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# Update

## “The *Crawford v. Washington* Decision—Five Years Later”<sup>1</sup>

### *Implications for Child Abuse Prosecutors*

SPECIAL TWO-PART ARTICLE

ON *Crawford v. Washington* AND ITS PROGENY

By Mary E. Sawicki<sup>2</sup>

Five years have passed since the landmark United States Supreme Court decision in *Crawford v. Washington*<sup>3</sup> redefining the Sixth Amendment right of confrontation guaranteed by the United States Constitution.<sup>4</sup> Under the guidelines established in *Crawford*, whenever the prosecution offers hearsay testimony, the critical confrontation clause analysis focuses on the “testimonial” nature of that hearsay statement. With limited exceptions, testimonial hearsay is no longer admissible unless the criminal defendant was afforded an opportunity to cross-examine the declarant. In *Crawford*, the Court ruled that the admittance at trial of a recorded statement by the non-testifying spouse of the defendant violated the defendant’s Sixth Amendment right to confront her on the witness stand. The decision in *Crawford*, which has far-reaching implications for child abuse prosecutors, established that testimonial statements would no longer be admissible

unless the criminal defendant was afforded an opportunity to cross-examine the declarant of those statements.

Prior to *Crawford*, an out-of-court statement of a child-victim who was not present to testify depended on the judge’s finding that the statement was reliable and trustworthy.<sup>5</sup> For many child abuse prosecutors in this country, the procedures used to prosecute child abuse cases dramatically shifted after the *Crawford* decision. *Crawford* changed the validity of many states’ “Tender Years” statutes. In the five years since the 2004 *Crawford* decision, federal and state courts have issued more than 6,000 opinions struggling to define the meaning of “testimonial.”<sup>6</sup>

This article will address key issues that child abuse prosecutors are confronted with when handling a *Crawford* defense motion alleging a Sixth Amendment confrontation violation. By detailing pertinent and current case decisions, this article will offer guidelines for child abuse prosecutors as they analyze whether or

not a *Crawford* issue is present in a particular case. More specifically, it will address three essential concerns: the status of the interviewer, the reasonable expectations of the child, and the utilization of forfeiture by wrongdoing motions by the prosecution.

### **Crawford’s Two-Prong Test for Determining Whether a Statement is “Testimonial”**

Although the facts of *Crawford* were unrelated to child abuse, this case established new standards for the admission of statements made by witnesses unavailable to testify at trial. Justice Scalia, the author of the majority *Crawford* opinion, wrote: “where testimonial statements are at issue, the only *indicium* of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”<sup>77</sup> The *Crawford* court did not specifically define which statements are and which are not testimonial, offering only the following guidance, “some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.”<sup>78</sup> In other words, testimony is testimonial. The Court then elaborated, “Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.”<sup>79</sup> Just two years later, in *Davis v. Washington*,<sup>10</sup> the Court refined that categorical statement, as discussed below. Only some statements to law enforcement, or people affiliated with law enforcement, are testimonial *per se*.

In *Crawford*, the Court set out what it termed “formulations of this core class of ‘testimonial’ statements,” as follows: 1. “*Ex parte* in-court testimony or its functional equivalent:”

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

2. “Extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” or
3. “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>11</sup>

Subsequently, in *Davis*, the Court quoted these three categories only to declare that it had “found it unnecessary to endorse any of them.”<sup>12</sup> Since the formulations have not been “endorsed,” they are seemingly less than authoritative,

although it is difficult to say how much less. Many lower courts continue to treat them as definitional.

Despite the lack of detailed guidance in *Crawford*, a two-prong test evolved in child abuse prosecutions. In analyzing the admissibility of statements of an unavailable child witness, the prosecutor must consider:

- a. Whether there was a government agent involved in taking the statement? and
- b. Would a reasonable person in the child-declarant’s position believe that her statements would be used in prosecution?

*Crawford* also provided, “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>13</sup> Thus a dichotomy was established. “Casual remarks” (which need not be casual in the ordinary dictionary sense of the word) are almost never testimonial, while formal statements to government officers almost always are testimonial in nature. The difficult cases involve statements that fall in between, such as formal statements to acquaintances or informal statements to government officers.

