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Out of Harm's Way:
Hearings that are Safe from the Impact of Crawford v. Washington (Part 1 of 2)

By Allie Phillips[1]

On March 8, 2004, the United States Supreme Court issued *Crawford v. Washington*[2] which changed the landscape of all criminal prosecutions. The *Crawford* case announced a new rule regarding the admission of hearsay statements from non-testifying witnesses: ***Testimonial statements are no longer admissible in criminal prosecutions unless the witness takes the stand and is subject to cross-examination.*** The Supreme Court, however, did not provide a definition of what statements are considered testimonial.[3] As a result, *Crawford* created more questions than it answered. For example, does this new rule apply to all phases and hearings of a criminal prosecution? Does it apply to hearings or proceedings that are collateral to a criminal prosecution and are civil in nature? This article will address the hearings and proceedings where *Crawford* does not apply and analyze 18 months of post-*Crawford* case law. Please consult your state law and procedures regarding the applicability of the Sixth Amendment and *Crawford* to each hearing and proceeding listed below. To request an outline of the cases interpreting *Crawford*, please visit the NCPCA link at www.ndaa-apri.org.

Crawford is a Sixth Amendment Case… Not a Hearsay Case

Many legal professionals are confused regarding the principle on which *Crawford* is based. Judges and lawyers have mistakenly applied the new rule of *Crawford* to all hearsay statements admitted in court regardless of whether the witness appears to testify. This is not the rule of *Crawford*. Courts should only conduct a testimonial -vs- non-testimonial *Crawford* analysis of out-of-court hearsay statements ***when*** the witness has not appeared for testimony and cross-examination (and when the witness has not previously testified or been subject to cross-examination). *Crawford* only comes into play when a witness has not appeared in court and the prosecutor wishes to introduce admissible hearsay in his or her absence. This new rule of *Crawford* is based on the Sixth Amendment confrontation clause.

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him." It is crucial to remember that because *Crawford* and its new rule are based on the Sixth Amendment right to confront, they only apply (1) when the witness does not appear to testify, and (2) to hearings and proceedings where there is a Sixth Amendment right. Further, because the Sixth Amendment right to confront is a criminal right to those accused of crimes, the new rule of *Crawford* only applies to criminal prosecutions. The Sixth Amendment right to confront does not extend to civil hearings. Listed below are some post-*Crawford* opinions that have held that the new rule is not applicable in certain proceedings.

Crawford Does Not Impact Cases Where the Witness Testifies

This is one absolute rule arising from *Crawford*. If a witness appears in court, testifies and an opportunity[4] to cross examine has been provided to opposing counsel, then the new rule of *Crawford* does not apply when subsequently introducing admissible hearsay.[5] For example, in a child abuse prosecution involving a 12-year-old child victim, if the child victim appears at trial and provides testimony that is subject to cross-examination, the prosecutor may subsequently introduce other admissible hearsay statements (subject to the Rules of Evidence). This does not violate *Crawford* since the victim appeared in court to testify and be cross-examined. As such, the admissible hearsay statements are not subject to the "testimonial -vs- non-testimonial" analysis since the confrontation rule as announced in *Crawford* was satisfied when the child victim testified and was subject to cross-examination. On the other hand, if the child victim does not appear for trial and has not testified in prior hearings, then admissible hearsay statements must go through the *Crawford* "testimonial -vs- non-testimonial" analysis in order to be admitted. If the statement is non-testimonial, then the Rules of Evidence and hearsay exceptions will govern admitting the statement. If the statement is testimonial, then the statement will not be admitted without the witness testifying. Therefore, when a prosecution witness testifies at trial, all admissible out-of-court hearsay statements (whether testimonial or not) may subsequently be introduced since confrontation under *Crawford* is satisfied.

Crawford Does Not Impact Civil Proceedings

The Sixth Amendment right to confront is not a right that attaches to civil proceedings.[6] Although some civil proceedings incorporate a confrontation right on due process grounds,[7] the Sixth Amendment is only a right for those accused of criminal conduct. The new rule announced in *Crawford* was solely based on Sixth Amendment confrontation rights of those accused of crimes. Therefore, *Crawford* will not apply to a proceeding arising out of a criminal case that is civil in nature, including many **civil child neglect proceedings**[8] (such as terminating parental rights) and **sex offender hearings**.[9]

In re Children of L.D., 2005 Minn. App. LEXIS 222

(2005), held that civil child abuse/neglect termination proceedings are civil in nature, and not quasi-criminal, thus not affording the Sixth Amendment protections as outlined in *Crawford*. *People v. Maxwell (In re C.M.)*, 815 N.E.2d 49 (Ill. App. Ct. 2004), also held that *Crawford* or the right to confrontation does not apply in civil proceedings under the Juvenile Act. And the cases of *In re D.R.*, 616 S.E.2d 300 (N.C. Ct. App. 2005) and *In re April C.*, 131 Cal. App. 4th 599, 31 Cal. Rptr. 3d 804 (Cal. App. 2nd Dist. 2005) held that the Sixth Amendment and the new rule of *Crawford* do not apply in civil child neglect proceedings.

However, *Crawford* may apply in states that label child neglect or deprivation cases as quasi-criminal rather than civil in nature. In *State v. Frazier (In re P.F.)*, 2005 OK CIV APP 50 (Ok. Ct. App. 2005), a mother and father were accused of abuse and failure to protect their child in a deprivation of child action. The court addressed whether a forensic interview of a non-testifying child could be admitted at trial. Although the court did not conduct a full *Crawford* analysis of the child's forensic interview, it did not admit the tape of the interview and simply referenced the proceeding as being quasi-criminal. Similarly, in *A.G.G. v. Commonwealth*, 2005 Ky. App. LEXIS 163 (Ky. Ct. App. 2005), the court found "[i]n termination of parental rights proceedings, fundamental fairness includes the right to confrontation."

