University of Baltimore Law Review

Volume 35
Issue 1 *Fall 2005*

Article 5

2005

Comments: Crawford v. Washington: Redefining Sixth Amendment Jurisprudence; The Impact across the United States and in Maryland

Tracey L. Perrick
University of Baltimore School of Law

CRAWFORD v. WASHINGTON: REDEFINING SIXTH AMENDMENT JURISPRUDENCE; THE IMPACT ACROSS THE UNITED STATES AND IN MARYLAND

I. INTRODUCTION

Nearly one-third of American women report being physically or sexually abused by a husband or boyfriend at some point in their lives,[1] while in 2003, an estimated 960,000 American children were determined to be victims of child abuse or neglect.[2] When the Supreme Court handed down its decision in *Crawford v. Washington*[3] on March 8, 2004, it "redirected the course of admissible hearsay in light of the [Sixth Amendment] Confrontation Clause,"[4] and the Sixth Amendment became a possible source of greater protection to those criminal defendants that are accused of committing domestic violence or abusing children. In an attempt to bring Sixth Amendment jurisprudence back to that which the Framers had intended, the *Crawford* Court held that under the Sixth Amendment Confrontation Clause, where "testimonial" evidence is offered to prove the truth of the matter asserted[5] against a criminal defendant, the witness must either testify at trial or be unavailable, and the defendant must have had a prior opportunity to cross-examine that witness.[6]

However, the Court failed to articulate a firm definition of "testimonial,"[7] thereby bestowing courts across the country with the duty of

1. KAREN SCOTT COLLINS, ET AL., HEALTH CONCERNS ACROSS A WOMAN'S LIFESPAN: THE COMMONWEALTH FUND 1998 SURVEY OF WOMEN'S HEALTH 8 (1999), *available at* http://www.cmwf.org/usr_doc/Healthconcerns_surveyreport.pdf.
2. NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION, CHILD MALTREATMENT 2003: SUMMARY OF KEY FINDINGS 1 (2005), http://nccanch.acf.hhs.gov/pubs/factsheets/canstats.pdf.
3. 541 U.S. 36 (2004).
4. Allie Phillips, *Weathering the Storm after* Crawford v. Washington (Part 1 of 2), UPDATE (Am. Prosecutors Research Inst. Nat'l Ctr. for the Prosecution of Child Abuse, Alexandria, Va.) (2004), http://www.ndaa-apri.org/publications/newsletters/update_volume_17_number_5_2004.html. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." U.S. CONST. amend. VI. The Sixth Amendment was applied to the states via the 14th Amendment in *Pointer v. Texas*, 380 U.S. 400 (1965).
5. "The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9.
6. *Id.* at 68. Some states have also codified the common law doctrine of forfeiture by wrongdoing, eliminating such requirements. *See* discussion *infra* Parts III.B. and IV., as well as notes 172-73 and accompanying text.
7. *Id.*

determining exactly what constitutes testimonial evidence. Since the *Crawford* Court left such questions unanswered, those courts must also determine the extent of *Crawford*'s impact in child and domestic abuse cases – at least in the immediate future. The enduring impact of *Crawford*, however, in domestic and child abuse cases is still unknown.

In Maryland, a convicted child sex offender was granted a new trial based on the Court of Appeals' interpretation of *Crawford*.[8] As a result, the Maryland Tender Years Statute, which allows for certain health professionals' courtroom testimony in lieu of a child abuse victim's testimony, based on particularized guarantees of trustworthiness, is no longer a powerful tool for child abuse prosecutors. Spurned by such *Crawford* ramifications, there were initially three Victim and Witness Intimidation bills before the Maryland legislature designed to codify the common law rule of forfeiture, potentially making it easier for prosecutors to again get out-of-court statements admitted against a criminal defendant without *Crawford* acting as a barrier.[9] Recently, the Maryland General Assembly codified the common law rule of forfeiture, adopting a statute that incorporates by reference Maryland Rule 5-804.[10] However, the Maryland statute is more restrictive than the federal rule, the original rule proposed by the Rules Committee, as well as many other state's statutes.[11]

Clearly, the ramifications of *Crawford v. Washington* extend beyond domestic and child abuse prosecutions, yet this Comment will specifically focus on the short and long-term impacts[12] of *Crawford* in the prosecution of those cases where victims repeatedly "recant and refuse to testify, invoke a privilege, or cannot testify at trial, primarily domestic abuse and child abuse prosecutions."[13]

Specifically, Part II.A will discuss the pre-*Crawford* analysis of a criminal defendant's Sixth Amendment Confrontation Clause right. Part II.B will examine the *Crawford* decision in depth, in order to explore the historical reasoning of the Court's decision and its exact ramifications. Part III.A will evaluate how courts are currently defining testi-

8. Snowden v. State, 385 Md. 64, 867 A.2d 314 (2005).
9. *See infra* discussion Part IV.
10. 6A LYNN MCLAIN, MARYLAND EVIDENCE, STATE AND FEDERAL § 804(6):1 (2005 Supp.). The statute is codified as MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (2005). Notably, Maryland Rule 5-804 is the "corollary" to Federal Rule of Evidence 804(b)(6), the rule that codifies the forfeiture by wrongdoing doctrine. McLain, *supra* at § 804(6):1.
11. McLain, *supra* note 10, at § 804(6):1. *See also* discussion *infra* Part IV.
12. Terms used in Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to* Crawford v. Washington *in Domestic Violence Cases*, The Voice (Am. Prosecutors Research Inst.'s Violence Against Women Program, Alexandria, Va.), Nov. 2004, at 1, 2-3, available at http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf.
13. Professor Lynn McLain, "What Hath *Crawford* Wrought?", A Panel Discussion at the University of Baltimore School of Law 2 (Nov. 3, 2004) (transcript on file with author).

monial under *Crawford* in domestic violence and child abuse prosecutions, also specifically examining the relevant Maryland case, *Snowden v. State*.[14] Part III.B will discuss a possible long-term solution to combat the effects of the *Crawford* decision in domestic violence and child abuse prosecutions: the forfeiture by wrongdoing common law exception to the Confrontation Clause. Part IV will examine how Maryland has codified this common law exception, and will further argue that while this is a desirable solution in light of *Crawford*, Maryland's statute is too restrictive. Finally, Part V concludes that while the exact ramifications of *Crawford* in domestic and child abuse cases are not yet known, the forfeiture by wrongdoing exception may prove to be a worthy solution to admitting what is now considered testimonial evidence.

II. BACKGROUND

A. Ohio v. Roberts[15]

1. "[S]ufficient 'indicia of reliability'"[16]

Before *Crawford*, courts used reliability as the standard to determine admissibility of out-of-court statements against the criminally accused. In *Ohio v. Roberts*, the Court had to decide whether, under the Sixth Amendment Confrontation Clause, a witness's preliminary hearing testimony is admissible hearsay in a criminal trial if the witness is not produced at trial.[17] Respondent Herschel Roberts was convicted of forgery and possession of stolen credit cards.[18] In its case-in-chief, the prosecution had relied on the preliminary hearing testimony of witness Anita Isaacs to rebut the respondent's assertion that Isaacs had given him the checks and credit cards.[19] While the Court recognized the importance of a criminal defendant's Sixth Amendment right to literally "face" his or her accuser, it also noted that "competing interests . . . may warrant dispensing with confrontation at trial."[20] In acting as a barrier to the admission of hearsay, the *Roberts* Court concluded that the Sixth Amendment Confrontation Clause instructs that a witness be shown to be "unavailable" for cross-examination at trial.[21] Then, the witnesses' statement is admissible only if the state-

14. 156 Md. App. 139, 846 A.2d 36 (2004), *aff'd*, 385 Md. 64, 867 A.2d 314 (2005).
15. 448 U.S. 56 (1980).
16. *Id.* at 68 (quoting standard applied in Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)).
17. 448 U.S. at 58.
18. *Id.* at 58, 60.
19. *Id.* at 59. The State relied on OHIO REV. CODE ANN. § 2945.49 "which permits the use of preliminary examination testimony of a witness who 'cannot for any reason be produced at trial.'" *Id.*; *See* OHIO REV. CODE ANN. § 2945.49 (West 1997).
20. *Roberts*, 448 U.S. at 63-64 (citation omitted).
21. *Id.* at 66.

ment "bears [an] 'adequate indicia of reliability.'"[22] The Court went on to explain that "[r]eliability can be inferred without more in a case "where the evidence falls within a firmly rooted hearsay exception,"[23] or upon a "showing of particularized guarantees of trustworthiness."[24]

In reaching its holding, the Court found that Anita Isaacs' preliminary hearing testimony "bore sufficient 'indicia of reliability,'"[25] analogous to the witness in *California v. Green*.[26] In *Green*, the Court found that a witness's preliminary testimony was admissible even though he was unavailable at trial because his statement had "been given under circumstances closely approximating those that surround the typical trial."[27] Similar to the finding of admissibility in *Green*, the Court held that the questioning by Roberts' counsel during the preliminary hearing "clearly partook of cross-examination as a matter of *form*," in that counsel obviously attacked Anita Isaacs' testimony and its truthfulness.[28] Because Roberts' counsel had, and seized, the opportunity to cross-examine Anita Isaacs, Isaacs' testimony had adequate "indicia of reliability" and was admissible.[29]

B. Crawford v. Washington[30]

1. Before Reaching the Supreme Court: Reliability as the Standard

Although Michael Crawford's wife, Sylvia Crawford, did not testify at his trial for assault and attempted murder, as she relied on the state marital privilege that generally barred one spouse from testifying against the other without the other's consent, the State was permitted to introduce a tape of her statements to police, implicating her husband in the crime.[31] The trial court, invoking and applying *Ohio v.*

