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Crawford v. Washington: Implications for the Presentation of Child-Witness Testimony in Child-Abuse Cases

Lisa S. Nored[1]

I. Introduction

In 2004, the United States Supreme Court drastically shifted the course of jurisprudence relating to the nexus between the Sixth Amendment right to confrontation and the widespread use of hearsay exceptions in criminal trials.[2] Based on a historical examination of the purpose and underlying intent of the Confrontation Clause, the Court, in *Crawford v. Washington*, concluded that the resolution of the question of admissibility pursuant to a firmly-rooted hearsay exception is no longer a sufficient proxy for the exacting scrutiny required by the Sixth Amendment.[3]

The use of certain hearsay exceptions has been especially helpful in the prosecution of child abuse. Many times, child-abuse cases present significant challenges for prosecutors who, given the nature of the case, are often faced with a traumatized child witness and very little physical evidence. These unique challenges were recognized by the Supreme Court in 1987 when it stated that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."[4] However, it is unclear whether the unique challenges associated with the prosecution of child abuse and the state interest in protecting child witnesses from extreme emotional distress will be sufficient to overcome the strict demands of post-*Crawford* analysis. As such, the following discussion will examine the *Crawford* decision and address the potential implications for the presentation of child-witness testimony in Mississippi.[5]

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2. Crawford v. Washington, 541 U.S. 36 (2004).
3. *Id.*
4. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).
5. *See also* Lisa S. Nored, Child Advocacy in Mississippi (2005).

II. The Confrontation Clause and the Child Witness

*A. Pre-*Crawford *Jurisprudence*

While the *Crawford* decision has significant implications for the presentation of statements made by child witnesses, it is important to appreciate the evolution of jurisprudence before undertaking a thorough review of *Crawford v. Washington.* Pre-*Crawford* decisions by the United States Supreme Court reflect a judicial body that is protective of the fundamental right of criminal defendants to confront their accusers at trial yet also cognizant of the unique needs of child witnesses. The Court labored to find an appropriate balance to accommodate each interest. The post-*Crawford* approach, however, appears to be much more exacting and considerably less accommodating of alternatives to in-court testimony in criminal trials.

The Sixth Amendment to the Constitution clearly provides criminal defendants with the right to confront adverse witnesses in a criminal trial.[6] In *Coy v. Iowa*, Justice Scalia specifically stated that "[w]e have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[7] However, while the statement penned by Justice Scalia reflects the traditional view, throughout the nineties the Court was called upon to resolve the constitutional issues implicated by the increasing use among the states of procedural alternatives to present testimony.

Many alternatives were specifically designed to alleviate the trauma of child-abuse victims who were required to testify against their abusers in court.[8] For example, in *Coy* the Court was faced with a Sixth Amendment challenge to the use of a barrier in a criminal trial.[9] Iowa law allowed the shield to be used in cases where it was necessary to shield the victim from the perpetrator at trial.[10]

In a sense, the *Coy* decision opened the door for procedural modifications in criminal trials. The Court exhibited a willingness to accommodate the needs of child witnesses and acknowledged that the Confrontation Clause was not absolute in its guarantee of a face-to-face encounter between victims and the accused.[11] It concluded that exceptions to the Confrontation Clause may exist if necessary to promote an important public policy.[12] While the Court did not specifically delineate what exceptions were permissible, the concurring opinion by Justice O'Connor proved informative. Justice O'Connor concurred with the majority's view that the

6. U.S. Const. amend. VI.

7. Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

8. *See* Commonwealth v. Ludwig, 531 A.2d 459, 463 (Pa. Super. Ct. 1987), *rev'd*, 594 A.2d 281 (Pa. 1991), where the Pennsylvania Superior Court stated that "[t]he right to confront does not confer upon an accused the right to intimidate."

9. *Coy*, 487 U.S. 1012.

10. *Id.* at 1014–15 (citing Iowa Code § 910A.14 (1987) (repealed 1998)).

11. *Id.* at 1020–21.

12. *Id.* at 1021.

