

In addition, most courts have held that child protective employees and social workers are included as part of the extended law enforcement family. In *People v. Warner*, a 5-year-old child mentioned that the defendant, her father, had touched her inappropriately.<sup>83</sup> The minor was questioned by a multi-disciplinary interview center (MDIC) specialist after her mother called Child Protective Services.<sup>84</sup> The court found this statement, made by the child to a MDIC specialist, to be testimonial in nature because the interview was similar to a police interrogation and was reasonably expected to be used at trial.<sup>85</sup> The court also noted that although the MDIC interview is not intended to be used solely as an investigative tool for criminal prosecutions, this is one of its many purposes, and law enforcement officers were involved in the training of the MDIC specialist.<sup>86</sup>

A Maryland court has extended the reach of law enforcement agency to social workers. The court in *Snowden v. State* excluded testimony of a licensed social worker who was testifying in lieu of first person testimony from three alleged victims of child abuse, all of whom were under the age of 10.<sup>87</sup> The statements testified to at trial by the social worker—statements made by the children to the social worker during a series of interviews—were deemed testimonial in nature because the children were interviewed with the express purpose of developing their testimony.<sup>88</sup> Upon review by the Court of Appeals of Maryland, the court noted that: child declarants were aware of the prosecutorial purpose of their statements; the statements

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82. *Id.*

83. *People v. Warner*, 14 Cal.Rptr.3d 419, 424 (Cal. Ct. App. 2004).

84. *Id.*

85. *Id.* at 429.

86. *Id.*

87. 846 A.2d 36 (Md. Ct. Spec. App. 2004), *aff'd* 867 A.2d 314 (Md. 2004).

88. 846 A.2d 36, 47.

were elicited by the social worker after initial questioning by police; the children were brought to the interviews for the express purpose of developing testimony for use at trial; the social worker only became involved at the request of the police; and the interviews took place at a location used for the purpose of investigating and assessing victims of child abuse.<sup>89</sup>

In a similar vein, *State v. Courtney* held that a videotaped interview by a child protection worker was testimonial in nature, and thus, implicated the protections of the Confrontation Clause.<sup>90</sup> The child protection worker interviewed the child with the express purpose of developing a case against the defendant so the statement was made in anticipation of prosecutorial proceedings.<sup>91</sup> In the wake of *Crawford v. Washington*, courts have held that statements made to government officials, including those made to social workers and multi-disciplinary interview center specialists, are predominantly testimonial because they are made with the reasonable intention of being used prosecutorially in the future.

### C. 911 calls

The admissibility of 911 calls is evaluated under a slightly different analysis than that used for child abuse and interview statements, but the reasoning behind these cases can provide guidance for evaluating child abuse statements. Courts appear to be adopting a case-by-case analysis to 911 calls, considering the intention of the caller.<sup>92</sup> The Supreme Court of Minnesota concluded that statements made during a 911 call moments after an attack were non-testimonial in nature because of the “trembling, stuttering, crying [and] hyperventilating” demeanor of the victims, the close temporal proximity of the call to the incident, and the dialogue between the victims and the operator seeking only to obtain information for immediate intervention, and not future prosecution.<sup>93</sup>

In *People v. Cortes*, the People sought to introduce recordings of two telephone calls made to 911 by two witness reporting

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89. 867 A.2d 314, 325-328 (Md. 2004)

90. 682 N.W.2d 185, 196 (Minn. Ct. App. 2004), *rev'd* *State v. Courtney*, 696 N.W.2d 73 (Minn. 2005) (holding that admission of videotaped interview was harmless error and therefore, no Confrontation Clause analysis was necessary).

91. 682 N.W.2d 185, 196 (Minn. Ct. App. 2004).

92. *See, e.g., State v. Davis*, 613 S.E.2d 760 (S.C. Ct. App. 2005) (citing the Washington Court of Appeals in *State v. Powers* which adopted a case-by-case approach to 911 calls) and *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005).

93. *Id.*

observations of recent shootings.<sup>94</sup> The court struggled with the definition of a “testimonial” statement. The court believed that a standard of testimonial in which the declarant believes that statement will be presented later at trial would require inquiry into the declarant’s mindset, possibly leading to inconsistent results.<sup>95</sup> Ultimately, the court in *Cortes* held that calls to 911 were testimonial under the *Crawford* test, without having to use a subjective test.<sup>96</sup> The purpose of the information elicited and gathered from a 911 call is for potential use at trial when the call is made to report a crime and provide information to police for later investigatory purposes.<sup>97</sup>

This testimonial view of 911 calls is not consistent across all courts, even within the same state. In *People v. Moscat*, another New York case, defendant sought to exclude as evidence the recording of a 911 call made by complainant in a domestic violence case.<sup>98</sup> The court noted that a 911 call is not initiated by police; but rather, the call originates from the victim of the crime.<sup>99</sup> The 911 call “has its genesis in the urgent desire of the citizen to be rescued from immediate peril.”<sup>100</sup> While a testimonial statement is extracted by the government in contemplation of future legal proceedings, the 911 call is instigated by the victim who wants immediate protection.<sup>101</sup>

At first glance, the holdings of *Moscat* and *Cortes* appear diametrically opposed. However, upon closer inquiry of these cases, the role and intention of the caller is dispositive in the determination of whether or not the statement is testimonial. *Cortes* involved bystanders, completing a 911 call to report observations to police with the intention of aiding an investigation. On the other hand, the 911 caller in *Moscat* was the actual alleged victim of domestic violence. The call in *Moscat* was more closely associated with an excited utterance, an instinctual reaction to wanting protection from a posed danger. Therefore, although somewhat of a tangential point to the discussions of child abuse statements and their classification within or

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94. *People v. Cortes*, 781 N.Y.S.2d 401, 402 (N.Y. App. Div. 2004).

95. *Id.* at 414.

96. *Id.* at 415.

97. *Id.*

98. 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

99. *Id.* at 879.