Two years after *Crawford*, the United States Supreme Court decided two consolidated cases, *Davis v. Washington* and *Hammon v. Indiana*. Both cases involved prosecution of domestic violence. The Court in these cases held, contrary to its categorical statement in *Crawford*, that some statements to police officers are not “testimonial” after all. But to determine whether a statement to a police officer or agent of the police (such as a 911 operator) is testimonial, trial judges must utilize a test that differs significantly from the *Crawford* “reasonable declarant” test. The existence of two different and sometimes incompatible tests has proved a source of great confusion.

*Davis v. Washington* involved a domestic violence victim’s statements in response to questions by a 911 operator, whom the Court assumed to be an agent of law enforcement. The victim called 911 immediately after her assailant had “run out the door.”<sup>14</sup> In *Hammon v. Indiana*, by contrast, the police arrived at the scene after the domestic violence victim was able to get away from her assailant. The officers found her on the porch and him inside the house. Officers spoke to each separately. The victim was relatively calm and wrote by hand an account of what had happened.<sup>15</sup> Neither victim testified at trial, but both trial courts admitted their out-of-

court statements. The Supreme Court held that the hearsay was properly admitted in *Davis* but should have been excluded in *Hammon*, offering this formulation of its new test:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>16</sup>

Since *Davis*, different lower courts have evaluated the existence of an emergency from the perspective of the declarant, of the listener, of both participants and of neither.<sup>17</sup>

In cases involving very young children, the perspective from which the existence of an emergency is measured usually determines the result reached. For instance, the Ohio Supreme Court held that the recent murder of a three-year-old's mother was not an emergency, when the officers on the scene were not in immediate danger from the killer as the child was questioned.<sup>18</sup> From the child's perspective, of course, it is impossible to imagine a more dire emergency. When the victim or witness is an adult, courts are far more likely to consider the declarant's point of view.<sup>19</sup> This double standard is one that prosecutors should bring to the court's attention in hearings.

After *Davis*, the primary purpose of the interview became the key factor for child abuse prosecutors to consider as they gauge the testimonial nature of statements made by an unavailable child witness to law enforcement or an "agent" of law enforcement.

#### A. Status of the Interviewer (Non-Police Interviews)

Determining the status of the interviewer coupled with the primary purpose for conducting the interview are integral factors in the analysis set forth in *Crauford*, *Davis* and *Hammon* to determine the admissibility of statements of an unavailable witness. For child abuse prosecutors evaluating their cases, the person asking the questions of a potential child witness is usually a forensic interviewer, social worker or police officer. Police officers and law enforcement personnel generally are government agents. See the recent cases

of *Wright v. State*,<sup>20</sup> *State v. Nyhammer*,<sup>21</sup> and *In re T.T.*<sup>22</sup>

As regards non-police interviewers, the 2008 Illinois Supreme Court ruling in *In re Rolandis G.*,<sup>23</sup> 232 Ill. 2d 13 (2008) explored a variety of factors drawn from recent court decisions to determine the interviewer's status. In *Rolandis*, a child advocate conducted a taped forensic interview of a six-year-old in a children's center at the request of law enforcement. This interview was witnessed by a detective. In addition, the detective was also provided a copy of the videotape as evidence at the conclusion of the interview. Due to heavy police involvement, the *Rolandis* court ruled that the statements elicited by the trained interviewer from the child were in fact "to gather information about past events for potential future prosecutions"<sup>24</sup> and therefore should be treated as a product of police interrogation. Similarly in *State v. Contreras*,<sup>25</sup> the fact that police officers were electronically connected to the child interview and available to suggest questions to the interviewer were integral factors leading the court to decide that the child's statements in this case were indeed testimonial.<sup>26</sup>

