CHILD WITNESSES & THE CONFRONTATION CLAUSE

Priscilla M. Grantham, Esq.

OBJECTIVES:

After this session, you will be able to:
2. Analyze factors used in determinations as to whether statements are testimonial or non-testimonial; and
3. Describe the relationship between states’ Child Hearsay or Tender Years statutes and the Confrontation Clause.

REQUIRED READING:

Priscilla Grantham, Child Witnesses and the Confrontation Clause (Aug. 2011)
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Child Witnesses
and the
Confrontation Clause

Priscilla Grantham
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Objectives
After this presentation, you will be able to:
• State the ruling re: admissibility of out-of-court statements by witnesses set forth in Crawford v. Washington;
• Analyze factors used in determinations as to whether statements are testimonial or non-testimonial; and
• Describe the relationship between states’ Child Hearsay or Tender Years statutes and the Confrontation Clause.

Hearsay testimony &
Confrontation clause
• 6/A guarantee: In all criminal prosecutions, the accused shall enjoy the right...to be confronted with witnesses against him.
• Frequently, there’s an attempt to introduce hearsay evid. over accused’s objection that it violates confrontation clause.
• Admissibility governed by Crawford v. Washington
Crawford v. Washington

• Overruled Roberts v. Ohio

• Under Roberts, hearsay statements subjected to “indicia of reliability” or “trustworthiness” test.

• In Crawford, Court adopted “testimonial” approach to Confrontation Clause.

Crawford’s point:
#1
Principal, and perhaps only, focus of Confrontation Clause is testimonial statements.

(What statements are to be considered testimonial?)

Crawford point:
#2
If statement is testimonial & offered by prosecution to prove truth of what it asserts, cannot be admitted unless accused has opportunity to cross examine maker of statement.

Reliability (because it fits w/in firmly rooted hearsay exception or b/c of particularized guarantee of trustworthiness) cannot be a substitute for cross-exam.
**Crawford point:**

#3

Ordinarily, cross-exam should occur at trial, but if witness - maker of testimonial statement- is unavailable to testify at trial, cross examination at earlier proceeding acceptable.

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**What Remains Unchanged Under Crawford**

#1. Under *Crawford* as before, statement does not raise a confrontation issue unless it is offered to prove the truth of the matter that it asserts.

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**What Remains Unchanged Under Crawford**

#2. Rule against hearsay and the Confrontation clause are separate sources of law; *Crawford* stops tendency to meld them.

Q. In each case is whether the given statement is testimonial; fact that statement fits w/in a hearsay exception does not alter its status w/ respect to that question.
What Remains Unchanged Under Crawford

#3 When the declarant appears for cross examination at trial, the Confrontation Clause places no constraints on the use of his prior testimonial statements.

What Remains Unchanged Under Crawford

#4. If the accused’s own misconduct prevented him or her from having an opportunity to cross examine the witness, the accused is deemed to have forfeited the confrontation clause.

What Remains Unchanged Under Crawford

#5 Crawford addresses *when* confrontation is requires; Craig addresses the Q of *what* procedures confrontation requires. The two can co-exist, so...
Upon a particularized showing that a child witness would be traumatized by having to testify in the presence of the accused, child may testify in another room with judge and counsel present but jury and accused connected electronically.

What Remains Unchanged Under Crawford

#6. A violation of the Confrontation right may be deemed harmless and therefore not require reversal.

Changed under Crawford:

#1. When a prosecutor attempts to introduce a testimonial statement made by a declarant who is not a witness at trial, (s)he will not be able to argue that statement should be admitted on ground that it’s reliable.
What this means

#1. Grand jury testimony, station house statements, statements made in plea hearings, etc. may not be introduced by the prosecution unless either:
• the witness testifies at trial, or
• the witness is unavailable and the accused has had an opportunity to cross-examine.

Defining “Testimonial.”

“Whatever else the term covers, 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. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”

Crawford

Statements Made to Police…

• Nontestimonial when made in course of police interrogation under circumstances objectively indicating primary purpose is to enable police assistance to meet an ongoing emergency.

Statements Made to Police…

Testimonial circumstances objectively indicate there is no ongoing emergency, and primary purpose is of interrogation is to establish past events potentially relevant to later criminal prosecution.

*Davis v. Washington, 547 U.S. 813 (2006).*

Issues Re: Children:

- Must interrogator be a government agent?
- Line between past events and ongoing emergencies often blurry.
- Does objective standard used to determine testimonial character of particular statements take into account age of witness and understanding of interrogation’s purpose?

To Whom Was Statement Made?

- Police
- Social worker
- “Forensic Interviewer”
- Members of child protection svcs. team
- Nurses
- Doctors
- Parents
No Hard and Fast Rules…
Factors to consider:
• Was interviewer a proxy for police?
• Where was interview conducted?
• When was interview conducted?
• Primary purpose of interview?
• Ongoing emergency?

Statements to social worker deemed nontestimonial:
• Social worker not employee of state or governmental agency,
• Purpose of interview: gather info for medical staff to treat child, not to investigate alleged child abuse.
• Interview conducted at Children’s Hospital
• No evidence that child knew detective was watching the interview
  
  *State v. Ball*, 2008 WL 2246656 (Ohio App. 10 Dist.)