100. *Id.*

101. *Id.*; see also *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (holding nontestimonial victim statements made to 911 operator after husband hit her because the call was initiated by the victim to request assistance and bore no “indicia common to the official and formal quality” of structured police questioning).

outside the testimonial category, courts have focused on the intention of the initiator for 911 calls. If the caller is the victim of an alleged crime who initiates the communication to seek protection, the statement is more similar to an excited utterance than a formal pretrial examination by a Justice of the Peace in Reformation England.<sup>102</sup> Therefore, the call made by a victim, such as in *Moscat*, is more likely to be classified as non-testimonial in nature and not implicate the Confrontation Clause.

In *United States v. Brito*, the Court of Appeals for the First Circuit encouraged a case-by-case examination into the totality of circumstances to determine if an excited utterance should be deemed testimonial in nature.<sup>103</sup> The court noted that just because a statement falls within the literal definition of an excited utterance, it does not necessarily follow that the declarant lacked the ability to recognize that the statement could be used for prosecutorial purposes.<sup>104</sup> Thus, the *Brito* court proposes a two-step analysis to determine if an excited utterance is testimonial. First, the court must determine whether a particular hearsay statement qualifies as an excited utterance, focusing on whether the defendant was under the stress of a startling event.<sup>105</sup> If so, the court must determine if a reasonable victim, similarly situated, would have retained or regained capacity at the time of the utterance to understand the legal ramifications of the statement.<sup>106</sup>

## V. Non-testimonial Child Abuse Victim Statements

Court opinions since the Spring 2004 Supreme Court Term and the *Crawford* decision have revealed several possible loopholes to admit child abuse victim statements into court. At first glance,

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102. See *People v. Moscat*, 777 N.Y.S.2d 875 (a hurried and panicked conversation between injured victim and telephone operator is not equivalent to a formal pretrial examination by a Justice of the Peace in Reformation England); see also *Crawford*, 541 U.S. at 43-50 (discussing the history of Confrontation Clause jurisprudence).

103. 427 F.3d 53, 61 (1st Cir. 2005), see also *State v. Parks*, 116 P.3d 631 (Ariz. Ct. App. 2005) (holding that need to use a case-by-case inquiry to see if an excited utterance is testimonial or not).

104. *Brito*, 427 F.3d at 61.

105. *Id.*

106. *Id.* at 61-62. The *Brito* court provided examples for the proper application of this two set analysis. Statements made to police while the declarant is still in personal danger are not considered to have been made with consideration of the legal ramifications, and not testimonial, because the declarant is speaking out of urgency and desiring a prompt response. However, once the immediate danger has passed, the declarant is more likely to understand the larger significance of his or her words. *Id.* at 62 n.4.



*Crawford* appears to prevent the admission of most of these statements because, usually, children are often unavailable to testify in court and they have not been subject to cross-examination. However, courts have looked elsewhere to allow admission of these statements, including exceptions such as: (1) unavailability of witnesses; (2) statements made to family members and friends; (3) relaxed conditions for excited utterances for children; (4) statements made to medical personnel; (5) an alteration of the objective person standard; (6) initiation by the victim, with no government coercion; (7) the high state and judicial interest in allowing these statements to be admitted; and (8) the rule of forfeiture. Some of these options are more effective and provide a potential avenue to admissibility, while others appear to lack credence with the courts. These areas will be covered in turn below.

#### A. Unavailability of witnesses

*Crawford* and Confrontation Clause protections are only implicated if the witness is determined to be unavailable.<sup>107</sup> Therefore, should the child victim testify in court, they would be subject to cross-examination and their prior statements would be admissible.<sup>108</sup> Even if the child is unable to remember making the statement, there is no Confrontation Clause violation because this does not render a witness unavailable.<sup>109</sup> The Confrontation Clause only requires an *opportunity* for cross-examination and does not guarantee an *effective* cross-examination.<sup>110</sup>

However, child sexual abuse victims have unique problems because they are often unable to testify because of fear, guilt, or intimidation.<sup>111</sup> Child victims are determined to be unavailable if unable to testify, unable to communicate in the courtroom, or incompetent because they are unable to express themselves in a manner to be understood.<sup>112</sup> The child can start testifying; however, should the defense be unable to cross-examine and complete the testimony for any of the above-mentioned reasons (such as the child freezing under continued questioning), then the child will be declared

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107. *Id.* at 1374 (two-prong test of witness being unavailable and needing a prior opportunity for cross examination).

108. *See* Fed. R. Ev. 613 (b).

109. *United States v. Owens*, 484 U.S. 554, 559 (1988).

110. *Id.*

111. *In re T.T.*, 815 N.E.2d 789, 797 (Ill. App. Ct. 2004).

112. *Id.*

unavailable, triggering the protections of the Confrontation Clause.<sup>113</sup> Therefore, there is little room to circumvent the unavailability requirement by placing the child on the stand simply to deflect questions. The Confrontation Clause is triggered as soon as the child is unable to answer questions competently; thus, in effect, requiring child victims to take the stand to explain completely their prior statements.

### **B. Statements made to friends and family members**

Child abuse victim statements made to friends or family members should usually be admissible because they are not similar to structured police questioning and are not made with the expectation that they will be used prosecutorially later. *Crawford* outlined examples of testimonial statements – basically statements which are made for the purpose of establishing or proving some fact, and used to develop evidence and aid in a criminal investigation.<sup>114</sup> The Eighth Circuit Court of Appeals defined this point, holding in *United States v. Manfre* that *Crawford* is inapplicable because statements “made to loved ones or acquaintances . . . are not the kind of memorialized, judicial-process-created evidence to which *Crawford* speaks.”<sup>115</sup>

Recent court decisions have held that statements to family members and friends are not testimonial because no government agent is involved and there is no intention for use in a future prosecution. Although not a case about child abuse reporting, in *Demons v. State*, a co-worker of a murder victim testified about the victim’s fear of the accused, threats to kill him, and physical bruises which appeared days before the alleged murder.<sup>116</sup> The court distinguished these non-testimonial statements and permitted them to be admitted into evidence because they were not “remotely similar to such prior testimony or police interrogation, as they were made . . . [to] a friend, and without any reasonable expectation that they would be used at a later trial.”<sup>117</sup>

Child victims’ statements to family members can be critical to a

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113. *Id.* (citing *People v. Coleman*, 563 N.E.2d 1010 (Ill. App. Ct. 1990) (at the point when the child witness is unable to proceed with testimony, he or she is properly considered unavailable)).