22. *Id.*
23. *Id.* The *Roberts* Court cited dying declarations, cross-examined prior trial testimony, and properly administered business and public records as those hearsay exceptions that "rest upon such solid foundations" that they are "firmly rooted hearsay exception[s]." *Id.* at 66 n.8.
24. *Id.* at 66. Such "particularized guarantees of trustworthiness" are based on the circumstances attendant to the making of the statement and not based on corroborative extrinsic evidence. *See* Idaho v. Wright, 497 U.S. 805, 820 (1990).
25. *Roberts*, 448 U.S. at 68.
26. 399 U.S. 149 (1970).
27. *Id.* at 165. The specific factors the court relied on were that the witness was under oath, the respondent was represented by the same counsel at trial, the respondent had opportunities to cross-examine the witness as to his statements at the preliminary hearing, and the preliminary hearing was before a tribunal and on the record. *Id.*
28. *Roberts*, 448 U.S. at 70-71 (emphasis in original).
29. *Id.* at 73 (quoting Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)).
30. 541 U.S. 36 (2004).
31. *Id.* at 40. According to Washington law, even though Crawford's wife claimed her marital privilege, the privilege does "not extend to a spouse's out-of-court statements admissible under a hearsay exception." *Id.* at 40; *see* WASH. REV. CODE ANN. § 5.60.060(1) (West 1995). The State, therefore,

Roberts,[32] held that Sylvia Crawford's statement bore "adequate 'indicia of reliability'" because it was "trustworthy."[33] Reversing the trial court, the Washington Court of Appeals employed a nine-factor test to determine the trustworthiness of Sylvia Crawford's statement, ultimately finding her statement was not trustworthy.[34] The Washington Supreme Court reinstated the conviction, finding that Sylvia Crawford's statement was trustworthy, based on its "interlocking" nature with the defendant's statement.[35] The Supreme Court granted certiorari to determine whether the use of Sylvia Crawford's statement at her husband's trial violated his Sixth Amendment Confrontation Clause right.[36]

2. Supreme Court Analysis: A Historical Examination of the Confrontation Clause in England

The Court began its analysis stating that the text of the U.S. Constitution is not enough; that a thorough study of the history of the Sixth Amendment Confrontation Clause was required in order to make a proper ruling.[37]

First examining early English law, the Court articulated that "continental civil law" was often utilized when adjudicating "the manner in

---

was able to argue the "statements against penal interest" hearsay exception because in Crawford's wife's statements to police she admitted to facilitating the assault, and these statements indicated her husband did not stab the victim in self-defense. *Crawford*, 541 U.S. at 40.

32. 448 U.S. 56.
33. *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66). In particular, the trial court found Sylvia Crawford's statement was trustworthy because the statement corroborated Michael Crawford's story, she had "direct knowledge as an eyewitness," it was a description of "recent events," and a "neutral law enforcement officer" did the questioning. *Id.*
34. *Id.* at 41. In contrast to the trial court, the court of appeals articulated several reasons as to why Sylvia Crawford's statements did not bear "particularized guarantees of trustworthiness." *Id.* For example, her statement "contradicted one she had previously given[,] it was made in response to specific questions," and she "admitted she had shut her eyes during the stabbing." *Id.* Most importantly, the court of appeals held that Sylvia Crawford's statement "differed on the issue crucial to petitioner's self-defense claim," that is, whether the victim had anything in his hand when stabbed by Crawford. *Id.*
35. State v. Crawford, 54 P.3d 656, 664 (Wash. 2002). Specifically, "'when a codefendant's confession is virtually identical [i.e., interlocks] to that of a defendant, it may be deemed reliable.'" *Id.* at 663 (alteration in original) (quoting State v. Rice, 844 P.2d 416, 427 (Wash. 1993)). Because the statements of both Michael Crawford and his wife were unclear as to whether the victim had a weapon in his hand, the court held an "omission by both that interlocks the statements . . . makes Sylvia's statement reliable." *Id.* at 664.
36. *Crawford*, 541 U.S. at 42.
37. *Id.* at 42-43. The Court noted that the "right to confront one's accusers is a concept that dates back to Roman times," but the right as known and understood today dates to English common law. *Id.* at 43.

which witnesses give testimony in criminal trials."[38] Importantly, continental civil law "condone[d] examination in private by judicial officers."[39] Justices of the Peace would often conduct civil law examinations, which were basically, pretrial examinations of witnesses and suspects.[40] Such pretrial examinations became routine during Queen Mary's reign, and these examinations were commonly used as evidence in lieu of live testimony.[41]

Sir Walter Raleigh's trial for treason in 1603 is one of the most famous uses of civil-law examination.[42] At Raleigh's trial, for purposes of recitation to the jury, the court admitted the out-of-court examination of, and letter written by, Raleigh's alleged accomplice, Lord Cobham, inculpating Raleigh.[43] In response, "Raleigh argued that Cobham had lied to save himself" and "demanded that the judges call him to appear" so he could "'[c]all [his] accuser before [his] face.'"[44] The judges did not allow Lord Cobham to appear at Raleigh's trial, and Raleigh was convicted and sentenced to death.[45]

The trial of Sir Walter Raleigh served as an impetus in England for "statutory and judicial reforms" to English law.[46] In particular, the courts solidified the rule that a witness must be "demonstrably unavailable to testify in person" before an out-of-court examination will be admissible.[47] Moreover, in *King v. Paine*, an English court concluded that the "admissibility of an unavailable witness's pretrial examination" hinges on whether the right of the accused to cross-examine that witness has been satisfied.[48]

3. Supreme Court Analysis: A Historical Examination of the Confrontation Clause in the Colonies

The *Crawford* Court noted that England was not the only sovereign to employ troublesome witness examination practices.[49] As a result, many colonial states adopted declarations of rights that guaranteed

38. *Id.*
39. *Id.* Later on, English law would adopt a "common law" approach to witness testimony at trials, which has a "tradition . . . of live testimony in court subject to adversarial testing." *Id.*
40. *Id.*
41. *Id.* at 43-44.
42. *Id.* at 44.
43. *Id.*
44. *Id.* (quoting Raleigh's Case, 2 How. St. Tr. 1, 15-16 (1603)).
45. *Id.*
46. *Id.*
47. *Id.* at 45.
48. *Id.* (citing King v. Paine, 87 Eng. Rep. 584 (1696)). "[B]y 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases." *Id.* at 46.
49. *Id.* at 47. For example, "[a] decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testi-

the right to confrontation.[50] Moreover, as the right of confrontation evolved from colonial interpretations of English common law, it became clear that confrontation was an important and highly protected Sixth Amendment right.[51]

The *Crawford* Court also cited the case of *State v. Webb*, in which the Supreme Court of North Carolina held that "depositions could be read against an accused only if they were taken in his presence."[52] Additionally, the majority noted that many other nineteenth century cases affirmed the admissibility of prior testimony only if there was a previous opportunity for the cross-examination by the accused.[53]

4. Supreme Court Analysis: Recognizing the Present Meaning of the Sixth Amendment Confrontation Clause

Adhering to its stated goal to interpret the Sixth Amendment within the context of how the Framers viewed it, the *Crawford* majority determined that English and colonial history "supports two inferences about the meaning of the Sixth Amendment."[54]

First, the Court articulated the inference that the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[55] Specifically, notorious cases such as Sir Walter Raleigh's served as the stimulus for the English common law's right to confrontation and adoption of this notion by the American colonials.[56] As a result, the *Crawford* Court vowed to make its interpretation of the Sixth Amendment with "this focus in mind."[57]

The Court recognized that not all out-of-court testimony, or hearsay, triggers a Sixth Amendment analysis; for example, an "off-hand . . . remark" might be disallowed under hearsay rules, but is not a concern of Sixth Amendment.[58] Thus, the Court focused on the text of the Sixth Amendment, which gives the accused a right to confront "'witnesses,'" or, as the Court declares, those who "'bear testimony.'"[59] Defining "'testimony'" as "'a solemn declaration or affirmation made for the purpose of establishing or proving some fact,'"[60]

---

mony by deposition or private judicial examination." *Id.* at 47-48. Colonial representatives protested these types of practices. *Id.* at 48.

50. *Id.* Notably, "[t]he First Congress . . . include[d] the Confrontation Clause in the proposal that later became the Sixth Amendment." *Id.* at 49.
51. *Id.*
52. *Id.* (citing State v. Webb, 2 N.C. (1 Hayw.) 103, 103 (N.C. 1794)).
53. *Id.* at 50.
54. *Id.* at 42-43, 50.
55. *Id.* at 50.
56. *See supra* notes 42-47 and accompanying text.
57. *Crawford*, 541 U.S. at 50.
58. *Id.* at 51.
59. *Id.* (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Johnson Reprint Corp. 1970) (1828)).
60. *Id.* (quoting WEBSTER, *supra* note 59).

the Court concluded that the text of the Sixth Amendment, along with its common-law historical evolution "reflects an especially acute concern with a specific type of out-of-court statement,"[61] that is, those statements which are testimonial.[62]

While the Court failed to reach an articulable definition of what constitutes testimonial statements, it did find certain types of out-of-court statements unequivocally, regardless of any adopted definition, testimonial.[63] Those statements are: *ex parte* testimony at a preliminary hearing,[64] statements taken by police officers in the course of interrogations,[65] grand jury testimony,[66] prior trial testimony,[67] and plea allocutions.[68]

Because the *Crawford* Court held that Sylvia Crawford's out-of-court statement to the police officer was clearly testimonial, it stated it did not need to further define what else is testimonial.[69] However, the majority did refer to three possible formulations as to what constitutes testimonial evidence. One position is that previously advocated by Justices Scalia and Thomas, defining testimonial as "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"[70] Arguably more elastic is the position argued by Crawford's lawyers, that testimonial statements are "[*e*]*x parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[71] Finally, obviously the most flexible position is that articulated by the National Association of Criminal Defense Lawyers, defining testimonial as "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."[72] Nevertheless, the Court was clear in its refusal to adopt any particular definition of testimonial.