Sixth Amendment did not require a face-to-face encounter in all situations.[13] Moreover, Justice O'Connor clearly reflected an appreciation of the unique issues that attend the prosecution of child abuse and concluded that nothing in the majority opinion "necessarily dooms such efforts by state legislatures to protect child witnesses."[14] Unlike the majority, Justice O'Connor was willing to specifically acknowledge the interest of states in the protection of child witnesses as an important public policy which may, in turn, justify exceptions to the Confrontation Clause.[15]

Two years later, in *Maryland v. Craig*,[16] the Court was again required to resolve a conflict between the Sixth Amendment and a procedural alternative. *Craig* involved a challenge to a Maryland statute that allowed the use of one-way closed-circuit television in child-abuse cases.[17] Justice O'Connor, now writing for the majority, stated that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[18] Thus, while face-to-face confrontation is preferred, the Court concluded that the Confrontation Clause was not absolute in its guarantee of a face-to-face encounter.[19] The Court observed that a strict interpretation of the Sixth Amendment, requiring face-to-face encounters in all situations, would effectively eliminate the use of all hearsay exceptions.[20] It held that the Sixth Amendment "'must occasionally give way to considerations of public policy and the necessities of the case.'"[21]

In *Craig*, the Court concluded that the state interest in the protection of child-abuse victims from the trauma of testifying in criminal trials is a compelling interest that is sufficient to justify the use of a procedural alternative.[22] However, the Court did not allow the wholesale use of procedural modifications in all prosecutions involving child victims who must testify.[23] Rather, *Craig* requires a trial court to conduct a hearing to evaluate whether the procedure is necessary to protect the child.[24] Thus, in order to utilize a procedural alternative, the state must establish the following:

- the procedure is required to protect the child's welfare;

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13. *Id.* at 1022 (O'Connor, J., concurring).
14. *Id.* at 1023.
15. *Id.* at 1025.
16. Maryland v. Craig, 497 U.S. 836 (1990).
17. *Id.*
18. *Id.* at 845.
19. *Id.* at 844.
20. *Id.* at 848.
21. *Id.* at 849 (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).
22. *Id.* at 852 (citing Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596 (1982); New York v. Ferber, 458 U.S. 747 (1982); FCC v. Pacifica Found., 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944)).
23. *Id.* at 856.
24. *Id.* at 857–58.

- the child would suffer emotional distress due to the presence of the defendant;[25] and
- if required to testify, the emotional distress is more than de minimis.[26]

In evaluating claims of emotional distress, the Court held that the trauma must be "more than mere nervousness or excitement or some reluctance to testify."[27]

States also utilize videotaped testimony of child witnesses in criminal trials in an effort to reduce their trauma and enhance their ability to testify. The use of videotaped testimony, like closed-circuit television, arguably raises Sixth Amendment issues. However, the Supreme Court has not yet addressed the use of videotaped testimony. Most state appellate courts that have considered the issue have utilized guidelines similar to those established in *Maryland v. Craig*.

The use of hearsay exceptions to introduce statements of child witnesses in child-abuse cases, a useful alternative for prosecutors, was addressed by the Supreme Court in *Idaho v. Wright*[28] and *White v. Illinois*.[29] In *Wright*, the trial court admitted out-of-court statements made by a three-year-old victim of sexual abuse.[30] Statements by the child to an examining physician were admitted pursuant to a residual hearsay exception.[31] The defendant challenged the admission of the statements, arguing that it violated the Sixth Amendment.[32]

In its analysis, the Court held that admissibility pursuant to a hearsay exception did not provide insulation from Sixth Amendment scrutiny.[33] Trial courts must insure that incriminating statements satisfy the requirements of the Sixth Amendment as well as the hearsay exception.[34] The Court utilized the test established in *Ohio v. Roberts*[35] to determine whether the statements were admissible.[36]

The *Roberts* test requires that the proponent of the statement must establish that the declarant is unavailable and that the statement possesses

25. If the source of the trauma to the child is the courtroom environment, as opposed to the presence of the defendant, the child may be allowed to testify in less intimidating surroundings with the defendant present. In such situations, there is no denial of the right to confrontation. *Id.* at 856.