Furthermore, recent cases have defined the status of social workers conducting child interviews. In the Ohio case of *State v. Arnold*,<sup>27</sup> the Court ruled that a social worker conducting the interview of the four-year-old child was a hospital, not a state employee, therefore rendering her not an agent of law enforcement. The statements of the child in question here were found to be non-testimonial and admissible under the medical diagnosis and treatment hearsay exception.<sup>28</sup> In addition, the case of *State v. Buda*,<sup>29</sup> holds that the "primary purpose of DYFS worker is not to collect evidence of past events to secure the prosecution of an offender but to protect prospectively a child in need."<sup>30</sup>

To effectively analyze the status of the interviewer, a child abuse prosecutor should consider the following:

1. *Employment position of the interviewers*—Are they police officers or other members of the law enforcement community?
2. *Primary purpose of the interview*—Is it for the health, welfare and safety of the child or is it to gather evidence of a past crime? (Remember, "both" is not an acceptable answer.)
3. *Independence of the interviewers*—Do they interview via an independent and/or separate professional protocol or at the behest of or under the supervision of law enforcement?

4. *Overall role of law enforcement in the interview—*

How involved is law enforcement in the coordination, observation and participation in the child interview?

**B. Status of Interviewer (Hospital Setting)**

If a child makes a statement to medical personnel in a hospital setting or doctor's office, many recent decisions indicate that those statements will be deemed non-testimonial because the primary purpose of the interview is the health of the child. Therefore, any statements elicited from the child are admissible under the medical diagnosis and treatment hearsay exception, which by definition means they weren't made for purposes of establishing facts in a criminal prosecution.

In the 2008 case of *State v. Lortz*,<sup>31</sup> an Ohio court rejected defendant's claim that the child's statements were testimonial, ruling instead that the child's statements to the nurse practitioner in a hospital setting were non-testimonial. The Court reasoned that the role of the nurse practitioner was not to gather evidence of a past crime, but to interview the child to assess information for medical diagnosis and treatment.

In *State v. Brown*,<sup>32</sup> a social worker interviewed a ten-year-old child with Asperger's Syndrome at Akron Children's Hospital. The Court held that the primary purpose of the interview was not to gather evidence of a past crime but to gain information to facilitate a medical exam. Similarly, in *State v. Muttart*,<sup>33</sup> a social worker and assistant director of a children's program interviewed a child at the Child Maltreatment Clinic. Here again, the Court ruled that the primary purpose of the interview was to gather information to facilitate a medical exam of the child, not to act in a law enforcement role or evidence gathering capacity.

*People v. Cage*,<sup>34</sup> involving family members, has proved particularly influential. A 15-year-old broke the family's glass coffee table. While his grandmother held the boy down, the boy's own mother cut his face deeply with a glass shard. The child victim made statements to medical providers at the hospital. The child victim also made a statement to an officer who interviewed him at the hospital to investigate what had occurred. The statements to the medical providers were deemed non-testimonial, while the statements to the officer were deemed testimonial.

Further support can be found in the recent domestic assault case of *Moore v. City of Leeds*,<sup>35</sup> which can be useful to child abuse prosecutors. In *Moore*, the Court held that a do-

mestic assault victim's statements to medical personnel as to the identity of her perpetrator were admissible and non-testimonial. The Court in its rationale cited that "statements by a child abuse victim that the abuser is a member of the victim's immediate family are reasonably pertinent to treatment."<sup>36</sup>

Child abuse prosecutors may be confronted by a *Crawford* defense motion alleging that a sexual assault nurse examiner is an agent of law enforcement. Courts have reached conflicting conclusions about whether SANE nurses should be considered medical workers or agents of law enforcement.<sup>37</sup> Prosecutors need to continue to make a good record that forensic nurses, like all nurses and physicians, are members of the medical profession, not police officers, and that their primary concern is the health and welfare of the child.

In addition, child abuse prosecutors should emphasize the nurse or physician's independence from law enforcement. For instance, can a police officer unilaterally direct a nurse or physician to do a certain medical exam, perform a certain procedure on a child, or ask specific questions? When a nurse or physician is not under the supervision of law enforcement and acts as a trained professional with their own medical guidelines, ethics and responsibilities, she or he should not be regarded as a police agent. Prosecutors should assert the independent role and medical protocols of a nurse or physician to stymie motions claiming they are agents of law enforcement.