---

61. *Id.* In distinguishing what the types of statements the right to confrontation is concerned with, the Court emphasized that "[a]n 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." *Id.*
62. *Id.*
63. *Id.* at 52, 68.
64. *Id.*
65. *Id.*
66. *Id.* at 68.
67. *Id.*
68. *Id.* at 64 (citing United States v. Aguilar, 295 F.3d 1018, 1022 (9th Cir. 2002)). This determination will be critical as the lower courts across the country attempt to categorize evidence as testimonial or non-testimonial. *See infra* Part III.A.
69. *Crawford*, 541 U.S. at 61, 68.
70. *Id.* at 51-52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).
71. *Id.* at 51.
72. *Id.* at 52.

The Court found that the second historically-based inference regarding the meaning of the Sixth Amendment was that "[t]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, *and* the defendant had had a prior opportunity for cross-examination."[73]

In support of its contention that the Confrontation Clause requires unavailability and a prior opportunity to cross-examine when determining the admissibility of testimonial evidence of witnesses absent from trial, the *Crawford* majority relied upon prior case law consistency.[74]

5. Supreme Court Analysis: Overruling *Ohio v. Roberts*[75]

While the results under preceding case law may protect the historical goals of the Sixth Amendment Confrontation Clause, the majority in *Crawford* definitively asserted that the *Roberts* test determining the admissibility of hearsay evidence[76] is both too broad and too narrow.[77]

Instead of allowing a "jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability,"[78] the Court averred that the Sixth Amendment Confrontation Clause "commands, not that evidence be reliable, but that reliability be as-

73. *Id.* at 53-54 (emphasis added). Importantly, the only exceptions to the Sixth Amendment Confrontation Clause right are those hearsay exceptions that existed at common law. Specifically, the majority asserted that business records, statements by coconspirators during and in furtherance of a conspiracy, and "casual remark[s]" are "by their nature" non-testimonial. *Id.* at 56, 51. Regarding dying declarations, the Court chose "not [to] decide . . . whether the *Sixth Amendment* incorporates an exception for testimonial dying declarations." *Id.* at 56 n.6.

74. *Id.* at 55-58. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56, 73 (1980) (admitting preliminary hearing testimony because the defendant's counsel had, and took, the opportunity to cross-examine the witness); Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (holding that because "there was an adequate opportunity" for the defendant to cross-examine the witness at the first trial, and because the defendant "availed himself of that opportunity," the testimony of the unavailable witness was admissible at defendant's second trial); Barber v. Page, 390 U.S. 719, 724-25 (1968) (excluding testimony given at a preliminary hearing because the witness was not proven to be unavailable).

75. 448 U.S. 56.

76. The *Roberts* test "conditions the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Crawford*, 541 U.S. at 60 (quoting *Roberts*, 448 U.S. at 66).

77. *Id.* Specifically, it is too broad in that it "applies the same mode of analysis whether or not the hearsay consist of *ex parte* testimony . . . result[ing] in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause." *Id.* Moreover, the test is too narrow because "[i]t admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability . . . fail[ing] to protect against paradigmatic confrontation violations." *Id.*

78. *Id.* at 62.

sessed in a particular manner: by testing in the crucible of cross-examination."[79] To illustrate the problems of the *Roberts* reliability test, the Court examined its progeny.

To begin, the Court described the reliability test as "amorphous," because "[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords to each of them."[80] But more importantly, the *Crawford* Court found issue with the *Roberts* test because of its "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[81]

6. Supreme Court Analysis: The End Result

As recognized by the Court, *Crawford*, in and of itself, is illustrative of the inherent constitutional and applicability problems that arise because of the *Roberts* test.[82] In fact, all three Washington state courts relied on *different* reliability factors to determine whether to admit Sylvia Crawford's statement.[83] Moreover, such a vague reliability standard

---

79. *Id.* at 61. In reaching this conclusion, the *Crawford* Court relied on its reasoning that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* The right of confrontation, is a "procedural rather than a substantive guarantee." *Id.* Importantly, the Court distinguished the *Roberts* reliability test from exceptions to the Confrontation Clause, such as forfeiture by wrongdoing, which "extinguishes confrontation claims on essentially equitable grounds; [because] it does not purport to be an alternative means of determining reliability." *Id.* at 62. The Court's acceptance of the forfeiture by wrongdoing hearsay exception will possibly have critical implications to the impact of domestic and child abuse prosecutions under *Crawford*. *See infra* Part III.B.

80. *Crawford*, 541 U.S. at 63. To support its point, the Court cited the *People v. Farrell* eight-factor balancing test. 34 P.3d 401, 406-07 (Colo. 2001). It also pointed to the fact that courts "wind up attaching the same significance to opposite facts." *Crawford*, 541 U.S. at 63. For example, in *Nowlin v. Virginia*, the court "found a statement more reliable because the witness was in custody and charged with a crime." *Id.* (citing *Nowlin*, 579 S.E.2d 367, 371-72 (Va. Ct. App. 2003)). In contrast, in *State v. Bintz*, the "Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect." *Crawford*, 541 U.S. at 63 (citing *Bintz*, 650 N.W.2d 913, 917 (Wis. Ct. App. 2002)).

81. *Crawford*, 541 U.S. at 63. The Court found, for example, "accomplice confessions implicating the accused" were routinely admitted. *Id.* at 64. Moreover, it pointed to the admission of plea allocutions, grand jury testimony, and prior trial testimony, as other "sorts of plainly testimonial statements" admitted based on the *Roberts* test, "despite the absence of any opportunity to cross-examine." *Id.* at 64-65. *See, e.g.*, United States v. Aguilar, 295 F.3d 1018, 1024 (9th Cir. 2002) (plea allocution admitted); United States v. Papajohn, 212 F.3d 1112, 1118 (8th Cir. 2000) (grand jury testimony admitted); State v. McNeill, 537 S.E.2d 518, 524 (N.C. Ct. App. 2000) (prior trial testimony admitted).

82. *Crawford*, 541 U.S. at 65-66.

83. *See supra* notes 33-35 and accompanying text. Moreover, "[e]ach of the courts also made assumptions that cross-examination might well have undermined." *Crawford*, 541 U.S. at 66. For example, the Washington trial

is not what the Framers had in mind, as illustrated in their adoption of English common law, not civil law, principles. In the Court's view, therefore, resolving *Crawford* based on the *Roberts* reliability test would be in conflict with the historical purpose behind the Sixth Amendment Confrontation Clause.[84]

Therefore, in accordance with what the common law required, the Court held that "[w]here testimonial evidence is at issue . . . the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination."[85] Yet, the Court "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'"[86]

Applying its articulated standard to the facts of *Crawford* and finding Sylvia Crawford's statement was clearly testimonial, due to the fact that defendant Michael Crawford had no opportunity, either at trial or before, to cross-examine Sylvia Crawford and because she was unavailable due to marital privilege, the Court ruled that the admission of her testimonial statement was in violation of the Sixth Amendment Confrontation Clause.[87]

While the impact of *Crawford* promises to be far-reaching, two critical areas it seems to affect negatively are domestic abuse and child abuse prosecutions, where it is common for a victim to retract previous statements and refuse to testify, invoke a privilege, or be simply terrified to testify. In domestic abuse and child abuse cases, prosecutors must often rely on various forms of the victim's out-of-court statements as the crux of the case.[88] Now, in light of *Crawford*, if such statements are deemed testimonial, and the defendant has not been

---

court found the Sylvia Crawford statement reliable because she was an eyewitness to the crime. *Id.* Nevertheless, Sylvia Crawford also admitted shutting her eyes at one point. *Id.* Therefore, only cross-examination could truly reveal Sylvia's true reliability as an eyewitness.

84. *Id.* at 67-68. "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack the authority to replace it with one of our own devising." *Id.* at 67.

85. *Id.* at 68. Notably, "[w]here *nontestimonial* hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law, . . . and . . . [the] exempt[ion] of such statements from Confrontation Clause scrutiny altogether." *Id.* (emphasis added). Indicating *Roberts* as an example, the Court seemed to imply that the *Roberts* reliability test is still good law in determining the admissibility of non-testimonial evidence. *Id.* at 63.

86. *Id.* at 68.

87. *Id.*

88. Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to* Crawford v. Washington *in Domestic Violence Cases*, The Voice (Am. Prosecutors Research Inst.'s Violence Against Women Program, Alexandria, Va.), Nov. 2004, at 1, 1, *available at* http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf.

afforded the opportunity to cross-examine the victim, all of the victim's out-of-court statements are inadmissible evidence.

III. ANALYSIS

A. Crawford's *Short Term Impact: How courts are defining "testimonial" evidence frequently used in domestic and child abuse prosecution*

1. Domestic Violence

"Domestic violence is one of the most difficult crimes to prosecute" due to internal and external pressures on the victim and obstacles with evidence, or the lack thereof.[89] As one South Bronx public defender stated: "[o]ne of the peculiar realities of domestic violence cases is that — abused or not — the complaining witnesses often don't want their loved ones prosecuted."[90] In order to manage this very issue, state prosecutors turned to "evidence based prosecution," whereby a "prosecutor proves his or her case with evidence other than the victim's testimony."[91]

Legal professionals seem divided on the issue of whether *Crawford* will have a detrimental impact on domestic violence prosecutions. Many legal experts exhort similar arguments to those of attorney Adam M. Krischer; that is, that the *Crawford* decision "threatens to remove this tool [of evidence based prosecution] from the hands of prosecutors across the country."[92] In contrast, other legal professionals assert that *Crawford* "should have little effect on the day-to-day trials seen in domestic violence courts in other [sic] states around the nation."[93] In light of the divided stance of professionals, an examination of how courts across the country are ruling on evidence typically utilized in domestic violence cases will provide the best way to assess the impact of *Crawford.*

Even if the victim in a domestic violence prosecution refuses to testify at trial for the prosecution, if he or she testifies for the defense, there is no Confrontation Clause issue.[94] This is because the victim has made him or herself available for confrontation.[95]

---

89. *Id.*
90. David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution,* SLATE, Mar. 12, 2004, http://slate.msn.com/id/2097041.
91. Krischer, *supra* note 88, at 1.
92. *Id.*
93. Amy Karan & David Gersten, *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington: *A View from the Bench,* SYNERGY (Nat'l Council of Juvenile and Family Court Judges, Reno, Nev.), Summer 2004, at 1, 3 *available at* http://www.ncdsv.org/images/DVHearsayExceptionsWakeCrawford.pdf.
94. *See* State v. Courtney, 682 N.W.2d 185, 196 (Minn. Ct. App. 2004) (holding that even though the victim's tape-recorded statement to police was testimonial, because the victim testified at trial for the defense, her pretrial statement was properly admitted).
95. Krischer, *supra* note 88, at 6.