26. *Id.*

27. *Id.* (quoting Wildermuth v. State, 530 A.2d 275, 289 (Md. 1987)).

28. Idaho v. Wright, 497 U.S. 805 (1990).

29. White v. Illinois, 502 U.S. 346 (1992).

30. *Wright*, 497 U.S. at 809–12.

31. The exception allows the admission of statements not covered by any other exception that are offered "(A) . . . as evidence of a material fact; (B) . . . [are] more probative on the point for which [they are] offered than any other evidence . . . procur[able] through reasonable efforts; and (C) the introduction of such evidence serves the purpose of the rules of evidence and the interests of justice." *Id.* at 812 (quoting IDAHO R. EVID. 803(24)).

32. *Wright*, 497 U.S. at 812.

33. *Id.* at 814–15.

34. *See id.*

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

36. *Wright*, 497 U.S at 814–15.

sufficient indicia of reliability.[37] However, in *Roberts*, the Court held that reliability may be inferred if the statement falls within a "firmly rooted" hearsay exception.[38] If the exception is not considered to be "firmly rooted," the proponent must establish that the statement possesses "particularized guarantees of trustworthiness."[39]

In *Wright*, the Court concluded that residual hearsay exceptions were not firmly rooted and, therefore, statements admitted pursuant to that exception violated the Sixth Amendment absent proof that they possessed particularized guarantees of trustworthiness. Further, "'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances . . . [which] include only those that surround the making of the statement and that render the declarant particularly worthy of belief."[40] Moreover, the Court specifically held that trustworthiness could not be established by simple reference to corroborating evidence.[41] Because independent indicia of trustworthiness were not established, the case was reversed.[42]

Two years later, the Court again addressed the admission of incriminating statements of a child-abuse victim pursuant to hearsay exceptions. In *White v. Illinois*,[43] the defendant was convicted of aggravated sexual assault of a four-year-old child. Due to trauma associated with the attack, the child was unable to testify at trial.[44] The state sought admission of statements made by the child to her babysitter, her mother, and a police officer immediately after the assault. Those statements were admitted pursuant to the spontaneous declaration exception.[45] Statements by the child approximately four hours later to a nurse and an emergency room physician were admitted pursuant to the exceptions for spontaneous declarations and for statements for purposes of medical treatment and diagnosis.[46]

The defendant challenged the admission of the statements arguing that *Ohio v. Roberts*[47] required the state to either produce the witness at trial or find that the witness is unavailable prior to the admission of any out-of-

37. *Id.* at 815–16.

38. *Id.* at 816 (quoting *Roberts*, 448 U.S. at 66). Firmly rooted hearsay exceptions are unique "because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Wright*, 497 U.S. at 817 (citations omitted).

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

40. *Wright*, 497 U.S. at 819. In conducting the totality-of-the-circumstances analysis, the Court suggested the following factors: spontaneity and consistency of the statement; the mental state of the declarant; the use of terminology not expected from a child of that age; and lack of a motive to fabricate. The Court specifically acknowledged that a disqualification of the child as a witness at trial based on competency does not in and of itself establish that out-of-court statements by the child are unreliable. *Id.* at 822–23.

41. *Id.* at 821.

42. *Id.* at 827.

43. White v. Illinois, 502 U.S. 346 (1992).

44. *Id.* at 350.

45. *Id.*

46. *Id.* at 350–51.