114. *Crawford*, 541 U.S. at 51-53, 68 (giving examples of “testimonial” statements and defining the word “testimony”, while the Court refused to give a precise definition of the “testimonial”).

115. 368 F.3d 832, 838 n.1 (8th Cir. 2004).

116. 595 S.E.2d 76, 79-80 (Ga. 2004).

117. *Id.* at 80.

prosecution. Often victims are too young or too frightened to be subjected to intense direct and cross-examination in the courtroom. Although unable to provide formal testimony, the child often can give an account of the events in a more relaxed, familiar, and spontaneous atmosphere at home.<sup>118</sup>

However, statements made to private individuals can and should be attributed to government involvement if law enforcement has substantial involvement in procuring and requesting the information.<sup>119</sup> This reasoning was used in *State v. Harr*, whereby the court held statements made by the 7-year-old child abuse victim to her mother and grandmother to be testimonial.<sup>120</sup> The court emphasized that the investigating officer had contacted the family to uncover information about the incidents, and the victim's statement was given nearly two weeks after the events.<sup>121</sup>

In general, statements made to family members will be considered non-testimonial and will not trigger the protections of the Confrontation Clause. However, family members need to be "unassociated with government activity."<sup>122</sup> In addition, it may be critical to determine if the statement was accusatory in particularly naming the perpetrator and if the statement was intended to be conveyed to law enforcement investigators.<sup>123</sup> If this was the case, then the statement might be more similar to those directly protected by the Confrontation Clause.

### C. Excited utterances and spontaneous declarations

Under the hearsay exception in Federal Rule of Evidence 803(2), victim's statements reporting child abuse may be admissible notwithstanding the *Crawford* holding if the declarant has no time for

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118. *Herrera-Vega v. State*, 888 So.2d 66 (Fla. Dist. Ct. App. 2004) (deciding that a spontaneous statement by victim to mother and father are not testimonial); *Somervell v. State*, 883 So.2d 836 (Fla. Dist. Ct. App. 2004) (holding that statements made by child to mother does not fit within the "penumbra" of any of the categories of testimonial statements listed in *Crawford*); see *United State v. Dorian*, 803 F.2d 1439 (8th Cir. 1986). *Dorian* was decided before the *Crawford* holding and admitted a 5-year-old victim's statements about her sexual abuse. The court held that the statements were constitutionally admissible under the Confrontation Clause in the interests of justice.

119. *Mosteller, supra* note 28, at 574.

120. 821 N.E.2d 1058, 1067-68 (Ohio Ct. App. 2004).

121. *Id.*

122. *People v. Compan*, 100 P.3d 533, 537 (Colo. Ct. App. 2004), *aff'd*, 121 P.3d 876 (Colo. 2005).

123. *Mosteller, supra* note 28, at 554-56.

reflective thought.<sup>124</sup> In this case, it is less likely that the statement will be fabricated because of the short time frame between the events and the making of the statement. In other words, the statement is considered an instinctual response. The court in *People v. Rivera* drew a traditional line, admitting the telephoned statement of a victim's girlfriend which identified the defendant, an accused murderer.<sup>125</sup> The court looked at various factors including: the fact that the declaration was made within minutes of the stabbing; the declarant was crying; declarant was clearly under continuing stress of the shocking event; and the declarant did not have time for "studied reflection."<sup>126</sup>

Along similar lines, *State v. Orndorff* acknowledged that excited utterances made immediately in response to a stressful event are not testimonial in nature because they are not made in response to police questioning.<sup>127</sup> In this case, the victim of burglary and assault stated that she saw a man with a pistol leaving, tried to call 911, and was panic stricken.<sup>128</sup> The court held that these spontaneous declarations were non-testimonial because they were not a declaration or affirmation used to establish or prove a fact; they were not in response to police questioning; and the declarant had no reason to expect that the statements would be used in a future trial.<sup>129</sup>

The court in *State v. Forrest* explicitly stated that *Crawford* does not prohibit spontaneous statements made by unavailable witnesses from being admitted.<sup>130</sup> In *Forrest*, the alleged assault victim, immediately after being freed from the grasps of her kidnapper, blurted out to police officers what defendant had done to her inside the house.<sup>131</sup> Following the reasoning of *Moscat*,<sup>132</sup> the *Forrest* court held that these were non-testimonial statements because the victim

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124. FED. R. EVID. 803(2).

125. 778 N.Y.S.2d 28, 29 (N.Y. App. Ct. 2004).

126. *Id.*

127. 95 P.3d 406, 408 (Wash. Ct. App. 2004).

128. *Id.*

129. *Id.*

130. 596 S.E.2d 22, 27-28 (N.C. Ct. App. 2004), *aff'd*, 611 S.E.2d 833 (N.C. 2005)

131. *Id.* at 23-24.