Calls to 911 are an extremely common form of hearsay evidence sought to be introduced in domestic violence prosecutions.[96] In *People v. Moscat*,[97] the New York Criminal Court recognized that after *Crawford*, "the relevant inquiry . . . is whether a 911 call for help is testimonial in nature."[98] In answering its question, the court held that the 911 call at issue in the case was not testimonial, stating that "a 911 call for help is not 'testimonial' in nature . . . provided that it meets the requirements for an 'excited utterance' or other exception to the hearsay rule."[99] The court found that the 911 call at issue was clearly an excited utterance, therefore, non-testimonial.[100] Specifically, the call was not generated by law enforcement or the state to seek prosecution for a crime; rather it was initiated by a victim of a crime in need of immediate assistance.[101] Moreover, "testimonial" contemplates that the government sought out the witness to testify for the prosecution, while a 911 call is a victim/witness seeking the government's help.[102] Thus, the court concluded that 911 calls are clearly "*not* equivalent to a formal pretrial examination" the Confrontation Clause was meant to protect against.[103] Other courts have reached the same view as the *Moscat* Court, finding that 911 calls are excited utterances and therefore non-testimonial.[104]

In contrast, other courts have found 911 calls testimonial. The New York Supreme Court, in *People v. Cortes*,[105] upheld the holding of the trial court that the 911 tape of an unidentified caller reporting an alleged crime was clearly testimonial, based on the rationale that

96. People v. Moscat, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004) (discussing evidence used in domestic violence prosecutions, the court stated that "[p]erhaps the most common form of such evidence is a call for help made by a woman to 911"). *See also* Karan & Gersten, *supra* note 93, at 3.
97. 777 N.Y.S.2d 875.
98. *Id.* at 879.
99. *Id.* at 880.
100. *Id.*
101. *Id.* at 879.
102. *Id.*
103. *Id.* at 880.
104. *See, e.g.*, Leavitt v. Arave, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (holding that the victim's 911 call the night before her murder, indicating the defendant as the perpetrator, was non-testimonial because the victim initiated contact with the police, sought the assistance of the police, and was not being interrogated); People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004) (The court found the assault victim's 911 telephone call was non-testimonial because it was not given in response to police interrogation or police questioning. Moreover, the victim, not the police, initiated the 911 call to request assistance.); People v. Conyers, 777 N.Y.S.2d 274, 277 (N.Y. Sup. Ct. 2004) (The court held holding that the witness to an assault intended to call 911 to stop the assault that was in progress, not to initiate future criminal proceedings against the defendant. Thus, the witness's statements in her 911 call were not "testimonial;" rather, they were "excited utterances.").
105. 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004).

"[w]hen a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding. . . ."[106] Because the call was "for the purpose of invoking police action and the prosecutorial process"[107] it "is the modern equivalent, made possible by technology, to the depositions taken by magistrates . . . under the Marian committal statute."[108] Other courts have followed the same logic set forth by the *Cortes* Court, finding 911 calls testimonial.[109]

Seemingly, many courts hold that 911 calls made out of fear or a need for immediate help and safety are not testimonial.[110] Conversely, 911 calls made with the intent to provide information about a crime are often deemed testimonial.[111]

Statements made to treating medical doctors are also a common form of out-of-court hearsay evidence sought to be introduced in domestic violence prosecutions.[112] The status of a victim's out-of-court statements to doctors in domestic violence prosecutions is unclear; there are only a few cases thus far addressing the issue of statements to medical personnel. Although the case did not involve domestic violence, a California appeals court held that a stabbing victim's statements to a doctor at a hospital were non-testimonial, therefore, even though the victim was unavailable at trial, his statements were admissible.[113] Specifically, the court reasoned that the doctor:

> was not a police officer or even an agent of the police. He was not performing any function remotely resembling that of a Tudor, Stuart, or Hanoverian justice of the peace. Using [the victim's] statement to him against the defendant 'bears little resemblance to the civil-law abuses the Confrontation Clause targeted.'[114]

---

106. *Id.* at 415.

107. *Id.* at 416.

108. *Id.* at 415. Such depositions under the Marian committal statute are mentioned in *Crawford* by the majority as part of the history that the Confrontation Clause was meant to guard against. Crawford v. Washington, 541 U.S. 36, 43-50 (2004).

109. *See, e.g.*, State v. Powers, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (The court held that the victim's 911 call to report the violation of a no-contact order was testimonial in that the victim called 911 to report the incident and describe the defendant to the operator, rather than protect herself from his return. Also, the call was "not 'part of the criminal incident itself.'").

110. Krischer, *supra* note 88, at 6.

111. *Id.*

112. Karan & Gersten, *supra* note 93, at 3.

113. People v. Cage, 15 Cal. Rptr. 3d 846, 855 (Ct. App. 2004), *cert. granted and depublished by*, 99 P.3d 2 (Cal. 2004).

114. *Id.* at 854 (quoting Crawford v. Washington, 541 U.S. 36, 51).

In contrast, although the case did not involve domestic violence, a Colorado appeals court held that the child/victim's statements about an alleged abusive incident to a doctor were testimonial and thus inadmissible.[115] In particular, the court reached its determination based on the facts that the doctor:

> was a member of a child protection team that provide[d] consultations at . . . hospitals in cases of suspected child abuse. He had previously provided extensive expert testimony in child abuse cases. . . . [He] elicited the statements after consultation with the police, and he necessarily understood that information he obtained would be used in a subsequent prosecution for child abuse.[116]

Presently, "[s]tatements made to medical personnel appear to be non-testimonial" if "they are made out of a desire to seek medical attention rather than in anticipation of future litigation,"[117] while seemingly, "[i]f the police are already involved, so that the examination is, in a sense, part of the investigation, then statements to [a] doctor are testimonial."[118]

Lastly, statements made to police are frequently utilized as hearsay evidence in domestic violence prosecutions.[119] It is well established that "statements made to police are generally deemed testimonial and therefore require confrontation and the right to cross-examine" if they are to be admitted as evidence.[120] However, beyond statements garnered by the police in "interrogation-like" settings, which the *Crawford* Court envisions in a "colloquial" sense,[121] courts have distinguished some statements made to police as non-testimonial.

In Maine, the Supreme Judicial Court ruled that a murder victim's statements to police were non-testimonial and therefore admissible

---

115. People v. Vigil, 104 P.3d 258, 265 (Colo. Ct. App. 2004), *cert. granted*, No. 04SC532, 2004 WL 2926003 (Colo. Dec. 20, 2004).
116. *Id.* Importantly, the court noted that its finding did not exclude the doctor from testifying at pre-trial as to "his observations and physical findings." *Id.* at 266.
117. Krischer, *supra* note 88, at 7. *See also infra* note 157 and accompanying text.
118. Jeffrey L. Fisher, *Crawford v. Washington*: Reframing the Right to Confrontation 10, (June 16, 2005), http://www.dwt.com/lawdir/publications/06-05_CrawfordOutline.pdf. *See also infra* text accompanying note 157.
119. Karan & Gersten, *supra* note 93, at 3.
120. Krischer, *supra* note 88, at 7. The language in *Crawford* clearly states that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." 541 U.S. 36, 52. Encompassed within this analysis, some courts have found, a domestic violence victim's application for a protective orders to be testimonial. *See* People v. Thompson, 812 N.E.2d 516, 521 (Ill. App. Ct. 2004) (wife's written statements in her application for a protective order against her husband/defendant deemed testimonial); People v. Pantoja, 18 Cal. Rptr. 3d 492, 499 (Ct. App. 2004) (statement of declaration in support of a protective order written by victim killed via domestic violence testimonial).
121. *Crawford*, 541 U.S. at 53 n.4.

without violating the Confrontation Clause.[122] Specifically, the court held:

> First, the police did not seek her out. She went to the police station on her own . . . [s]econd, her statements to them were made when she was still under the stress of the alleged assault. Any questions posed to her by the police were presented in the context of determining why she was distressed. Third, she was not responding to tactically structured police questioning as in *Crawford*, but was instead seeking safety and aid . . . Considering all of these facts in their context, we conclude that interaction between Barnes's mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause as interpreted by the Court in *Crawford*. Nor did the victim's words in any other way constitute a 'testimonial' statement. Accordingly, it was not obvious error for the court to admit the officer's testimony.[123]

Other courts have made similar distinctions regarding statements made to police that are not akin to a structured police interrogation.[124]

A cooperative domestic violence victim who is willing to testify is certainly always the preferred choice for prosecutors – even more so today, as the victim's in-court testimony renders *Crawford* a moot point at trial. However, the dilemma of unwilling victims will inevitably continue to arise in domestic violence prosecutions. And with the Court's handing down of the *Crawford* decision, prosecutors must now attempt to prove their cases within the evolving boundaries of the new law.[125] Currently, it seems as though "*Crawford* may make domestic violence prosecutions more difficult, but it does not make them impossible."[126]

2. Child Abuse

Similar to domestic violence prosecutions, child abuse prosecutions may require proving the case with evidence other than the child's testimony. The type of evidence commonly used, however, can often differ from a domestic abuse case. Nevertheless, "[i]n a criminal case of

---

122. State v. Barnes, 854 A.2d 208, 211 (Me. 2004).
123. *Id.* at 211-12 (quoting *Crawford*, 541 U.S. at 51) (footnote omitted).
124. *See, e.g.*, People v. Cage, 15 Cal. Rptr. 3d 846, 856 (Ct. App. 2004) (The court found that "*Crawford* strongly suggested that a hearsay statement is not testimonial unless it is made in a relatively formal proceeding that contemplates a future trial." Therefore, the victim's statement to a police officer at the hospital, where there was no suspect, "no structured questioning," and "no trial . . . contemplated," was non-testimonial.) *cert. granted and depublished by*, 99 P.3d 2 (Cal. 2004).
125. The evidence, however, even if non-testimonial, must still pass the *Ohio v. Roberts* reliability standard. *See supra* note 85 and accompanying text.
126. Krischer, *supra* note 88, at 10.

child abuse in which the child is unavailable to testify, *Crawford* bars the admission of hearsay statements that are 'testimonial' unless the defendant was afforded an opportunity of prior cross-examination of the witness."[127] An examination of how courts across the country are ruling on the types of out-of-court hearsay evidence typically utilized in child abuse prosecutions will best illustrate *Crawford*'s impact, at least in the short-term, in the prosecution of child abuse offenders.