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

court statements.[48] The Court rejected the argument raised by the appellant and concluded that "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."[49] The Court specifically addressed its refusal to extend the *Roberts* unavailability requirement to all out-of-court statements.[50] First, the Court emphasized the need to present the statements within the context in which they were made. It acknowledged that declarants inherently have difficultly replicating certain statements; therefore, those to whom the statements were made may offer evidence regarding the context of the statement.[51] The Court also found that the evidentiary benefits achieved by the imposition of the unavailability requirement could, in many cases, be outweighed by the burden upon the state if prosecutors were required to continually locate and subpoena each declarant to trial.[52] Lastly, the Court held that an unavailability requirement was unnecessary when hearsay exceptions are considered to be "firmly rooted." The Court concluded that such exceptions provide for the admission of statements made in "contexts which provide substantial guarantees of trustworthiness."[53] Thus, in *White* the Court essentially concluded that admissibility pursuant to a firmly rooted hearsay exception satisfied the Confrontation Clause.[54]

B. Crawford v. Washington

While the Court had become more flexible in its approach to the impact of the Confrontation Clause on statements admitted pursuant to hearsay exceptions, the tide was about to turn. In *Crawford*, the Supreme Court seized the opportunity to revert to a more exacting treatment of the Confrontation Clause of the Sixth Amendment and thus restore the true protections contemplated for criminal defendants.[55]

In *Crawford*, the defendant was charged with attempted murder and assault.[56] Crawford alleged at trial that the victim had attempted to rape his wife and therefore raised a claim of self-defense. At trial, Crawford's wife did not testify due to the marital privilege and the prosecution sought admission of her audiotaped statement to the police wherein she described the stabbing. Relying on the analysis in *Ohio v. Roberts*, the trial court admitted the statement based on its indicia of trustworthiness.[57]

48. *White*, 502 U.S. at 353.
49. *Id.* at 354.
50. *Id.*
51. *Id.*
52. *Id.* at 355.
53. *Id.*
54. *Id.* at 356.
55. Crawford v. Washington, 541 U.S. 36 (2004).
56. *Id.* at 40.
57. *Id.*

On appeal, the Court reversed the decision of the Washington Supreme Court and overturned the conviction.[58] The focus of the opinion was the continued sufficiency of the "reliability" analysis as announced in *Ohio v. Roberts*. After a thorough review of the historical basis for the Confrontation Clause, the Court concluded that the *Roberts* test was insufficient for purposes of the Sixth Amendment. In overruling *Roberts*, the Court stated that "the *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability."[59] The Court specifically held that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[60]

In order to admit out-of-court statements that are "testimonial" in nature at trial, even those that fall within firmly rooted hearsay exceptions, the proponent must establish that the declarant is unavailable *and* was subjected to cross-examination at the time the statement was made.[61] The Court concluded that such an approach was consistent with the historical purpose of the Confrontation Clause, which sought to avoid admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross examination. However, in cases where the proffered statement is non-testimonial, the *Crawford* Court concluded that it is "wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."[62]

C. The Implications of Crawford

Commentators predict that the *Crawford* decision will have the most significant impact on domestic-violence and child-abuse prosecutions.[63] The dynamics of spousal and child abuse often pose unique challenges for the legal system. Over the last decade modern courts, armed with a more enlightened understanding of domestic violence and child maltreatment, have been more empathetic to the issues attending prosecution of these cases. However, *Crawford*, unlike *Coy v. Iowa*, *Maryland v. Craig*, and *White v. Illinois*, evidences little tolerance for the public-policy implications

58. *Id.* at 69.
59. *Id.* at 62.
60. *Id.* at 61.
61. *Id.* at 68.
62. *Id.*
63. *See* Erin Thompson, *Child Sex Abuse Victims: How Will Their Stories Be Heard After* Crawford v. Washington?, 27 CAMPBELL L. REV. 279 (2005); David Jaros, *The Lessons of* People v. Moscat*: Confronting Judicial Bias in Domestic Violence Cases Interpreting* Crawford v. Washington, 42 AM. CRIM. L. REV. 995 (2005); Heather L. McKimmie, *Repercussions of* Crawford v. Washington: *A Child's Statement to a Washington State Child Protective Services Worker May be Inadmissible*, 80 WASH. L. REV. 219 (2005); Whitney Baugh, *Why the Sky Didn't Fall: Using Judicial Creativity to Circumvent* Crawford v. Washington, 38 LOY. L.A. L. REV. 1835 (2005); *cf.* Kristen Sluyter, *Sixth Amendment and the Confrontation Clause—Testimonial Trumps Reliable: The United States Supreme Court Reconsiders Its Approach to the Confrontation Clause*, 27 U. ARK. LITTLE ROCK L. REV. 323 (2005) (discussing the effect of *Crawford v. Washington* on evidentiary procedures in the criminal justice system).

of its mandate. As such, *Crawford* has the potential to significantly impact the manner in which prosecutions in these cases are handled. One only hopes that it is not a deterrent.