132. *See* *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004) (hurried and panicked conversation between injured victim and 911 telephone operator is not equivalent to a formal pretrial examination by a Justice of the Peace in Reformation England); *see also supra* Section IV(b) regarding discussion of admissibility of 911 calls; *see also* *Crawford v. Washington*, 541 U.S. 36, 43-50 (2004) (discussing the history of Confrontation Clause jurisprudence).

had no time for reflection and the comments were initiated by the victim.<sup>133</sup> The court, in this case, extended the scope and time allowed for giving excited utterances. The court included under the umbrella of non-testimonial statements those made while responding to questions from the detective immediately after arrest, because the demeanor of crying, shaking, and overall nervousness continued.<sup>134</sup>

As stated in *Forrest*, it has been suggested that the strict temporal requirements for excited utterances made by child witnesses should be liberalized.<sup>135</sup> The *Harr* court did not admit a child victim's statements to his mother made two weeks after the alleged incident.<sup>136</sup> However, the mother in that case was prompted by police and used leading questions, and again, the conversation occurred two weeks after the alleged incident.<sup>137</sup>

Although few courts have endorsed liberalizing spontaneous declaration policies for children, perhaps a moderate liberalizing and relaxing of the timing requirements for excited utterances should be used in cases of child abuse reporting. Child abuse can be a traumatizing event in and of itself, and the startling nature of the event may last longer than that caused by other stimuli and crimes. Yet even if the courts adopted such a viewpoint, the excited utterance exception probably would rarely be used for child abuse victims because the statements implicating the defendant would still have to be made in reasonable proximity to the actual event. Because abuse victims are often encouraged, or threatened, by their attackers to not report the event, accusatory statements are often slow to trickle out to authorities. Although a moderate enlargement of the timing for abuse victims might be possible, it would rarely be utilized and not the best avenue for admitting these crucial statements. Under current case law, the courts analyze the intent of the declarant and the recipient when dealing with excited utterances; if the declarant intends the excited utterance to be simply a cry for help and not reasonably intended to be used in a later prosecutorial manner, then the utterances are deemed non-testimonial and subject to traditional hearsay analysis. However, if the declarant could reasonably expect that the statement be used at a later trial, then the statement will be

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133. *Forrest*, 596 S.E.2d at 27.

134. *Id.*

135. *State v. Harr*, 821 N.E.2d 1058, 1067-68 (Ohio Ct. App. 2004).

136. *Id.*

137. *Id.*

deemed testimonial and subject to *Crawford* analysis.<sup>138</sup>

#### D. Statements to medical personnel and social workers

Child abuse statements made to medical personnel are generally admissible. However, statements made to social workers are probably inadmissible as they are usually considered extensions of the law enforcement community.

Under Federal Rule of Evidence 803(4), even when the declarant is available as a witness, statements, used for medical diagnosis or treatment which depict medical history, or “past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are admissible.<sup>139</sup> Courts specifically focus on only permitting information which is *necessary* for treatment by a medical professional. Statements made to medical personnel are admissible under *Crawford* because such personnel are not performing any “function remotely resembling that of a Tudor, Stuart, or Hanoverian justice of the peace.”<sup>140</sup> *Crawford* repeatedly stressed the critical importance of government involvement in testimonial statements<sup>141</sup>, involvement which is usually absent from statements made to medical personnel.

In *United States v. Penaux*, the Eighth Circuit Court of Appeal had to determine the use of statements made to medical professionals.<sup>142</sup> In *Penaux*, a pediatrician interviewed the child brother of a sexual assault victim, also a child, about burns on his body.<sup>143</sup> These statements made by the victim’s brother were not considered testimonial because: the pediatrician conducted the interview, not police; no forensic interview preceded the meeting; and the interview lacked substantial government involvement.<sup>144</sup> Additionally, the interviewee was not the victim in this case, and the statement made by the victim’s brother was used to give medical aid in the form of diagnosis and/or treatment.<sup>145</sup>

In *State v. Vaught*, an emergency room physician examined a four

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138. See *State v. Staten*, 610 S.E.2d 823, 829-30 (S.C. App. Ct. 2005).

139. FED. R. EVID. 803(4).

140. *People v. Cage*, 15 Cal.Rptr.3d 846, 854 (Cal. Ct. App. 2004).

141. *Crawford v. Washington*, 541 U.S. 36, 51-53 (2004).

142. 432 F.3d 882 (8th Cir. 2005).

143. *Id.* at 896.

144. *Id.*

145. *Id.*

year-old sexual assault victim shortly after the alleged abuse.<sup>146</sup> The physician testified that, during the examination, the victim stated that “her Uncle DJ put his finger in her pee-pee.”<sup>147</sup> The Supreme Court of Nebraska held that this statement was not a “testimonial” statement under *Crawford* because it did not have the attributes as described by the Supreme Court and the statement was made by the victim for the purposes of medical diagnosis or treatment.<sup>148</sup> This court held a very expansive viewpoint of medical statements. Even though the victim identified her alleged perpetrator in this statement, there was no “indication of government involvement in the initiation or course of examination,” and thereby did not trigger special Confrontation Clause protection.<sup>149</sup>

This holding in *Vaught* appears to be an extension of *Cage*, wherein a statement made by the 15-year-old victim of child abuse to the doctor at the hospital was held to be non-testimonial.<sup>150</sup> The court in *Cage* also emphasized the role of government involvement in testimonial statements, an element which is lacking in most, if not all, medical treatment environments.<sup>151</sup> *Crawford* pertains to statements that “declarants would reasonably expect to be used prosecutorially”<sup>152</sup>; reasonable persons would not expect that statements to medical personnel, and given to receive medical treatment, would be used at a later trial. For this reason, most statements made in response to questions by physicians for the purposes of medical diagnosis are considered non-testimonial because such physicians are not government employees, the statements are used for the purposes of medical treatment, and the statements are not intended for future prosecution.<sup>153</sup>

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146. 682 N.W.2d 284, 286 (Neb. 2004).

147. *Id.*

148. *Id.* at 291 (testimonial statements consist of *ex parte* testimony or functional equivalent).

149. *Id.*

150. *People v. Cage*, 15 Cal.Rptr.3d 846, 854-55 (Cal. Ct. App. 2004).