The forensic interview[128] is a common tool utilized by prosecutors in place of a child's testimony in an abuse case. While prosecutors will argue forensic interviews "are not conducted primarily for the purpose of criminal prosecution"[129] and are therefore non-testimonial, courts across the country do not seem to agree.[130]

Maryland had the opportunity to address the issue of out-of-court hearsay evidence commonly utilized in child abuse prosecutions in *Snowden v. State*.[131] Here, the court focused on forensic interview evidence. Specifically, the issue was whether a Maryland statute,[132] that

127. Victor I. Veith, *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, UPDATE, (Am. Prosecutors Research Inst. Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.) (2004), *available at* http://www.ndaa-apri.org/publications/newsletters/update_volume_16_number_12_2004.html. *Crawford* does not apply to civil protection proceedings and criminal proceedings in which the child testifies. *Id.*

128. [A] forensic interview[ ] is [the] first step in most child protective services investigations, one in which a professional interviews a child to find out if he or she has been maltreated. . . . The goal of the forensic interview is to obtain a statement from a child in an objective, developmentally sensitive, and legally defensible manner.

What is Forensic Interviewing, PRACTICE NOTES (The N.C. Div. of Soc. Servs. and the Family and Children's Res. Program, Chapel Hill, N.C.), Dec. 2002, *available at* http://www.practicenotes.org/vol8_no1/what_is.htm.

129. Phillips, *supra* note 4. Prosecutor Victor Veith asserts that forensic interviews:

[i]f done as part of a multi-disciplinary response to the possibility of abuse . . . serve[ ] the needs of the physicians who may treat the child, the therapists who may deal with the child's emotional needs, and the civil child protection professionals who may seek to prevent further abuse and even work toward the preservation of the family. Although the statement may also serve the purposes of the prosecutor at a criminal trial, the interview itself is not to focus exclusively or even primarily on the needs of investigators or prosecutors.

Veith, *supra* note 127.

130. *See infra* notes 131-45 and accompanying text.

131. 156 Md. App. 139, 846 A.2d 36 (2004), *aff'd*, 385 Md. 64, 867 A.2d 314 (2005).

132. *Id.* at 144, 846 A.2d at 39 (citing MD. CODE ANN., CRIM. PROC. §11-304 (2002 & Supp. 2004)). Generally, in juvenile and criminal proceedings, this statute establishes the admissibility of out-of-court statements of allegedly sexually abused children under twelve, offered to prove the truth of the matter asserted, if testified to by a physician, social worker, nurse, psychologist, or education professional. CRIM. PROC. § 11-304.

permitted the out-of-court hearsay statements of three child declarants through the testimony of a social worker to whom the statements were made, violated the defendant's right to confrontation under the Sixth Amendment and Article 21 of Maryland Declaration of Rights.[133] The Court of Special Appeals of Maryland held that the forensic interview statements testified to by the social worker were testimonial because they were prepared with the explicit purpose of developing the children's testimony for trial.[134] Because the statements were deemed testimonial, the social worker could not testify as to the children's statements because the children were not unavailable to testify and the defendant had had no opportunity to cross-examine them.[135]

After granting certiorari, the Court of Appeals of Maryland unanimously affirmed the testimonial quality of the social worker's trial testimony as to what the children had told her in the forensic interview.[136] In determining that the social worker's testimony was testimonial, the court found that the interview was clearly conducted with the express purpose of prosecuting the defendant.[137] And thus, "because [the social worker] was performing her responsibilities in response and at the behest of law enforcement, she became, for Confrontation Clause analysis, an agent of the police department."[138] Moreover, in response to other arguments asserted by the State, the court found that neither the location of the forensic interview, the social worker's age-appropriate demeanor in questioning the children, nor any therapeutic goals of the interview, rendered her testimony about their statements non-testimonial.[139] In concluding its

133. *Snowden*, 156 Md. App. 139, 152, 846 A.2d 36, 47.
134. *Id.* at 157, 846 A.2d at 47.
135. *Id.* at 157, 846 A.2d at 47. In so holding, the court effectively mooted a portion of Maryland's Tender Years Statute, which had previously provided for a health professional or social worker's testimony in lieu of a child abuse victim's testimony as admissible hearsay. *See* MD. CODE ANN., CRIM. PROC. § 11-304(c) (2001).
136. State v. Snowden, 385 Md. 64, 84, 867 A.2d 314, 325 (2005).
137. *Id.* at 85, 867 A.2d at 326. The court found the following facts pertinent: the social worker's questioning was done after police questioning, the interview was conducted at the request of a police detective, the social worker had the police report identifying the defendant as the abuser in her hand while interviewing the children, and the children indicated during the interviews that they knew of the illegality of defendant's conduct. *Id.* at 84, 867 A.2d at 325-26.
138. *Id.* at 86, 867 A.2d at 327. This was one of the evils that the *Crawford* Court explicitly stated that the Sixth Amendment Confrontation Clause is meant to guard against. Specifically, in *Crawford*, the Court stated: "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar." Crawford v. Washington, 541 U.S. 36, 56 n.7 (2004).
139. *Snowden*, 385 Md. at 87-88, 91, 867 A.2d at 327-30. In particular, the court found that the location of the interview, at a juvenile assessment center,

analysis as to what makes a forensic interview testimonial, the court stated:

> [n]o matter what other motives exist, if a statement is made under such circumstances that would lead an objective person to believe that statements made in response to government interrogation later would be used at trial, the admission of those statements must be conditioned upon *Crawford*'s requirements of unavailability and a prior opportunity to cross-examine.[140]

Although not a child abuse case, in the Oregon case of *State v. Mack*, a social worker's interview with a three-year-old boy who was in the house when the victim died was held to be testimonial.[141] In reaching its conclusion, the Supreme Court of Oregon reasoned that by taking over the police interviews, the social worker was acting as a "proxy for the police,"[142] and her interviews were therefore "effectively indistinguishable from the *ex parte* examinations that *Crawford* places at the heart of the Confrontation Clause protections."[143] Analogous rationales and holdings appear to be the trend in determining the status of forensic interviews in child abuse cases.[144]

It is therefore probable that courts will analyze forensic interviews by examining the status of the person conducting the interview[145] and

---

provided "a controlled and structured environment for the questioning." *Id.* at 88, 867 A.2d at 328. As to the nature of the social worker's questioning, the court asserted that "statements made to a sexual abuse investigator are no less testimonial because the investigator uses non-intimidating, age-appropriate interview techniques designed to limit re-traumatization," and furthermore, "[a]ny therapeutic motive, or effect, of [the social worker's] involvement with the children is secondary, in terms of proper Confrontation Clause analysis, to the overarching investigatory purpose, and therefore testimonial nature, of the statements elicited during the interviews." *Id.* at 88, 91, 867 A.2d at 328, 330.

140. *Id.* at 91-92, 867 A.2d at 330. The State had also attempted to argue that Snowden did not properly preserve his objection because the children were available in the courtroom and he did not expressly object to the state's failure to call them. *Id.* at 92-93, 867 A.2d at 330-31. However, the court refused to accept this interpretation, asserting that "Snowden's objections to the use of the social worker's testimony properly preserved his [Sixth Amendment] Confrontation Clause arguments for appellate review." *Id.* at 93, 867 A.2d at 331.

141. 101 P.3d 349, 352 (Or. 2004).

142. *Id.*

143. *Id.* at 353.

144. *See* State v. Courtney, 682 N.W.2d 185, 196 (Minn. Ct. App. 2004) (holding that the videotaped statements of a child's interview with a protective services worker regarding the witnessing of a domestic assault was done with "the purpose of developing the case" against the Defendant and was therefore testimonial and inadmissible), *rev'd*, 696 N.W.2d 73 (Minn. 2005) (holding that the admission of the videotaped statements was harmless error).