The exact implications are not yet known and will be apparent only as lower courts work to interpret and apply the *Crawford* decision. A key element that will be determinative of the impact of *Crawford* on child-abuse prosecutions is the manner in which "testimonial" is interpreted. While the *Crawford* Court declined to specifically delineate which statements were testimonial in nature, it did offer some guidance for lower courts. It suggested that testimonial statements are "'extrajudicial statements . . . contained in formalized testimonial materials.'"[64] Plea allocutions; testimony offered at preliminary hearings, depositions, grand jury proceedings, or prior trials; statements contained in affidavits; confessions to police; and responses to police interrogation would be properly characterized as testimonial.[65] Moreover, the Court noted that statements made to law enforcement officers would be testimonial if made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[66]

Thus, while the Court provided some guidance, a great deal of ambiguity surrounds the future application of the *Crawford* rule. Lower courts have begun the process of post-*Crawford* hearsay analysis and cases are beginning to emerge from review by appellate courts. The Mississippi Supreme Court recently addressed the *Crawford* rule as it applied to the admission of statements made by a five-year-old child pursuant to the medical treatment and diagnosis exception[67] and the tender years exception.[68]

Scott Foley was convicted of capital rape, sexual battery, and child exploitation.[69] The child was deemed unavailable to testify at trial due to her age and developmental ability.[70] On appeal, Foley challenged the admission of statements by his five-year-old daughter to Dr. Ruth Cash, a therapist who interviewed the child.[71] The appellate challenge by Foley was dual in nature and focused on the requirements of the Mississippi Rules of Evidence as well as his inability to cross-examine the child as required by *Crawford v. Washington*.[72]

Following review, the Mississippi Supreme Court concluded that the admission of statements pursuant to the above-referenced hearsay exceptions was proper.[73] In *Foley*, the court held that *Crawford* addresses only those statements that are testimonial in nature.[74] As a preliminary matter,

64. *Crawford*, 541 U.S. at 52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).
65. *Id.*
66. *Id.* (citation and internal quotation marks omitted).
67. MISS. R. EVID. 803(4).
68. MISS. R. EVID. 803(25); Foley v. State, 914 So. 2d 677 (Miss. 2005).
69. *Foley*, 914 So. 2d at 682.
70. *Id.* at 683.
71. *Id.*
72. *Id.* at 683–85.
73. *Id.*
74. *Id.* at 685.

Foley was required to establish that the challenged statements were testimonial.[75] Relying on *Crawford*, the Mississippi Supreme Court concluded that the statements by the child to her therapist were not testimonial in nature.[76] The court noted that Foley "failed to argue or show that the therapists or medical professionals who testified concerning statements made by K.F. had contacted the police or were being used by the police as a means to interrogate K.F. or investigate her claims."[77] The court concluded that the statements by the child "were made as a part of neutral medical evaluations and thus do not meet *Crawford's* 'testimonial' criterion."[78]

The approach taken by the Mississippi Supreme Court in *Foley* is similar to that used in other states. In *State v. Forrest*,[79] the defendant challenged the admission of statements pursuant to the excited utterance exception. The challenged statements were made by the victim to law enforcement officers immediately following rescue from her kidnapper.[80] The victim was unavailable and did not testify at trial.[81] As a result, the prosecution sought admission of the statements made to the officer.[82] Following review by the North Carolina Court of Appeals, the admission of the statements at trial under the excited utterance exception was affirmed.[83]