151. *Id.*

152. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

153. *See State v. Scacchetti*, 690 N.W.2d 393 (Minn. Ct. App. 2005) (holding that a three-year-old victim’s out of court statements to examining physician about defendant’s sexual abuse are not testimonial because statements made in response to questions for purposes of medical diagnosis and not posed by a government agent) and *State v. Fisher*, 108 P.3d 1262 (Wash. Ct. App. 2005) (holding that statement to physician in response to what happened was not testimonial because doctor was not government employee, defendant was not under suspicion at the time, and was not foreseeable that statement would be used by prosecution at a later time).

The difficult issue arises when the identity of the perpetrator of the assault is disclosed during a medical diagnosis and/or subsequent treatment, as this information is not generally required for services. However, one could argue that in a case of child abuse, medical personnel are responsible for the overall health and safety of the victim. Thus, it is critical to know the identity of the assailant, thereby preventing any further harm and providing comprehensive treatment. In this sense, even a statement to medical personnel which identifies the perpetrator would be admissible under the hearsay exception of Federal Rule of Evidence 803(4), as the identity is necessary for proper medical treatment and safety.

Statements to social workers and child protective service investigators are not per se inadmissible.<sup>154</sup> However, if the child protective services office works under order of and together with the state and prosecutor's office to assist in their prosecutorial function, then the persons are considered agents of the prosecution.<sup>155</sup> Child protection units usually are considered extensions of the prosecutorial team because the interviews are motivated by the search for evidence, and these repetitive procedural events are defined by their context and not the expectations of the parties involved.<sup>156</sup> Although nearly all statements to social workers and child protective services will be considered testimonial in nature, an inquiry into the interaction between the agent and the specific law enforcement office may provide latitude for the statement's admissibility.

### **E. Objective person standard revisited**

Although not formally approved by the Supreme Court, the vague language of an objective person standard might provide a permissible avenue to admit child abuse victims' statements into court. The majority in *Crawford* mentioned, although did not full-heartedly endorse, a proposed definition of testimonial statements advanced as *amici curiae* by the National Association of Criminal

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154. In re T.T., 815 N.E.2d 789, 801, 803 (Ill. App. Ct. 2004); see *supra* Section IV(a)(1) regarding the extension of law enforcement community.

155. In re T.T., 815 N.E.2d at 801; see *State v. Courtney*, 682 N.W.2d 185 (Minn. Ct. App. 2004) (holding that a statement to a child protection worker is testimonial because they work along with law enforcement officer for the purpose of developing a case against the defendant), *rev'd*, 696 N.W.2d 73 (Minn. 2005) (holding that the admission of videotaped interview was harmless error and therefore, no Confrontation Clause analysis is necessary).

156. John F. Yetter, *Wrestling with Crawford v. Washington and the New Constitutional Law of Confrontation*, 78 FLA. B.J. 26, 29 (2004).



Defense Lawyers.<sup>157</sup> This definition of testimonial statements includes those “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.”<sup>158</sup>

Some scholarly analysis has disregarded any emphasis of this declarant-centric approach to the Confrontation Clause and testimonial statements. There are three potential problems with a declarant-centric approach: (1) there is no historical evidence that the Framers were concerned about declarant expectations, instead only focused on the rights of the accused; (2) there are many testimonial statements that would not be covered by this declarant-focused formula, including children’s statements which have no intention of later evidentiary use; and (3) the Court in *Crawford* only mentioned this definition in passing, and used an entirely different analysis to decide the case.<sup>159</sup> The Appellate Court of Illinois argued that the use of declarant’s age and state of mind in the determination of a testimonial statement would “undermine the Confrontation Clause’s protections” because of its vague and manipulable standard.<sup>160</sup>

Courts, in their interpretations, have held differing viewpoints as to the definition of an objective witness; namely, if the definition should be the intention of the specific declarant or of the generic reasonable person. The court in *People v. Sisavath* noted, in a footnote, that the Supreme Court conceivably could have been referring to an objective witness in the same category of persons as the actual witness, including that of a child witness.<sup>161</sup> However, the California Court of Appeal disregarded this proposition, believing that the Court meant that the statement is testimonial if it was given under circumstances in which its use in a future prosecution is reasonably foreseeable by an objective *observer*.<sup>162</sup>

Other courts seem to interpret this objective reasonable person test differently. Another California Court of Appeal, in *People v. Cage*, first noted that declarant’s subjective understanding is

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157. *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004).

158. *Id.* (quoting Brief for National Association of Criminal Defense Lawyers et al., as *Amici Curiae* 3).

159. Yetter, *supra* note 155, at 29.

160. *In re T.T.*, 815 N.E.2d at 802 (holding that child’s statements to DCFS agent were testimonial, even though interview was conducted in the victim’s home two months after call to hotline).

161. 13 Cal.Rptr.3d 753, 758, n.3 (Cal. Ct. App. 2004).

162. *Id.* (emphasis added).

irrelevant.<sup>163</sup> The court went on to state, in the same opinion, that the Supreme Court wanted an objective, reasonable person test, and courts should analyze if a reasonable person in declarant's shoes would have expected statements made to a doctor to be used at a later trial.<sup>164</sup> It appears, although disregarding a declarant's subjective understanding, the court did analyze how an objective person *in declarant's shoes* would believe the statement be used.<sup>165</sup> This analysis opens the door to allow analysis into how the specific declarant child would view the statement, instead of interpreting what an objective *observer*, most likely an adult, would believe.