145. *See, e.g.*, People v. Geno, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (finding that a "child's statement did not constitute testimonial evidence under

the purpose of the interview.[146] Courts across the country, however, have all found forensic interviews admissible under the Sixth Amendment if the interviewee testifies or, even in some courts, is available to testify.[147]

Often, a prosecutor will want to admit the statements of a child made to his or her parents or to a medical professional. In terms of out-of-court statements made to parents, the Fifth Circuit of the Florida Court of Appeals, in a capital sexual battery case, held that a child's statements to her parents were non-testimonial because they were "spontaneous."[148] Even though the child refused to testify, was therefore unavailable at trial, and had not been previously cross-examined by the defendant, the court ruled that because her statements were made "spontaneous[ly]" while being dressed by her mother, they were not testimonial within the contemplation of *Crawford*.[149]

However, in Ohio, a child victim's statements to her mother were ruled inadmissible under the Sixth Amendment Confrontation Clause.[150] When the child began sobbing uncontrollably on the stand, the trial court allowed the child's mother to testify as to what

---

Crawford, and therefore was not barred by the Confrontation Clause" because "[t]he child's statement was made to the executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question of whether she had an 'owie' was not a statement in the nature of 'ex parte in-court testimony or its functional equivalent'") (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004))). *But cf.* People v. Vigil, 104 P.3d 258, 262 (Colo. Ct. App. 2004) (holding that the videotaped statement given by the child to the police officer in this case was testimonial under *Crawford* because "the police officer who conducted the interview had had extensive training in the particular interrogation techniques required for interviewing children," and conducted the interview in a manner indicating preparation for charges and a trial, especially by asking the child what should happen to the defendant), *cert. granted in part*, No. 04SC532, 2004 Colo. WL 2926003(Colo. Dec. 20, 2004). *See also supra* note 138 and accompanying text and *supra* text accompanying note 142.

146. *See supra* notes 137, 139 & 144 and accompanying text.

147. *See, e.g.*, People v. Argomaniz-Ramirez, 102 P.3d 1015, 1019 (Colo. 2004) (holding that "[b]ecause the admission of prior out-of-court statements made by a witness who is testifying at trial and is subject to cross-examination does not violate a defendant's right to confrontation . . . the videotaped statements of both children are admissible."); Somervell v. State, 883 So. 2d 836, 837 (Fla. Dist. Ct. App. 2004) (finding that the videotaped forensic interview of an eight-year-old boy was properly admitted at trial against the defendant because the boy "was not only available to testify, he did in fact testify, and [the defendant] . . . had a full and complete opportunity to confront and cross-examine him"); Starr v. State, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004) (holding that videotaped interview with the victim did not violate the Confrontation Clause and was admissible because although the victim did not testify, the record showed "she was available for cross-examination").

148. Herrera-Vega v. State, 888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004).

149. *Id.* at 67, 69.

150. State v. Harr, 821 N.E.2d 1058, 1067 (Ohio Ct. App. 2004).

the child had told her under the "excited utterances" hearsay exception.[151] On appeal, the Ohio Court of Appeals ruled that the trial court abused its discretion by admitting the mother's statements because the child victim's statements to her mother "were given nearly two weeks after the startling event . . . after the child was confronted by her mother for disobeying her order not to enter a stranger's apartment, and only after she interrogated the child with leading questions."[152] While the status of out-of-court statements to parents seems to hinge on the spontaneity of the statement, it is worth noting that out-of-court statements made to parents by children will seemingly be admissible if the child is available to testify with an opportunity for cross-examination afforded to the defendant.[153]

In a case concerning a child sexual abuse victim's statements to a medical professional, the Supreme Court of Nebraska held that the four-year-old victim's statements to her doctor were for the sole purpose of obtaining medical treatment and therefore non-testimonial.[154] The court reasoned that "the victim was taken to the hospital by her family to be examined . . . . [t]here was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination."[155] However, in the case of *In re* T.T., the Illinois appellate court refused to admit a doctor's testimony as to the child abuse victim's identification of the defendant because such statements dealing with "fault or identity". . . "implicate[d] the core concerns protected by the confrontation clause."[156] Similar to domestic abuse cases, it seems as though a child abuse victim's statements will be deemed testimonial if made when medical personnel are involved with a police investigation or if made with the purpose of identifying the defendant as the perpe-

151. *Id.* at 1059-60, 1064.

152. *Id.* at 1067.

153. *See* State v. McClanahan, No. 50866-1-I, 2004 Wash. App. LEXIS 597, at *1, *11-13 (Wash. Ct. App. Apr. 5, 2004) (holding that a child's statements to her mother were admissible under the Sixth Amendment Confrontation Clause because the child/victim had testified).

154. State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004). *See also*, People v. Cage, 15 Cal. Rptr. 3d 846, 854-55, (Ct. App. 2004) (holding statements to a doctor could not be expected to be used in a prosecution so were not testimonial)), *cert. granted and depublished by*, 99 P.3d 2 (Cal. 2004).

155. *Vaught*, 682 N.W.2d at 291.

156. 815 N.E.2d 789, 803-04 (Ill. App. Ct. 2004). The court, however, did find that the child abuse victim's statements regarding all physical symptoms do not violate the Confrontation Clause and are admissible. *Id. See also* People v. Vigil, 104 P.3d 258, 265-66 (Colo. Ct. App. 2004) (stating that a finding that a child's statements to a doctor were testimonial does not require the exclusion of testimony by the doctor regarding his observations and physical findings), *cert. granted*, No. 04SC532, 2004 WL 2926003 (Colo. Dec 20, 2004).

trator, whereas statements made to medical personnel merely describing physical symptoms are deemed non-testimonial.[157]

Finally, it is not unusual for a child abuse victim to exhibit poor memory or freeze, or both, during his or her trial testimony. The issue then becomes whether just by virtue of being on the stand at trial, the child's out-of-court statements to others are admissible. Although still uncertain, recent *Crawford* case law addressing this scenario indicates that "[p]rovided that the child takes the witness stand and is subject to cross-examination, the child's lack of memory regarding [his or her] prior statements does not bar the admission of those hearsay statements (including statements made during a forensic interview)."[158]

For example, in *People v. Harless*, the California Court of Appeals held that a child victim's partial memory loss on the stand did not violate the defendant's Sixth Amendment Confrontation right.[159] Based on the Supreme Court's exact language in *Crawford*,[160] the California court found that the victim's

> partial failure of recollection did not prevent her from explaining her prior statements, or preclude the jury from assessing her demeanor and determining whether her prior statements or her trial testimony was more credible. Accordingly, defendant had the opportunity for effective cross-examination . . . .[161]

---

157. *See supra* notes 154-56 and accompanying text. *See also supra* notes 112-18 and accompanying text.

158. Phillips, *supra* note 4. *See also* United States v. Owens, 484 U.S. 554 (1988). In *Owens*, a correctional officer was violently attacked with a metal pipe. *Id.* at 556. At trial, the officer testified that he remembered being visited by an FBI agent and identifying the defendant as the assailant. *Id.* However, on cross-examination, the officer admitted he did "not remember seeing [his] assailant," did not remember any other visitors during his hospital stay, and further, could not recall whether he had any visitors suggest that the defendant was the assailant. *Id.* Defense counsel appealed, alleging, in part, that the Sixth Amendment Confrontation Clause prohibits "testimony concerning a prior, out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis of the identification." *Id.* at 555. The Supreme Court held that the defendant's Sixth Amendment right to confrontation was not violated, stating, "[w]e do not think that a constitutional line drawn by the Confrontation Clause falls between a witness's forgetful live testimony . . . and the introduction of the witness's earlier statement. . . ." *Id.* at 560.

159. 22 Cal. Rptr. 3d 625, 637 (Ct. App. 2004), *cert. granted*, 109 P.3d 68 (Cal. 2005).

160. The specific portion of the *Crawford* decision states:

> we reiterate 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. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) (citations omitted).

161. *Harless*, 22 Cal. Rptr. 3d at 637.

Another California case has set forth similar results.[162]

However, when a child victim takes the stand but refuses to testify regarding the alleged incident, if the defendant has had no prior opportunity to cross-examine the child, all of the child's testimonial will be deemed inadmissible in violation of the Confrontation Clause.[163] As an Illinois court noted, "[c]hild sexual abuse cases present special problems where the child victim may be unable to testify adequately due to fear, guilt, or intimidation."[164] Thus, even though the child victim is declared unavailable, the defendant is also often precluded from cross-examination; therefore, under *Crawford*, critical out-of-court statements regarding abuse will be inadmissible.

Ideally, analogous to a domestic abuse victim, a willing and able child's testimony makes *Crawford* a moot point for prosecutors. In reality, a significant amount of what is now called testimonial evidence, once undoubtedly admissible in a child abuse prosecution (i.e. forensic interviews), must, at least for now, meet a more exacting, yet still unstable, *Crawford* admissibility standard.[165]

B. Forfeiture by Wrongdoing: An Enduring Solution?

> The defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him. And where a defendant has silenced a witness through the use of threats, violence or murder, admission of the victim's prior statements at least partially offsets the perpetrator's rewards for his misconduct.[166]

---

162. People v. Phan, No. H025002, 2004 Cal. App. Unpub. LEXIS 5047, at *13-14 (Ct. App. 2004) (The court held that because a child victim testified at trial, even though she had poor recollection concerning statements she made to an investigating police officer, *Crawford* was satisfied with the police officer's testimony regarding the child's statements because the victim testified and was subject to cross-examination. The fact that the victim had poor memory and was not able to be fully cross-examined did not require reversal.).

163. *E.g.*, *In Re* T.T., 815 N.E.2d 789 (Ill. App. Ct. 2004).

164. *Id.* at 797. However, some courts are now making the argument that if the defendant has made the child unavailable, he or she may have forfeited his or her right to confront the children. *See infra* Parts III.B., IV.

165. *But see supra* notes 85 & 125 and accompanying text (discussing the continued use of a reliability standard for *non*-testimonial evidence). Also, it is important to recognize that

> [e]ven though the confrontation right [may] no longer appl[y], the courts hold that the due process clause of the Constitution still applies, so that evidence that is unreliable on its face will be excluded. This guarantee is achieved in the federal courts through the application of Federal Rule 403 (identical to Maryland Rule 5-403).

Letter from Lynn McLain, Professor of Law and Dean Joseph Curtis Faculty Fellow, Univ. of Balt., Sch. of Law, to Delegate Joseph F. Vallario, Jr., Chair, Judiciary Comm. (Feb. 15, 2005) at 5 (on file with author).