***Crawford* Does Not Impact Testimony by Closed-Circuit TV**

Testimony of children via closed-circuit television (CCTV) does not violate the Sixth Amendment right to confront or *Crawford,* because this testimony actually occurs during trial but is simply located outside of the courtroom and outside the direct view of the defendant. *Maryland v. Craig*, 497 U.S. 836 (1990), which allowed for closed-circuit testimony for traumatized children, is in compliance with the new rule announced in *Crawford*. However, attorneys should be warned against utilizing closed-circuit televised testimony for adult witnesses. This issue was addressed in *United States v. Yates*, 18 Fla. L. Weekly Fed. C 50 (11th Cir. Ala. 2004), which involved two adult victims of identity fraud who lived in Australia and were outside the subpoena power of the prosecutor's office. The victims testified via live two-way video teleconferencing. The appeals court overturned the conviction and held that the testimony violated *Crawford* and the Confrontation Clause. The court distinguished the testimony from *Maryland v. Craig*, requiring face-to-face testimony from the victims since no public policy outweighed the right of confrontation (whereas in *Maryland v. Craig* the public policy of avoiding trauma to the child allowed for CCTV testimony).

Please refer to Part Two of this article for continued discussion of proceedings where *Crawford* does not apply.

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[2] 514 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[3] In determining whether a statement is testimonial or non-testimonial, courts are consistently applying the *Crawford* two-pronged analysis to otherwise admissible hearsay statements: (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 to later be used at trial? For a more complete analysis of the *Crawford* test, please see *A Flurry of Court Interpretations: Weathering the Storm after Crawford v. Washington*, by Allie Phillips, in THE PROSECUTOR, Volume 38, Number 6 (November-December 2004); and APRI UPDATE NEWSLETTER, Volume17, Numbers 5&6 (October 2004) and *Child Forensic Interviews after Crawford v. Washington: Testimonial or Not?*, by Allie Phillips, in THE PROSECUTOR, Volume 39, Number 4 (July-August 2005).

[4] The *Crawford* decision only spoke of providing the opposing party an "opportunity" to cross-examine. If the opposing party does not take the opportunity, or only conducts a minimal or partial cross-examination, they later cannot complain that they were denied a full cross-examination. This issue may appear when the witness is unavailable for a later trial or hearing and the transcript of the prior testimony is admissible under *Crawford* so long as the opportunity to cross-examine was previously afforded. Some states expand the "opportunity" rule and require a meaningful or full and fair opportunity to cross-examine. Please consult your state procedures on the rules regarding cross-examination.

[5] See, *De La Cruz v. State*, 2005 Tex. App. LEXIS 5850 (Tex. App. Houston 14th Dist. 2005); *State v. Lewis*, 616 S.E.2d 1 (N.C. Ct. App 2005 – child victim); *Elkins v. State*, 2005 Miss. App. LEXIS 483 (Miss. Ct. App. 2005 – child victim); *State v. Wrightsman*, 2005 Haw. App. LEXIS 268 (Haw. Ct. App. 2005); *King v. State*, 2005 Ala. Crim. App. LEXIS 123 (Ala. Crim. App. 2005); *Williamson v. Miller-Stout*, 135 Fed. Appx. 958 (9th Cir. Wash. 2005); *Moreno v. State*, 2005 Tex. App. LEXIS 4091 (Tex. App. 2005); *People v. Argomaniz-Ramirez*, 102 P.3d 1015 (2004).

[6] *Erickson v. Dep't of Labor & Indus.*, 2005 Wash. App. LEXIS 1206 (Wash. Ct. App. 2005).

[7] See, *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (The Due Process Clause of the Fourteenth Amendment allows, in some civil proceedings, the right to confront adverse witnesses. This Due Process right to confront does not rise to the level of the Sixth Amendment right to confront.)

[8] The Sixth Amendment does not vest in a father the right to confront his accusers before employees of state agency investigating his estranged wife's charges that he sexually abused their minor daughter, since governmental agencies that are engaged in purely fact-finding activities are not bound by Sixth Amendment confrontational restraints. *Stem v. Ahearn* (1990, CA5 Tex.) 908 F.2d 1, cert den (1991) 498 U.S. 1069, 112 L.Ed.2d 850, 111 S.Ct. 788, reh den (1991) 499 U.S. 932, 113 L.Ed.2d 272, 111 S.Ct. 1341. Child dependency hearings are civil matters so that use of hearsay evidence did not involve Sixth Amendment and confrontation problem. *In re Appeal in Maricopa County* (1975) 111 Ariz. 588, 536 P.2d 197 (superseded by statute as stated in *In re Appeal in Maricopa County Juvenile Action No. JD-6123* (1997, App.) 191 Ariz. 384, 956 P.2d 511, 243 Ariz. Adv. Rep. 11).

[9] *People v. Angulo*, 129 Cal. App. 4th 1349, 30 Cal. Rptr. 3d 483 (Cal. App. 4th Dist. 2005); *People v. Dort*, 18 A.D. 3d 23, 792 N.Y.S.2d 112 (N.Y. App. Div. 3d Dept 2005); *Alesi v. Sex Offender Registry Bd.*, 18 Mass. L. Rep. 500 (Mass. Super. Ct. 2004); *In re Civil Commitment of G.G.N.*, 372 N.J. Super. 562. 854 A.2d 936 (N.J. Super. Ct. App. Div. 2004).

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