Again, the resolution of the Sixth Amendment challenge focused on the nature of the statements.[84] Like the *Foley* court, this court concluded that they were not testimonial.[85] "Just as with a 911 call, a spontaneous statement made to police immediately after a rescue can be considered 'part of the criminal incident itself, rather than as a part of the prosecution that follows.'"[86]

In other cases, however, the results have been markedly different. For example, in *State v. Snowden*,[87] the Maryland Court of Appeals reviewed the admission of statements made to a social worker by child victims of sexual abuse pursuant to the tender years exception. Following review, the court concluded that the admission of the statements at trial violated the Confrontation Clause and the holding of *Crawford v. Washington*.[88] The *Snowden* court found that the statements made to the social worker "were

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75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004).
80. *Id.* at 27.
81. *Id.*
82. *Id.*
83. *Id.* at 29.
84. *Id.* at 26.
85. *Id.* at 27.
86. *Id.* (quoting People v. Moscat, 777 N.Y.S. 2d 875, 880 (N.Y. City Crim. Ct. 2004)).
87. State v. Snowden, 867 A.2d 314 (Md. 2005).
88. *Id.* at 325–30.

in every way the functional equivalent of the formal police questioning discussed in *Crawford* as a prime example of what may be considered testimonial."[89]

In reaching its decision, the court relied on the following circumstances. First, the court noted that the social worker was asked by law enforcement to interview the children.[90] The court distinguished the case from other cases where the interviews were conducted "because they were in the course of ascertaining whether a crime had been committed."[91] In *Snowden*, however, the "children's statements were elicited by [the social worker] subsequent to initial questioning of them by police and after the identity of a suspect was known."[92] The court deemed the social worker "for Confrontation Clause analysis, [to be] an agent of the police department."[93]

In addition, the children indicated during the interview that they were aware of the potential for their statements to be used as evidence at a trial.[94] The court noted that one purpose of the interviews was to satisfy the requirements of the tender years exception.[95] It was not receptive to the argument by the state that the fact that the interviews were conducted by a social worker, as opposed to a member of law enforcement, rendered the statement nontestimonial.[96] The court held that the role of the social worker in this particular case "was little different from the role of a police officer in a routine police interrogation."[97] Therefore, the court concluded that the "structure, location, and style of the interviews actually support the notion that the children's interviews were a formal and structured interrogation where the responses reasonably would be expected to be used at a later trial."[98]

In *People v. Sisavath*,[99] the defendant, convicted of multiple counts of child sexual abuse and narcotics violations, challenged the admission of statements made by the four-year-old victim to a law enforcement officer and to child-abuse investigators. The child was not deemed competent to testify at trial due to her inability to respond to questions and understand the duty to tell the truth.[100] As such, she was unavailable to testify.[101]

On appeal, the state conceded that statements by the child to the police officer were clearly testimonial in light of *Crawford v. Washington*.[102]

89. *Id.* at 325.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 327. The court specifically noted that the social worker had extensive training in the investigation and interviewing of child witnesses and in testifying about the results of her investigations.
94. *Id.* at 326.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* (citing Crawford v. Washington, 541 U.S. 36, 51 (2004)).
99. People v. Sisavath, 118 Cal. App. 4th 1396 (2004).
100. *Id.* at 1400.
101. *Id.*
102. *Id.* at 1402.

Following review, the court concluded that statements by the child to child-abuse investigators were likewise testimonial.[103] In support of its conclusion, the court relied on the fact that the interviews were conducted after the initial complaint and information had been filed and the preliminary hearing held.[104] Moreover, a deputy district attorney and an investigator were present during the interview by a forensic interview specialist.[105] The court was not persuaded by the state's argument that the statements were not testimonial in nature due to the neutral location of the interview; that the interviewer was not a government employee; or that the interview may not have been conducted solely for a prosecutorial purpose, but also for therapeutic purposes or in preparation for removal proceedings.[106]