The Colorado Court of Appeals appears to use a similar viewpoint. *People v. Vigil* held that a child victim's videotaped statement to police officer was testimonial.<sup>166</sup> However, the child had been told that the interviewer was a police officer, the child knew the difference between being truthful and lying, and the child knew that the defendant assailant might go to jail.<sup>167</sup> The court stated that the testimonial determination is based on what "would indicate to an objective person *in the child's position* that statements were intended for use at a later proceeding that would lead to punishment of defendant."<sup>168</sup>

Scholars, those favoring the protection of child abuse statements, have provided alternative interpretations to this objective person test. Richard Friedman, recognizing that a child reacts and communicates differently than adults, argues that a person is not a witness unless he or she understands that the given statement may have adverse consequences for the person accused.<sup>169</sup> Because the Confrontation Clause is driven by a desire to require the accuser to confront the accused, Friedman realizes that it is a societal question as to how much responsibility and obligation to place in the hands of children.<sup>170</sup> Thus, the cognitive and mental development of a child would be taken into account to determine the testimonial nature of a statement

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163. *People v. Cage*, 15 Cal.Rptr.3d 846, 855 (Cal. Ct. App. 2004) (holding that statement made to doctor is not testimonial).

164. *Id.*

165. *Id.*

166. 104 P.3d 258, 262 (Colo. Ct. App. 2004).

167. *Id.* at 262-63.

168. *Id.* at 263 (*citing Crawford v. Washington*, 541 U.S. 36, 51-52 (2004)) (emphasis added).

169. *Adjusting to Crawford, supra* note 10, at \*10.

170. *Id.*

given by a child witness.

This moderately expansive view of an objective person test for testimonial statements has not been explicitly endorsed by the Supreme Court. However, Justices Thomas and Scalia's concurrence in *White v. Illinois* stated that a subjective formula to decide if statements were made in contemplation of legal proceedings "would entangle the courts in a multitude of difficulties" because of the subjective nature of the inquiry.<sup>171</sup> Instead, the two Justices suggested that the Confrontation Clause protections should be limited to any witness who actually testifies at trial, and only extrajudicial statements contained in formal testimonial materials, such as affidavits, depositions, prior testimony, or confessions should be governed by the Confrontation Clause.<sup>172</sup> These materials are limited so as to support the history and original purpose of the Confrontation Clause—to prevent depositions and *ex parte* affidavits, anonymous accusers and absentee witnesses in lieu of personal examination in court.<sup>173</sup>

Child abuse victims' statements have a greater possibility of admittance under an expansive view of an objective person test because children often do not comprehend the potential later uses of the statements. However, such a formula would require inquiry into the cognitive development of the child at issue. A better approach would be to limit Confrontation Clause protections. This was heralded originally by Justice Thomas in his concurrence in *White*, limiting the Confrontation Clause to *only* those statements at which the Clause was originally intended—that of formalized affidavits, depositions, and prior testimony. Under this narrow definition, child abuse statements would not be eligible for Confrontation Clause protections, and thereby only analyzed under traditional hearsay rules.

#### **F. High state interest in keeping children off the witness stand**

Beyond deciphering the Framers' original intention when drafting the Confrontation Clause, the state has an inherent interest in protecting children from likely harmful situations. Prior to the decision in *Crawford*, courts acknowledged the need to balance

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171. 502 U.S. 346, 364 (1992) (J. Thomas and Scalia, concurring in part and concurring in the judgment). It should be noted that Justice Scalia wrote the majority opinion in *Crawford*, 14 years after the holding in *White*, to which Justice Thomas joined.

172. *Id.* at 365.

173. *Id.* at 362, 365.

competing interests in the sensitive arena of child abuse reports.

In *United States v. Dorian*, the Eighth Circuit admitted a child's statement of abuse under the two-prong test of *Roberts*, even though the defendant had not cross-examined the declarant.<sup>174</sup> Additionally, the court noted that the Supreme Court has construed the Confrontation Clause in a "pragmatic fashion, recognizing the need to balance the rights of the accused against the public's 'strong interest in effective law enforcement.'"<sup>175</sup> The strong public interest is nowhere stronger than in the case of defenseless child abuse victims.<sup>176</sup>

The Court has acknowledged that the state has a compelling interest in "the protection of minor victims of sex crimes from further trauma and embarrassment."<sup>177</sup> The Court held, in *Maryland v. Craig*, that this state interest in protecting child abuse victims may be sufficiently important to outweigh a defendant's right to face his or her accusers in court.<sup>178</sup> In *Craig*, the Court created a case specific test based on an adequate showing of necessity, thereby allowing the child victim to testify using alternative methods and not physically face the defendant in court.<sup>179</sup>

The Court should continue to acknowledge the compelling interest of the state to protect child abuse victims from further trauma in court, even under the new *Crawford* framework. Nothing has changed to make children less susceptible to emotional damage from having to face the accused in court. Because there is a compelling state interest, the Court should fashion rules, such as those covered above regarding excited utterances, statements to medical personnel or family members, and the definition of a reasonably objective person, which further the state's strong interest in protecting child victims from further harm.

### G. Rule of forfeiture still active

*Crawford* explicitly stated that the rule of forfeiture is still acceptable and active in Confrontation Clause analysis.<sup>180</sup> The rule of forfeiture states that if the accused's own misconduct prevents him or

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174. 803 F.2d 1439, 1447 (8th Cir. 1986).

175. *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 64 (1980)).

176. *Id.* (citing *United States v. Cree*, 778 F.2d 474, 478 n.7 (8th Cir. 1985)).

177. *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (citations omitted).

178. *Id.* at 853.

179. *Id.* at 855-56. For the status of *Craig*, and the possibility for alternative forms of testimony, under the new *Crawford* framework, see *infra* Section VI.

180. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

her from having an adequate opportunity to cross-examine the witness, then the accused should be considered to have waived the right of confrontation.<sup>181</sup> This is a way in which courts can guarantee that defendants do not benefit from their own bad acts.

Defendant's procurement can be shown in child abuse cases by their use of threats and trauma imposed upon the child victims.<sup>182</sup> Studies have shown that abuse can continue in the courtroom, with abusers reasserting control to convince victims not to cooperate or participate in judicial proceedings.<sup>183</sup>

A child victim being traumatized by the presence of the accused is a direct consequence of the accused's actions. Therefore, viewed in this light, the rule of forfeiture could be applicable to the unavailability of child abuse victims. Using this principle, the defendant, through his or her own misconduct, has caused the victim to be unavailable, unable to be subject to cross-examination, and thus, should be deemed to have waived the right of confrontation. Opponents might argue that this is too broad of an extension of the rule of forfeiture, which is usually used where the defendant has harmed the potential witness, traditionally in a physical or financial way. However, this extension of the rule of forfeiture might be properly combined with the compelling state interest in protecting child victims from further harm, and thereby allow the admission of statements without requiring in-court testimony.