**C. Reasonable Child Standard Argument**

Aside from the status of the person interviewing the child and the primary purpose of the interview, the child abuse prosecutors need to concern themselves with another important prong in the *Crawford* admissibility test: Would an objective person in the declarant's position reasonably believe that the statements would be used prosecutorially? For child abuse prosecutors, a key question is how the mental state of a traumatized child can be conveyed to a judge. Prosecutors should be alert to the possibility that other judges might adopt the "reasonable adult" perspective without acknowledgment, simply because they find it so difficult, and emotionally wrenching, to put themselves in the abused child's shoes.

The National District Attorneys Association's National Center for Prosecution of Child Abuse recently addressed this issue in its 2008 *amicus curiae* brief (seeking a writ of *certiorari* from the United States Supreme Court) on behalf of

the State of Iowa in the matter of *Iowa v. Bentley*.<sup>38</sup> In the *Bentley* case, the issue was the testimonial nature of statements made by a ten-year-old (functioning at the level of a seven-year-old) to a hospital counselor. The child became unavailable when she was killed pending the child abuse trial. Prosecutors sought to admit these statements in Court due to the unavailability of the child witness. NDAA in their *amicus curiae* brief in the *Bentley* case, urged the United States Supreme Court to grant a writ of *certiorari* and adopt a reasonable child standard in determining the admissibility of the ten-year-old's statements post-*Crawford*, *Davis* and *Hammon*. Citing the 2007 Kansas case of *State v. Henderson*,<sup>39</sup> NDAA's brief argued that a child of this age could not possibly understand that her statements to a hospital counselor could be used prosecutorially,<sup>40</sup> "a young victim's awareness or lack thereof, that her statement would be used to prosecute is not dispositive of whether her statement is testimonial. Rather, it is but one factor to consider in light of *Davis*' guidance after *Crawford*."<sup>41</sup>

Courts are sharply divided on this issue of applying a reasonable child standard to the *Crawford* analysis.<sup>42</sup> Unfortunately, the writ of *certiorari* was denied in the *Bentley* case, leaving the issue undecided. In this disputed legal territory, prosecutors should continue to pursue this argument when faced with a case of a child victim since the United States Supreme Court has yet to review a child abuse case concerning the use of a reasonable child standard.

Another argument is available to prosecutors urging courts to evaluate a child's statements to law enforcement, or agents of law enforcement, from the declarant's perspective. Courts routinely find drug suspects' remarks to confidential informants or undercover officers non-testimonial, because obviously the declarant did not know they would be used prosecutorially.<sup>43</sup> In other words, the courts adopt the declarant's perspective. Why shouldn't the same standard apply to statements made by a child?

#### *D. Use of the Forfeiture by Wrongdoing Motion*

Though the doctrine of forfeiture by wrongdoing was mentioned in the *Crawford* decision, it was not ruled upon until the Supreme Court's 2008 decision in *Giles v. California*.<sup>44</sup> In *Giles*, the primary issue to be decided was the admissibility of the murder victim's statements made to police following an earlier assault by the same perpetrator. The Court determined that the lower court had erred in admitting the statements without evidence that the defendant

killed her with the purpose of preventing her from testifying at trial. The Court in *Giles* indicated that:

[n]o case before 1985 applied forfeiture to admit statements outside the context of conduct designed to prevent a witness from testifying. The view that the exception applies only when the Defendant intends to make a witness unavailable is also supported by modern authorities, such as Federal Rule of Evidence 804 (b) (6) which codifies the forfeiture doctrine.<sup>45</sup>

The filing of a forfeiture by wrongdoing motion pre-trial is an effective tool for child abuse prosecutors faced with an unavailable child witness, when there is evidence of the defendant's actions towards the child. It is important that the search for potential forfeiture evidence begin at the inception of the criminal investigation. Prosecutors should look for potential forfeiture by wrongdoing in evidence drawn from:

1. The history of the relationship between abuser and child,
2. Any gifts or promises made to child by Defendant,
3. Any threats by Defendant to kill family members, friends or pets of the child,
4. Any letters, emails, videotaped messages of threats to child by Defendant, or
5. Any evidence of Defendant instructing a third party to ensure unavailability of child witness.