In *People v. Harless*,[107] the California Court of Appeals for the Sixth District concluded that statements by children to a pediatrician and a child abuse interview specialist were testimonial in nature because they were made "in the course of the district attorney's investigation of child abuse allegations against [the] defendant."[108] However, the defendant argued that although the victim did appear at trial, she was unavailable for cross examination because she testified inconsistently at trial, was unable to recall her prior statements, and so could not be thoroughly cross-examined about such matters.[109] Harless argued, therefore, that the admission of prior inconsistent statements violated the Confrontation Clause and *Crawford v. Washington.* In rejecting the argument of the defendant, the court stated "that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."[110] Further, the court held that "the Confrontation Clause guarantees only an opportunity for cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish . . . ."[111]

In *Lawson v. State*,[112] the Maryland Court of Appeals affirmed the admission of a social worker's testimony recounting out-of-court statements made by the child-victim and admitted pursuant to the tender years

103. *Id.* at 1402–03.

104. *Id.*

105. *Id.*

106. *Id.* at 1402.

107. People v. Harless, 22 Cal. Rptr. 3d 625 (Cal. Ct. App. 2004). Review was granted by the California Supreme Court and this opinion was depublished. People v. Harless, 26 Cal. Rptr. 3d 568 (Cal. 2005). Review was then dismissed in light of the decision reached in *People v. Black*, 29 Cal. Rptr. 3d 740 (Cal. 2005), which was decided on grounds different from those presented in this paper. People v. Harless, 34 Cal. Rptr. 3d 198 (Cal. 2005).

108. *Id.* at 636.

109. *Id.*

110. *Id.* at 637 (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)).

111. *Id.* (quoting United States v. Owens, 484 U.S. 554, 559 (1988) (quoting Kentucky v. Stincer, 482 U.S. 730 (1987))).

112. Lawson v. State, 886 A.2d 876 (Md. 2005). The appellate court reversed the convictions and remanded the case for a new trial based on improper comments made by the prosecutor during closing arguments. *See id.* at 898.

exception.[113] The court distinguished *Lawson* from its prior decision in *State v. Snowden*[114] due to the critical fact that the victim testified in *Lawson*, which, in turn, provided the defendant with the opportunity to cross-examine the child.[115] Unlike in *Snowden*, the "social worker did not testify in the place of the children."[116] The court, however, did not conduct an analysis to determine whether the statements were testimonial.

III. Conclusion

In most child-abuse cases, there is no physical evidence. Statements by victims are often the primary source of evidence in these cases. However, because of their vulnerability, youth, and the extent of their trauma, presentation of testimony by children can be inherently difficult. As a result, the widespread use of procedural modifications and hearsay exceptions to facilitate the introduction and admission of statements by child witnesses has evolved over the last two decades in an effort to facilitate prosecution of these cases.

On its face, *Crawford v. Washington*[117] strikes a healthy blow at the use of hearsay exceptions to admit prior statements by child complainants. During its short lifespan, *Crawford* has resulted in the reversal of numerous convictions throughout the country. A central theme emerging from the review of decisions reversing convictions in child-abuse cases post-*Crawford* is the importance of the analysis wherein appellate courts determine whether a statement is "testimonial" in nature. Statements have been considered testimonial where therapists or social workers work in conjunction with or as agents of law enforcement; where law enforcement or agents of the district attorney are present during interviews; where interviews are conducted after charges are filed; and where statements are obtained in preparation for trial. Such decisions clearly reflect an unwillingness to accommodate the reality of child-abuse investigations and thus an abandonment of the progress made over the last two decades. In the post-*Crawford* world, the burden on law enforcement and child-protection agencies in these cases has been significantly heightened; these professionals, therefore, will have to become increasingly creative when conducting investigations. Particularly troubling is the fact that the increased burden in these cases comes at a time when the extent of sex offenses against children and the relentless pursuit of child victims by sex offenders is increasing at a staggering rate.

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113. *Id.* at 887.
114. *See supra* notes 87–98 and accompanying text.
115. *Lawson*, 886 A.2d at 886–87.
116. *Id.* at 887.
117. Crawford v. Washington, 541 U.S. 36 (2004).