#### **H. Initiation by the victim and not the state**

Justice Scalia, in writing the majority opinion for the Court in *Crawford*, focused on the Framers' intentions in writing the Confrontation Clause. Scalia noted that the Confrontation Clause was principally directed at the use of *ex parte* examinations against the accused.<sup>184</sup> The text of the Clause itself focuses on those who bear witness against the accused.<sup>185</sup> In the same respect, *Crawford* explicitly noted 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."<sup>186</sup> The Court is

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181. *Adjusting to Crawford, supra* note 10, at \*8.

182. Adam M. Krischer, "Though Justice May be Blind, It is Not Stupid", 38 PROSECUTOR 14, 15 (2004).

183. *Id.*

184. *Crawford*, 541 U.S. at 50.

185. U.S. CONST. amend. VI.

186. *Crawford*, 541 U.S. at 51.

seemingly making a clear distinction with *formal* statements made to *government* officers and more informal statements made to others.

Additionally, lower courts have considered who initiated the making of such a statements, whether it be the police who approached the witness or a voluntary action by the victim.<sup>187</sup> In *People v. Moscat*, a complainant in a domestic assault case called 911 after allegedly being assaulted by the defendant.<sup>188</sup> The court held that the 911 call was not testimonial in nature because it was initiated by the victim of the crime, and its goal was to gain immediate rescue from potential danger.<sup>189</sup> The purpose of this call was not to investigate or prosecute a suspect; instead, it was to gain protection from peril following a crime, made while the victim was still in a startled and shocked state.<sup>190</sup> *Moscat* reiterated the intention of the Framers – to prohibit formal *ex parte* examinations by a Justice of the Peace in Reformation England—and such a 911 call is distinguishable from this intention.<sup>191</sup>

Similarly, in *State v. Barnes*, the Supreme Judicial Court of Maine found to be non-testimonial several statements made by victim to police officers about an earlier assault by her son.<sup>192</sup> The court reasoned that there was no structured police questioning, the mother went to the police station on her own, she was still under stress of assault by the defendant, and officers were not questioning her pursuant to an active criminal investigation.<sup>193</sup>

Therefore, following this line of reasoning, statements that are initiated by victims of sexual assault, and not by the government, could conceivably be considered non-testimonial in nature, especially if the victim is still under the stress or shock of the event. An interesting opposition to such a statement would place the Confrontation Clause as a requirement upon the accuser of a crime.

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187. The focus on who initiated the contact can also relate to the determination if an objective reasonable person would expect the statement to be used later at trial. Should the victim initiate contact with law enforcement, they might be less likely to be expected it to be used later at trial. However, other considerations include the details of events provided the officer, the state of mind of the declarant, as well as if the defendant was identified in such an interaction. See *supra* Section V(e) regarding the objective person standard.

188. 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

189. *Id.* at 879.

190. *Id.*

191. *Id.* at 880.

192. 854 A.2d 208 (Me. 2004).

193. *Id.* generally.

In such an accuser obligation approach, the witness has an obligation to confront the defendant, as the accuser is “casting a stone” and should be required to come forward and not hide in the shadows of the accusation.<sup>194</sup>

Even if we shift the obligations of the Confrontation Clause to the accuser, children present a unique problem due to their still developing mental and cognitive state. A child who cannot face the accused in court, in some degree, lacks the courage, which adults are assumed to possess, to confront those he or she accuses.<sup>195</sup> But, as shown in countless examples where our society does not expect children to have the maturity to make independent decisions until age 18, we should continue not to expect or require that children have the same fortitude that is required of adults.<sup>196</sup> Factors which should be considered to determine the obligation imposed upon children include the age of the child, the understanding of the implications of their statements, as well as considerations into the availability of alternative forms of testimony which would not cause continued harm upon the child.<sup>197</sup>

However, weighing of considerations such as age, cognitive development, understanding of consequences, and the creation of an objectively reasonable person in declarant’s position might create a subjective nightmare. Little consistency would exist to aid prosecutors and law enforcement in conducting investigations. The courts would be thrown into a plethora of case-by-case evaluations, hypothesizing about the mental state of the child in question. Instead, perhaps a more logical approach would be to hold fast to the framework of *Crawford*, accepting that children need special protections, and proposing alternatives to in-court testimony—thereby protecting the defendant’s right of confrontation while, at the same time, preventing further trauma upon the child and protecting their critical statements.

## VI. Alternatives to In-Court Testimony

While the Sixth Amendment requires the right of confrontation, the Supreme Court has held that the right to face-to-face confrontation is not absolute. In 1988, with *Coy v. Iowa*, the Court

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194. Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1264-68 (2003).

195. *Id.* at 1281.