The granting of the forfeiture by wrongdoing motion by the Court will enable the prosecutor to admit statements made by the unavailable child as if the child were physically testifying.

#### **Other Avenues for Child Testimony after *Crawford***

In the majority of child abuse cases prosecuted, the child does testify, and no *Crawford* issue is raised. But oftentimes, a prosecutor may have a sense that the child may be vulnerable and subsequently become unavailable when the actual trial does occur (often a year or more after the defendant is charged with the crime). Every child victim/witness who becomes involved with the court system is a unique individual. The child may become unavailable to testify at trial due

to the actions of the defendant, post-traumatic stress, a family move out of the jurisdiction or a variety of other personal reasons.

Child abuse prosecutors should keep in mind that a Confrontation Clause violation will not be triggered at trial if the defendant has had an opportunity to cross-examine the child at a preliminary hearing. Prosecutors should be mindful to utilize this option, if their jurisdiction allows, especially if they sense the child may become unavailable at a later date.

In addition, the use of closed circuit testimony is a viable option in the majority of states for child abuse prosecutors to lessen the trauma a child might experience in testifying before the defendant. In *Maryland v. Craig*,<sup>46</sup> the U.S. Supreme Court in its landmark ruling stated that closed-circuit testimony was not a violation of the Sixth Amendment. The *Crawford* decision did not overrule that decision,<sup>47</sup> so prosecutors may continue to make use of closed circuit television technology to protect young victims without contravening *Crawford*.

The Supreme Court most recently addressed the admissibility of statements by forensic analysts in *Melendez-Diaz*, holding that the Confrontation Clause “imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses to court.”<sup>48</sup>

### Determining if Crawford applies in non-trial Hearings

It is widely accepted that the Confrontation Clause does not govern the admission of evidence at non-trial hearings. The few exceptions generally involve sentencing proceedings before juries. Prosecutors should keep in mind that, under current law, *Crawford* does not apply at:

1. *Preliminary Hearings*—See the 2008 case of *Mendoza v. Solis* where the Court ruled that the *Crawford* decision “does not affect the admissibility of evidence at a preliminary hearing”
2. *Grand Jury proceedings*—In the 2008 New York case of *People v. Hoffer*, the defendant asserted that grand jury procedures were faulty due to evidence heard by jurors of an accomplice when the defendant did not have an opportunity to cross-examine. The Court held that “as defendant had no right of cross-examination, he was not deprived of any right by the grand jury considera-

tion of the statements.”<sup>50</sup>

3. *Pre-Trial Release Hearings*—The 2008 case of *Basciano v. Lindsay* highlighted the well-established rule that the Confrontation right is one afforded the defendant at the trial stage and that “the holding in *Crawford* was explicitly limited to the right of confrontation as it applies to testimonial witnesses absent from trial.”<sup>51</sup>
4. *Pre-trial Suppression Hearings*—In the 2008 Ohio case of *State v. Amilcar*, a police officer offered a passenger’s out-of-court statement at the suppression proceedings. The court ruled that such evidence was admissible at the suppression hearing due to “right to confront not constitutionally compelled rule of pre-trial proceedings”<sup>52</sup>
5. *Sexually Violent/Predator Commitment Hearings*—The Supreme Court of New York, Appellate Division ruled on this appeal from an adjudication of the defendant as a level two sex offender. Here, the Court ruled that “contrary to the defendant’s contention, reliable hearsay evidence is admissible to support a sex offender adjudication”<sup>53</sup>
6. *Civil Cases/ Child Dependency/Forfeiture Hearings*—In the civil forfeiture 2009 case of *United States v. \$40,995 in United States Currency*, the court decided that “although some constitutional protections apply to civil forfeiture proceedings...the Confrontation Clause does not”<sup>54</sup>  
In the 2008 parental neglect case of *In re Tyler E. et al*, a mother sought review of a neglect adjudication concerning her minor children. The court decidedly ruled that “this court has previously held that neither the Sixth Amendment to the United States constitution nor article first s. 8 of the Connecticut constitution can be extended to a parent in a termination of parental rights hearing...it therefore cannot logically be extended to a neglect hearing”<sup>55</sup>

### Conclusion

Given the thousands of cases interpreting *Crawford* in the last five years, child abuse prosecutors may understandably find the conflicting rulings from state-to-state daunting. However, certain steps are appropriate in almost all jurisdictions.