166. United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997).

Today, courts across the country are virtually, on a case-by-case basis, determining the definition of testimonial in domestic and child abuse cases. As a result, prosecutors must argue, on a case-by-case basis, that evidence typically utilized in domestic and child abuse cases is not excluded by *Crawford.* And the admissibility of that evidence, discussed *supra,* is still being resolved by the courts.

As a result, domestic and child abuse prosecutors, legislators, law professors, and other legal professionals are also advocating for an enduring solution to such evidentiary problems spurned by *Crawford.* That solution asserts the applicability of the forfeiture by wrongdoing exception to as many domestic violence and child abuse cases as possible, thereby precluding a *Crawford* analysis to determine the admissibility of a victim's out-of-court hearsay statements offered to prove the truth of the matter asserted.

In 1878, the Supreme Court of the United States pronounced the rule of forfeiture, a specific exception to a defendant's Sixth Amendment Confrontation Clause right.[167] While the Court acknowledged a criminal defendant's Sixth Amendment right to be "confronted with the witnesses against him," it went on to assert that "if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away."[168] Although *Crawford* has since altered Confrontation Clause analysis, the Court made a distinct point of upholding the rule of forfeiture in its opinion.[169] Explicitly, the Court stated the rule of forfeiture is one which it still "accept[s]," as it "extinguishes confrontation claims on essentially equitable grounds. . . ."[170] "In other words, defendants should not profit from their own bad acts."[171]

The rule of forfeiture, therefore, "should allow prosecutors to get a significant number of out-of-court statements of unavailable witnesses

---

167. Reynolds v. United States, 98 U.S. 145, 158 (1878). The "Federal Rule of Evidence 804(b)(6), . . . codified the common law forfeiture doctrine for the federal courts in 1997." Letter from Lynn McLain to Joseph Vallario, Jr., *supra* note 165, at 3.

168. *Reynolds,* 98 U.S. at 158. The Court developed its analysis further, going on to state:

> The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Id.

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

170. *Id.*

171. Krischer, *supra* note 88, at 3.

admitted."[172] Already, since *Crawford*, some state courts have applied the forfeiture by wrongdoing exception when a defendant's conduct has resulted in a witness being unavailable to testify.[173] The Supreme Court of Kansas, for example, held that the victim's statement identifying the defendant as the shooter, made before the victim died, was admissible under *Crawford* because the defendant "forfeited his right to confrontation by killing the witness."[174] Similarly, in *People v. Moore*, the Court of Appeals of Colorado held that the dead victim's out-of-court statement, implicating the defendant in prior acts of domestic violence, was admissible under *Crawford*, as there was "no dispute that the victim was unavailable to testify because of her death and that her death was the result of defendant's actions."[175] Thus, the court concluded "that [the] defendant forfeited his right to claim a confrontation violation in connection with the admission of the victim's statements into evidence."[176]

In addition to homicide prosecutions, some legal professionals argue that the forfeiture by wrongdoing exception argument logically extends to the admission of the out-of-court hearsay statements of domestic violence and child abuse victims.

1. "Forfeiture by Domestic Violence"[177]

The domestic violence problem in this nation is astounding. As the Supreme Court recognized, "[a]n estimated 4 million American wo-

172. Tom Harbinson, *Using the* Crawford v. Washington *"Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, REASONABLE EFFORTS (Am. Prosecutors Research Inst. Nat'l Child Prot. Training Ctr., Alexandria, Va.) (2004), *available at* http://www.ndaa-apri.org/publications/newsletters/reasonable_efforts_ volume_1_number_3_2004.html. Notably, "[a]ll of the federal courts . . . and the District of Columbia" apply Rule 804(6), the Federal Rule of Evidence codifying the common law rule of forfeiture. Letter from Lynn McLain to Joseph Vallario, Jr., *supra* note 165, at 3.

173. *See, e.g., infra* notes 175-77 and accompanying text. "At a minimum, the following states, as well as the District of Columbia, have rules, statutes, or case law explicitly adopting the [common law forfeiture] doctrine: Arizona, California, Colorado, Iowa, Kansas, Louisiana, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Texas." Letter from Lynn McLain, to Joseph F. Vallario, Jr., *supra* note 165, at 3.

174. State v. Meeks, 88 P.3d 789, 793-94 (Kan. 2004).

175. People v. Moore, 117 P.3d 1, 5 (Colo. Ct. App. 2004).

176. *Id.* at 5. *See also* People v. Giles, 19 Cal. Rptr. 3d 843, 846-47, 851 (Ct. App. 2004) (finding statements of the deceased victim, told to a police officer in a previous altercation admissible, because the court found that the defendant forfeited his right to cross-examine the victim due to his admitted wrongdoing in killing the victim), *cert. granted and opinion superseded by*, 102 P.3d 930 (Cal. 2004); Francis v. Duncan, No. 03 Civ. 4959 (DC), 2004 U.S. Dist. LEXIS 16670, at *54-58 (S.D.N.Y. Aug. 23, 2004) (The court held that the defendant forfeited his right to confront the victim because he had called her with death threats. Thus, the victim's grand jury testimony was admissible at trial, as were her statements regarding her fear of dying.).

177. Term adopted from Krischer, *supra* note 88, at 3.

men are battered each year by their husbands or partners."[178] Even more horrific is data illustrating that domestic violence is not normally a one-time occurrence.[179] And even if an abused woman attempts to leave her abuser, one study reveals that of those women that seek medical aid, seventy-three percent were injured *after* leaving their abuser.[180] Moreover, even if a woman is brave enough to attempt to prosecute, sadly, the involvement of the criminal justice system is oftentimes not enough to prevent further abuse.[181]

While no one wants to witness a battered woman suffer additional harm, the trend of an abuser to continue some sort of abuse, even after the criminal justice system is involved, can now perhaps work to the benefit of prosecutors. After *Crawford*, prosecutors might potentially use the abuser's continued harassing, threatening, or violent behavior to convict the abuser without the testimony of the woman victim and in full compliance with the Sixth Amendment.

The "Quincy Probation Project, which tracked court restrained male abusers," found that almost half of the victims were threatened with physical violence by their abusers if they continued cooperation with prosecutors.[182] Not all abusers use physical threats, however, as the Project reported that "[f]orty-two percent of victims reported economic threats and [twenty-five] percent were threatened with the loss of their children."[183] Physical evidence of threats of bodily harm, economic harm, and harm to the victim's children can be captured by prison phone records, e-mail, mail, caller ID logs showing numerous phone calls, or other witnesses who can "testify as to the content of specific threats made by the defendant . . . [to] the victim."[184] Post-*Crawford*, that evidence can be used to show the victim-witness's unavailability due to the defendant's unlawful procurement. "In short, prosecutors should be on the lookout for evidence that supports the argument that a defendant has forfeited his right to confrontation by his own wrongdoing."[185]

178. U.S. v. Morrison, 529 U.S. 598, 632 (2000) (quoting H.R. REP. NO. 103-395, § 331(a)(1) (1993) (citing Council on Scientific Affairs, American Med. Ass'n, *Violence Against Women: Relevance for Medical Practitioners*, 267 J. AM. MED. ASS'N 3184, 3185 (1992))).

179. Linell A. Letendre, Notes and Comments, *Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973, 977-78 (2000).

180. *Id.* at 980 (citing SUMAN KAKAR, DOMESTIC ABUSE: PUBLIC POLICY/CRIMINAL JUSTICE APPROACHES TOWARDS CHILD, SPOUSAL AND ELDERLY ABUSE 37 (1998)). Kakar cites the National Crime Survey which shows that 48% of domestic violence assaults go unreported. Kakar, *supra*.

181. Krischer, *supra* note 88, at 3.

182. *Id.* (citing EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 88 (James Inciardi ed., 2nd ed. 1996)).

183. *Id.* (citing Buzawa & Buzawa, *supra* note 182, at 88-89).

184. *Id.*

185. *Id.*

In some cases, there may be no physical evidence of a defendant's unlawful procurement. In such situations, the victim is already so traumatized, threatened, or both, by her abuser's past behavior that by the time the criminal justice system is involved, the abuser need not do anything else to procure the victim's unavailability.[186] In the context of child abuse prosecutions, Tom Harbinson, Senior Attorney at the National Child Protection Center of Winona State University, argues that "[a] common act of procurement is procurement of unavailability by trauma."[187] Like abused children, battered women have also been shown to suffer from severe trauma.[188] The former director of the Center for Applied Conflict Management at Kent State University stated, "[t]he growing body of research on the psychological and physiological effects of chronic trauma such as battering suggests that the harm to victims is even more complex than previously understood."[189] For example, "almost half of victims of battering and sexual assault meet the criteria for PTSD [Post Traumatic Stress Disorder]."[190]

Yet, PTSD is an after-effect of acts committed *during* a crime that has already occurred, and the Supreme Court has yet to rule on whether the rule of forfeiture applies to procurements made *during* the crime.[191] However, the underlying principle of the rule of forfeiture supports its application to procurements during the crime.[192] As Harbinson explains, "[T]he critical wrongdoing the [forfeiture] exception attempts to prevent is not based on when the act occurs, but whether the act caused a witness to be unavailable."[193] This argument succeeded in New Jersey, where the New Jersey Superior Court ruled that because the accused, while committing the abuse, threatened to kill his victim if she reported the abuse, he had forfeited his right to confront her in court.[194] Prosecutors can thus argue that the trauma preventing a victim from testifying later at trial was directly caused by the past abuse inflicted by the abuser. Consequently, the abuser has thus forfeited his right to confront the victim.

2. "Forfeiture by Child Abuse"[195]

There are few crimes in this country more atrocious than child abuse. The number of child abuse or neglect victims reached

186. *Id.*
187. Harbinson, *supra* note 172.
188. Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 341-43 (1999).
189. *Id.* at 341.
190. *Id.*
191. Harbinson, *supra* note 172.
192. *Id.*
193. *Id.*
194. State v. Sheppard, 484 A.2d 1330, 1345-49 (N.J. Super. Ct. Law Div. 1984).
195. Term adapted from Krischer, *supra* note 88, at 3.