Statements to Coordinator of Child Protection Team deemed Testimonial:
• Interview conducted and videotaped at shelter for victims of domestic violence.
• L.E. officer not in room, but connected electronically to CPT coordinator to suggest questions.
• CPT coordinator deemed to be a proxy for police.

  *State v. Contreras*, 979 So.2d 896 (Fla. 2008)
**Primary Purpose:**
Statements of 3 y/o to social worker (Smith) deemed Nontestimonial –

- Q of whether Smith was acting as govt. agent turns on primary purpose of interview.
- Smith provided testimony in prior child abuse cases, provided info to police and prosecutors
- Smith must have anticipated info she gathered might be used in subsequent prosecution

*But...*

- Child was in pain and about to be given medical exam
- Smith testified that her interview was to define scope of that medical exam
- Proper treatment of child included ensuring her continued safety
- No police officer initiated, observed, or participated in interview...

*Child's statements to Smith were nontestimonial based on fact that, using an objective standard, the primary purpose of the interview was medical treatment.*

*Seely v. State, 373 Ark. 141 (2008)*

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**Reasonable Child/Child’s State of Mind**

Statements made to medical personnel, employees of Dept. of Children and Family Services, parent by children as old as 9 have been classified as Nontestimonial based on fact that a typical child of that age would not reasonably believe that her statements would be used later for trial.¹
Age of Child Not Dispositive:
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.
Test: Objective, totality of the circumstances test to determine primary purpose of the interview.²

Status of Forensic Examiner:
4 y/o sister of infant made statement to psychologist that defendant (father) caused injury to infant.

Statement considered testimonial:
• Statement not given during an ongoing emergency
• Caseworker was responsible for ensuring infant’s safety upon removal from home, and therefore was an agent of law enforcement.³

The right to confrontation of a witness by a criminal D. has long been at odds w/ judicial system’s desire to protect child witnesses in certain types of crim. proceedings, i.e., sexual abuse.

Courts have permitted special hearsay exceptions & various methods of shielding child witnesses from trauma of testifying in courtroom w/ D. present.
**In-Court Protective Procedures:**

Testifying remotely or via videotape:

Actual face-to-face confrontation is not indispensable or required under every instance in which testimony is admitted against a defendant.4

• 2-way closed circuit method used in D.’s case, despite inability of children to see the D. (their father) while testifying, did not violate Confrontation Clause.5

• *Crawford* does not prohibit procedure outlined in Iowa statute (allowing minor to testify by closed circuit television.)6

• D. convicted for sexually abusing 5 y/o daughter.

• Trial ct admitted into evidence daughter’s videotaped deposition in lieu of live testimony under MO. Statute.

• Trial ct found significant emotional or psych. Damage would result to daughter if D. was present.

• D had right to cross examine his daughter during deposition through his attorney, therefore...

• Confrontation Clause not violated.7
**States’ Child Hearsay/Tender Years Statutes:**
- Tender years statute, providing for admissibility of hearsay statements of unavailable child sexual abuse victim or witness does not violate Confrontation Clause.  
- Statute specifically requires court to make determination of sufficient indicia of reliability based on:
  - Time
  - Content
  - Circumstances of statement

Nev. statute (NRS 51.385) permits introduction of statements made by child declarant describing sexual conduct or physical abuse as an exception to the hearsay rule if:
- Court holds hearing outside jury’s presence to assess circumstances surrounding trustworthiness of statement;
- Child testifies at trial or is unavailable or unable to testify, and
- Court finds the statement sufficiently trustworthy

Nevada statute implicates *Crawford* b/c it allows district court to assess reliability of child-declarant’s statements, rather than requiring assessment via cross-examination; however...

*Crawford* also states that when declarant appears for cross-examination at trial, Confrontation Clause places no constraints on use of prior testimonial statements
Pantano
• D. claimed child’s nonresponsive answers during cross effectively rendered her unavailable for confrontation purposes.
• D. argued introduction of her prior statements through testimony of others rendered unconstitutional as applied to him.
• Court disagreed.

Pantano
• Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-exam that is effective in whatever way and to whatever extent the defense might wish.
• When witness gives testimony marred by forgetfulness, confusion, or evasion...Confrontation Clause is generally satisfied when D. is given full & fair opportunity to probe and expose these infirmities through cross-exam.

Bishop v. State, 982 So.2d 371 (Miss. 2008)
Evidence re: likelihood of trauma if victim (4 y/o at time of offense) was uncontradicted, therefore victim was unavailable as a witness, as would support admission of victim’s out of court statement’s under tender years exception for sexual battery.

Admission of evidence of child victim’s statements to child-advocacy workers did not violate confrontation clause, where victim testified at trial.


Hearsay statements of child victim were admissible under child hearsay statute; victim was available to testify at trial and took witness stand; refusal of victim to answer questions at trial from either prosecutor or defense counsel did not mean she was unavailable to testify within the meaning of the statute.


4 y/o victim was not available and did not testify as a witness, and therefore, corroborative evidence of alleged act that was the subject of out of court statement was required in order to admit statement as hearsay exception, even though victim appeared in court to answer general questions, she did not testify at all about the charge.
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<td>State v. Henderson, 160 P.3d 776 (Kan. 2007); People v. Stechly, 870 N.E.2d 333 (Ill. 2007)</td>
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Thank You

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