First, if the child is available to testify at trial, “the Confrontation Clause places no constraints at all on the use of

his [or her] prior testimonial statements.”<sup>56</sup> Prosecutors should not concede the unavailability of a child-witness who takes the stand but freezes, or claims not to remember, or really doesn't remember. A witness can be simultaneously "unavailable" for purposes of Fed. R. Evid. 804 (and state analogues) but "available" for purposes of the confrontation clause.<sup>57</sup>

Second, alternatives to the intimidating atmosphere of the courtroom are possible, including use of closed circuit television. Also, if the child is truly unavailable, depositions and preliminary hearing testimony will also generally be admissible, if cross-examination was not unduly limited.

Third, statements made to parents, friends, teachers and other people not associated with law enforcement will usually be non-testimonial and therefore admissible whether or not the child testifies. The same is true of statements to pediatricians, nurses and other medical providers, with the possible exception (depending on precedent in a given location) of sexual assault nurse examiners. With regard to sexual assault nurse examiners, social workers and forensic interviewers, prosecutors should evaluate whether the interviewer acted independently of law enforcement and exercised independent professional protocols that would decouple the interview from testimonial statements under *Crawford*. If so, prosecutors should take the position that the non-police interviewer is not an agent of law enforcement and therefore only the reasonable expectation of the child-declarant, and not the primary purpose of the interrogation, is at issue. But even if the primary purpose of the interrogation is considered, it was to benefit the child, not to prejudice the defendant.

Fourth, when they suspect the child is being made unavailable by the defendant or those acting on the defendant's behalf, prosecutors should consider filing a forfeiture by wrongdoing motion before trial.

As the *Crawford* analysis continues to be refined, prosecutors should, within the guidelines of ethical conduct as officers of the court, use every available resource, strategy and argument to both empower and protect child victims of abuse.

The NDAA's National Center for Prosecution of Child Abuse *Crawford* outline of cases provides further analysis of *Crawford* decisions and a summary of hundreds of pertinent cases. For access to NDAA/NCPCA's *Crawford* outline of cases, please contact [ellen.giuseppe@ndaa.org](mailto:ellen.giuseppe@ndaa.org). For any *Crawford* related questions or trainings, please contact the Na-

tional Center for Prosecution of Child Abuse at 703-549-9222 or at [www.ndaa.org](http://www.ndaa.org)

<sup>2</sup> Mary E. Sawicki is a Project Consultant with NDAA's National Center for Prosecution of Child Abuse. Prior to this position, Attorney Sawicki was an Assistant District Attorney in Worcester County, MA for 23 years and Chief of its Child Abuse and Disabled Persons Protection Unit from 1991-2006. She was the recipient of the Massachusetts Bar Association Access to Justice Prosecutor Award in 2004 and Anna Maria College's "Everyday Hero" Award in 2006.

<sup>3</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>4</sup> U. S. CONST. art. VI. "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

<sup>5</sup> See *Ohio v. Roberts*, 448 U.S. 56 (1980), overruled by *Crawford*, 541 U.S. 36.

<sup>6</sup> NDAA/NCPCA's *Crawford* outline of cases was originally created by former NCPCA Senior Attorney Allie Phillips. The outline is now updated quarterly by New Mexico Assistant Attorney General Joel Jacobsen. Due to grant restrictions, the outline is only available to prosecutors and allied professionals. Please contact [ellen.giuseppe@ndaa.org](mailto:ellen.giuseppe@ndaa.org) to request access to the *Crawford* outline of cases. Special thanks to Joel Jacobsen for review and editing of this article.

<sup>7</sup> *Crawford*, 541 U.S. 36 (2004) at 68, 69.

<sup>8</sup> *Id.* at 52.