196. *See id.*

197. *Id.* at 1283.

held that a screen between the defendant and the child sexual assault victim violated defendant's confrontation rights.<sup>198</sup> The Court reasoned that it was essential to a fair criminal trial to have face-to-face confrontation between the accused and the accuser.<sup>199</sup> However, in closing, the Court left open the possibility for exceptions to this rule, but only "when necessary to further an important public policy" and individualized findings demanding such allowances have been made.<sup>200</sup> In her concurrence, Justice O'Connor noted that nothing in the *Coy* opinion prevented state legislatures from protecting child witnesses, and that the Clause only shows a *preference* for face-to-face confrontation.<sup>201</sup> O'Connor explicitly opined that these rights upheld by the majority are not absolute, but can give way to other competing interests in order to protect a child from trauma of courtroom testimony, as long as there is a showing of necessity.<sup>202</sup>

*Maryland v. Craig* reiterated that the Confrontation Clause only expresses a preference for face-to-face confrontation, and there are certain circumstances which permit the admission of hearsay statements notwithstanding the declarant's inability to confront the defendant at trial.<sup>203</sup> The exception permitted in *Craig*, whereby face-to-face confrontation is not required, is only permitted if it is necessary to further an important public policy and when the reliability of the testimony is otherwise assured.<sup>204</sup> Accordingly, the Court held that where it is necessary to protect a child witness from trauma caused by the physical presence of the defendant, the Confrontation Clause does not prohibit an alternative method of testifying, as long as the reliability of evidence is tested through the adversarial process.<sup>205</sup> The State must make a showing of necessity; in *Craig*, the State's interest in protecting a child witness from the trauma of testifying in a child abuse case was "sufficiently important to justify the use of a special procedure" to testify without face-to-face confrontation of the defendant.<sup>206</sup> The Court upheld the

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198. 487 U.S. 1012 (1988).

199. *Id.* at 1017.

200. *Id.* at 1021.

201. *Id.* at 1023-24 (*citing* *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980)) (emphasis added) (J. O'Connor, concurrence).

202. *Id.* at 1022, 1025.

203. 497 U.S. 836, 847-49 (1990).

204. *Id.* at 850.

205. *Id.* at 857.

206. *Id.* at 855.



constitutionality of allowing a child to testify via a one-way closed circuit television procedure after a case-specific finding of necessity was made.<sup>207</sup>

Therefore, pursuant to *Craig*, to waive the face-to-face confrontation requirement, the Court requires two particular findings: (1) the presence of the accused would traumatize the child witness and (2) emotional distress must be more than de minimus.<sup>208</sup> Alternatives to face-to-face confrontation include: placing a screen between child witnesses and the defendant during child's testimony; transmitting child's testimony via closed-circuit television; and admitting children's otherwise inadmissible hearsay testimony.<sup>209</sup> With the holding in *Crawford* and the requirement of the opportunity for cross-examination, it is unlikely that courts will allow the admission of otherwise inadmissible hearsay testimony. Instead, it is more likely that courts will seek an alternative method for child testimony, whereby a child is protected from the additional trauma caused by the physical presence of the defendant, while the defendant's right of cross-examination is still protected.

The use of shielding procedures or closed circuit television is perhaps the most likely alternative, and fulfills three out of the four goals of the Confrontation Clause as stated in *Craig*. The shielding procedure ensures that the witness will give testimony under oath, that the witness is subject to cross-examination, and that the jury is able to observe the demeanor of the witness.<sup>210</sup> Due to the compelling interest of the state, this solution would waive the physical presence requirement for children.

The rule of *Craig* should continue to be valid even in the face of the requirements of *Crawford*, as they address different areas of Confrontation Clause protections. "*Crawford* addresses the question of when confrontation is required; *Craig* addresses the question of what procedures confrontation requires."<sup>211</sup> *Crawford* substantively requires the opportunity for cross-examination, while *Craig* provides an alternative to the physical presence requirement while the accuser is cross-examined. It is important to use the reasoning of *Craig* and

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207. See generally *id.*

208. *Id.* at 855-56.

209. Dorothy F. Marsil, et al., *Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209 (2002).

210. *Craig*, 497 U.S. at 845-46, 851; Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS J. 769, 777 (2004).

211. *Confrontation Clause Re-Rooted*, *supra* note 5, at 454.

the emphasis on the public policy and state's interest in protecting children to formulate alternative methods of testimony for children in the future.

However, recently, the constitutionality of the *Craig* decision has been questioned by the Eighth Circuit Court of Appeals. In *United States v. Bordeaux*, a child sexual assault victim took the witness stand in court and began her testimony.<sup>212</sup> She was, shortly thereafter, unable to continue her testimony and the court permitted her, because the victim was afraid of the defendant and the courtroom, to testify from a separate room via two-way closed-circuit television.<sup>213</sup> Defendant was convicted of aggravated sexual assault and appealed his conviction claiming that his Sixth Amendment right to confrontation was violated.<sup>214</sup> The *Bordeaux* court found that "virtual 'confrontations' offered by closed circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect;" the witness does not have to endure an unmediated gaze from the defendant in the courtroom which may deter any attempt at untruthfulness.<sup>215</sup> The court did not overturn *Craig*, but rather, only clarified the requirements for alternative methods of testimony. *Bordeaux* held that the court must find that the witness victim's fear of the defendant is the *dominant* reason for unavailability to testify in court, not simply a reason.<sup>216</sup>

With this recent Eighth Circuit decision in *Bordeaux*, the constitutionality of *Craig* stands, with stringent requirements. Child victims are provided with alternatives to in-court testimony but only if the court makes a case specific finding that the *predominant* reason for inability to testify is caused directly by *defendant's* presence in the courtroom and that the emotional distress caused to the victim must be more than de minimus.

## VII. Conclusion

The aftermath of *Crawford* left the world of child protective services and prosecutorial officers in a state of disarray. Murkiness still exists as to the permissible avenues in which courts may admit child abuse reporting statements. *Crawford* made a bright line rule to

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212. 400 F.3d 548, 552 (8th Cir. 2005).

213. *Id.*

214. *Id.*

215. *Id.* at 554.

216. *Id.* at 555.

require the opportunity for cross-examination should the declarant be unavailable to testify at trial. However, under a narrow reading of this rule, nearly all child victim statements would be excluded as they rarely have been exposed to the adversarial process. These statements are often the only eyewitness accounts, and are necessary for a successful prosecution.

A balance needs to be struck between protecting the rights of the defendant to cross-examine his accusers and the compelling interests of the State to protect vulnerable child victims. Shielding procedures and closed circuit television testimony provide an alternative to close physical proximity with the defendant and might serve as a compromise between the two rights.