<sup>9</sup> *Id.*

<sup>10</sup> *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>11</sup> *Crawford*, 541 U.S. 36 at 52.

<sup>12</sup> *Davis*, 547 U.S. 813 at 822.

<sup>13</sup> *Crawford*, 541 U.S. 36 at 51.

<sup>14</sup> 547 U.S. 813 at 818 (quoting transcript; brackets omitted).

<sup>15</sup> *Id.* at 819-21.

<sup>16</sup> *Id.* at 822

<sup>17</sup> *U.S. v. Honken*, 541 F.3d 1146 (8th Cir. Iowa 2008) (declarant); *U.S. v. Udeozor*, 515 F.3d 260 (4th Cir. Md. 2008) (declarant); *State v. Slater*, 939 A.2d 1105 (Conn. 2008) (declarant); *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006) (declarant); *In re Rolandis G.*, 902 N.E.2d 600, (Ill. 2008) (listener); *State v. Shea*, 965 A.2d 504, 506 (Vt. 2008) (listener, mostly); *State v. Shelton*, 180 P.3d 155 (Or. Ct. App. 2008) (both); *Amos v. State*, 896 N.E.2d 1163 (Ind. Ct. App. 2008) (both, but in unequal proportion); *Clark v. State*, 199 P.3d 1203 (Alaska Ct. App. 2009) (neither); *State v. Ortega*, 175 P.3d 929 (N.M. Ct. App. 2007).

<sup>18</sup> *State v. Siler*, 876 N.E.2d 534, (Ohio Oct 25, 2007), cert. denied, 128 S.Ct. 1709 (2008).

<sup>19</sup> See, e.g., *People v. Byron*, 88 Cal.Rptr.3d 386 (Cal. Ct. App. 2009) (adult victim's statements to responding officer "were nontestimonial because the primary purpose in giving and receiving them [was] to deal with a contemporaneous emergency") (italics added); *State v. Martin*, 885 N.E.2d 18 (Ind. Ct. App. 2008) ("although [adult victim] herself was not in danger when she made these statements to police, she was experiencing an ongoing emergency in that she did not know where her children were and she feared for their safety").

<sup>20</sup> *Wright v. State*, 673 S.E.2d 249 (Ga. 2009) (statements of four-year-old questioned by military police officer in a residence deemed testimonial).

<sup>21</sup> *State v. Nyhammer*, 963 A.2d 316 (N.J.2009) (videotaped statement of child to law enforcement held testimonial).

<sup>22</sup> *People v. T.T.*, 892 N.E.2d 1163 (Ill. App. Ct. 2008) (seven-year-old's statements to police at police station held testimonial).

<sup>23</sup> *In re Rolandis G.*, 902 N.E.2d 600 (Ill. 2008). Petition for *certiorari* filed April 16, 2009.

<sup>24</sup> *Id.* at 613.

<sup>25</sup> *State v. Contreras*, 979 So. 2d 896 (Fla.2008).

<sup>26</sup> *Id.* at 896. See also *People v. T.T.*, 892 N.E.2d 1163 (Ill. App. Ct. 2008) ) (seven-year-old's statements to police given at police station held testimonial)

<sup>27</sup> *State v. Arnold*, 2008 Ohio 3471 (Ohio Ct. App. 10 Dist. 2008).

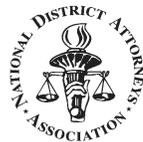
<sup>28</sup> FED. R. EVID. 803 (4) (2009) "statements made for purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment".

<sup>29</sup> *State v. Buda*, 949 A.2d 761, (N.J. 2008).

<sup>30</sup> See also *Seely v. State*, 373 Ark. 141 (Ark. 2008) (three-year-old's statement to social worker at hospital held non-testimonial.)

<sup>31</sup> *State v. Lortz*, 2008 Ohio 3108 (Ohio Ct. App. 2008).

**National District Attorneys Association**  
**American Prosecutors Research Institute**  
*National Center for Prosecution of Child Abuse*  
44 Canal Center Plaza, Suite 110  
Alexandria, Virginia 22314  
www.ndaa.org



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<sup>32</sup> *State v. Brown*, 2008 Ohio 3118 (Ohio Ct. App. 2008).

<sup>33</sup> *State v. Muttart*, 875 N.E.2d 944 (Ohio 2007).

<sup>34</sup> *People v. Cage*, 155 P.3d 205 (Cal. 2007)

<sup>35</sup> *Moore v. City of Leeds*, 1 So. 3d 145 (Ala. Crim. App. 2008).

<sup>36</sup> *Id.* at 149.

<sup>37</sup> *See, Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009) (testimonial); *State v. Ortega*, 175 P.3d 929 (N.M. Ct. App. 2007) (testimonial); *Medina v. State*, 143 P.3d 471 (Nev. 2006) (testimonial); *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006) (non-testimonial); *Commonwealth v. Brown*, 2006 Va. App. Lexis 152 (Va. Ct. App. 2006) (unpublished) (non-testimonial); *State v. Scacchetti*, 690 N.W.2d 393 (Minn. Ct. App. 2005) (non-testimonial).

<sup>38</sup> Petition for Writ of *Certiorari, State v. Bentley*, 757 N.W.2d 257 (Iowa 2008) Docket No. 07-886

<sup>39</sup> *Kansas v. Henderson*, 160 P. 3d 776 (Kan. 2007).

<sup>40</sup> *See State v. Scacchetti*, 690 N.W. 2d 393, (three-year-old's statements to social worker held to be non-testimonial).

<sup>41</sup> *Id.* at 785.

<sup>42</sup> *See, e.g., People v. Vigil*, 127 P.3d 916 (Colo. 2006) (evaluating child's statements from child's perspective); *Ohio v. Siler*, 876 N.E.2d 534 (Ohio 2007) (evaluating child's statements from uninvolved adult's perspective).

<sup>43</sup> *See, e.g., U.S. v. Watson*, 525 F.3d 583 (7th Cir. Ill. 2008) ("A statement unwittingly made to a confidential informant and recorded by the government is not 'testimonial' for Confrontation Clause purposes.").

<sup>44</sup> *Giles v. California*, 128 S.Ct. 2678 (2008).

<sup>45</sup> *Id.*

<sup>46</sup> *Maryland v. Craig*, 497 U.S. 836 (1990).

<sup>47</sup> "As nearly all courts and commentators have agreed, *Crawford* did not overrule *Craig*." *Roadcap v. Commonwealth*, 653 S.E.2d 620 (Va. Ct. App. 2007).

<sup>48</sup> *Melendez-Diaz v. Massachusetts*, United States Supreme Court Docket No. 07-591 (argued Nov. 10, 2008). For a summary of this decision, see [http://www.ndaa.org/apri/programs/ncpca/update\\_express\\_index.html](http://www.ndaa.org/apri/programs/ncpca/update_express_index.html).

<sup>49</sup> *Mendoza v. Solis*, 2008 U.S. Dist. LEXIS 35170 at 16 (Cal. Rptr. 2008)

<sup>50</sup> *People v. Hoffler*, 53 A.D. 3d 116 at 118 (N.Y. App. Div. 3d Dep't . 2008)

<sup>51</sup> *Basciano v. Lindsay*, 530 F. Supp. 2d 435 at 445 (E.D.N.Y. 2008)

<sup>52</sup> *State v. Amilcar*, 2008 Ohio 6918 (Ohio Ct. App. Franklin Co. 2008) at 36 citing *State v. Dunn*, 2004 Ohio 2883 (Ohio Ct. App. Washington Co., 2008).

<sup>53</sup> *People v. Bolton*, 50 A.D. 3d 990 (N.Y. App. Div. 2d Dep't 2008)

<sup>54</sup> *U.S. v. Farra* 554 F.3d 752 at 755 (9th Cir. Cal. 2009)

<sup>55</sup> *In re Tayler F et al*, 958 A.2d 170 at 183 (Conn. App. Ct. 2008)

<sup>56</sup> *Crawford*, 541 U.S. 36 at 59 n.9.

<sup>57</sup> *U.S. v. Owens*, 484 U.S. 554, 563 (1988).