1,054,000 (fifteen of every one thousand children) in 1997.[196] Before *Crawford*, most states had child hearsay statutes that were "over-inclusive," allowing for the admission of child hearsay, "not tested by cross-examination," even if the child did not testify at trial.[197] After *Crawford*, as discussed *supra*, a child's out-of-court hearsay statement may or may not be admissible.[198] In order to combat such a tenuous standard, the forfeiture by wrongdoing exception to the Confrontation Clause may be the long-term solution child abuse prosecutors need to combat the effects of *Crawford*.

Tom Harbinson asserts

> It is common in child abuse cases for the suspect to procure the child's unavailability to testify whether by telling the child not to tell; by threatening the child, the family, or even pets; or by procurement through use of others, such as family members.[199]

In doing so, the abuser is attempting to "prevent the child from disclosing and testifying against the abuser."[200] These actions arguably constitute a forfeiture of the defendant's right to confront his accuser, because the defendant has procured the witness's unavailability. Moreover, Harbinson argues that prosecutors should use the language "or the acts of the accused" as set forth in *Motes v. United States*,[201] to "argue the forfeiture by wrongdoing exception to as many acts as possible."[202] Specifically, *Motes* held that depositions not subject to cross-examinations and not taken under oath would violate the Sixth Amendment Confrontation Clause unless the witness was "absent from the trial by suggestions, procurement, or the acts of the accused."[203] These acts include, in addition to threatening the child or a family member, "[t]hings the child could view as being beneficial,

196. Andrea Charlow, *A Minnesota Comparative Family Law Symposium: Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 766 (2001) (citing NATIONAL COMMITTEE TO PREVENT CHILD ABUSE, CHILD ABUSE AND NEGLECT STATISTICS (Apr. 1998), http://www.childabuse.com/facts97.html).

197. Jean Montoya, *Child Hearsay Statutes: At Once Over-Inclusive and Under-Inclusive*, 5 PSYCHOL. PUB. POL'Y & L. 304, 309-11 (1999).

198. *See generally* Harbinson, *supra* note 172 (discussing the lack of a "comprehensive definition of testimonial statements" from the Supreme Court in *Crawford* and possible ways to handle out-of-court hearsay statements of child abuse victims).

199. Harbinson, *supra* note 172 (footnotes omitted) (citing various cases as examples including State v. Bewley, 68 S.W.3d 613, 616 (Mo. Ct. App. 2002) (defendant told child victim he would kill him if he refused to submit to sex or told anyone); State v. Nanucke, 829 S.W.2d 445, 448-49 (Mo. 1992) (four-year-old sodomy victim was told she and her mother would be killed if she told anyone about the abuse)).

200. Harbinson, *supra* note 172.

201. 178 U.S. 458, 471 (1900).

202. Harbinson, *supra* note 172.

203. *Motes*, 178 U.S. at 471.

such as gifts or money, should constitute procurement if they result in the child being unavailable."[204]

However, asking a child not to tell, threatening the child (or family member) if he or she tells, or using gifts to ensure a child's silence often occur *during* the abuse. As stated previously, the Supreme Court has not yet ruled on whether the forfeiture by wrongdoing exception applies to wrongful procurement made *during* the crime.[205] Yet, the purpose behind the forfeiture rule, (the removal of a defendant's confrontation rights if he causes a witness to be unavailable), supports applying the rule to procurement during the crime.[206] Thus, Harbinson asserts that "[i]f the accused's acts are responsible for . . . the child refus[ing] to testify, stating she cannot remember, or becom[ing] non-responsive, the requirement of unavailability should be considered to be met."[207] And, therefore, the "State should be allowed to show, in a pre-trial hearing, it has made a good faith effort to have the witness testify," but the child witness is not required to be called at trial because the defendant has wrongfully procured the child's unavailability.[208]

Additionally, Harbinson argues that wrongful procurement can make a child "unavail[able] by trauma."[209] "It is widely accepted that [abused] children can have Post Traumatic Stress Disorder, Acute Stress Disorder, or Traumatic Stress Disorder."[210] In order to assert the argument that the defendant has forfeited his confrontation right, he suggests having a prosecutor "talk[ ] to family members, caretakers, teachers, the child . . . , and perhaps [make] a referral to a child clinical psychologist" to determine if the defendant's acts caused the "trauma that renders [the] child unavailable to testify."[211] Instead of allowing a defendant to argue that the child merely "froze" because of his or her young age, therefore barring the child's out-of-court hearsay statements under *Crawford*, the argument becomes that "the acts of the accused . . . constitute[d] procurement by trauma."[212]

IV. FORFEITURE BY WRONGDOING: THE MARYLAND VERSION

While the common law rule of forfeiture was codified by Rule 804(b)(6) of the Federal Rules of Evidence,[213] and is therefore available to be utilized as a valid argument for the admissibility of testimonial evidence for federal prosecutors after *Crawford*, not all states have

204. Harbinson, *supra* note 172.
205. *See supra* note 194 and accompanying text.
206. *See* Harbinson, *supra* note 172.
207. *Id.* (footnotes omitted).
208. *Id.* (citing Barber v. Page, 390 U.S. 719, 724-25 (1968)).
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *See supra* note 172.

adopted the federal rule or some form thereof.[214] Consequently, domestic and child abuse prosecutors in those states are left without the ability to argue *statutory* forfeiture by wrongdoing.

It was only just recently that Maryland became one of the states to codify the common law doctrine of forfeiture by wrongdoing.[215] Originally, the Maryland General Assembly had three Victim and Witness Intimidation bills before it, all of which contained the same specific hearsay provision: in a judicial proceeding, a "statement . . . is not excluded by the hearsay rule if the statement is offered against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement."[216] In other words, criminal defendants could be found to have waived their Sixth Amendment Confrontation Clause right if they, either by their own doing or through a third person, intentionally attempt to keep, (or succeed in keeping) or comply with a plot to keep, a witness from testifying against them.[217]

Recently, however, the Maryland General Assembly "codified a more *restrictive* [forfeiture by wrongdoing] rule," which became applicable October 1, 2005 and is only pertinent to criminal proceedings.[218] And "[o]n June 24, 2005, the Rules Committee revised its proposal to incorporate the new statute by reference and to apply the Committee's own version to civil proceedings."[219]

Practically, under the Maryland statute, just as was proposed in the aforementioned bills, before a testimonial hearsay statement can come in under the forfeiture by wrongdoing exception, it has to pass

---

214. *But see supra* note 173.

215. *See supra* note 10 and accompanying text.

216. GUY G. CHERRY, DEPT. OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H.D. 248, 2005 Leg., 420th Reg. Sess., at 2 (Md. 2005). As Professor Lynn McLain explains:

> The bills simply codify the common law (and common sense) doctrine that a party whose misconduct causes the inability of a witness to testify live in court forfeits the right to object on the ground that the party cannot cross-examine the witness. Put simply: If you created the situation, you can't complain about it. If you make the witness unavailable, you can't complain that you can't cross-examine the witness. To provide otherwise would be to let the intimidator/murderer profit from his own wrongdoing.

Letter from Lynn McLain to Joseph F. Vallario, Jr., *supra* note 165, at 1. *See also* S. 122, 420th Gen. Assem., Reg. Sess. (Md. 2005) (changing the seriousness of and altering the penalties for witness intimidation crimes) and S. 188, 420th Gen. Assem., Reg. Sess. (Md. 2005) (providing forfeiture exception to hearsay rule in felony controlled dangerous substance case or case involving crime of violence).

217. The *Sixth Amendment* right to confrontation only applies to criminal defendants. *See supra* note 4 and accompanying text.

218. McLain, *supra* note 10, at § 804(6):1 (emphasis added).

219. *Id.* "The court of appeals has not yet considered either of the Committee's proposals." *Id.*

through a number of stages.[220] To begin, a judge must find that the witness (or victim) who made the statement is really unavailable to testify.[221] Next, a judge must find that the defendant's misconduct, or the defendant's direction of, or conspiracy to commit misconduct, procured the inability of live witness testimony.[222] Finally, a judge must determine that the defendant had the intent of causing the witness's unavailability through his misconduct, "and as reflected in (1) and (2) above, that this misconduct had the intended effect."[223] Additionally, even if the statement satisfies these three steps, the judge must then find that had the witness appeared to testify, he or she would have been permitted to testify to the facts contained in his or her statement and that the statement satisfies the reliability standard, mandated by the Constitution's guarantee of due process.[224]

---

220. Letter from Lynn McLain to Joseph F. Vallario, Jr., *supra* note 165, at 3.

221. *Id.* at 4. "The grounds for unavailability are exactly the same in Maryland courts as in federal courts, under Maryland Rule 5-804 and Federal Rule 804. They are well defined in the case law, which establishes the constitutional requirements for meeting these criteria." *Id.*

222. *Id.* Professor McLain explains:

> [B]oth the statute and the proposed Rule make clear that they will not make admissible statements of a witness who is not testifying for some reason other than because the opposing party's wrongdoing caused the witness' unavailability. The wrongdoing must be tied to that party: the party will be responsible for his or her own actions, or the actions of others which he or she 'directed' or in which he or she 'conspired.' Where insufficient proof is provided to tie the wrongdoing to the opponent of the evidence, the statute (or Rule) will not be available to the proponent.

McLain, *supra* note 10 at § 804(6):1. *But cf.* "Where insufficient proof is provided to tie the wrongdoing to the defendant, the Rule will not be available to the prosecution." Letter from Lynn McLain to Joseph F. Vallario, Jr., *supra* note 165, at 3. *See, e.g.*, United States v. Pineda, 208 F. Supp. 2d 619, 624 n.2 (W.D. Va. 2001) (finding that because the witness "maintained that fear of [the defendant] had nothing to do with his decision not to testify" and because it was not clear the defendant had caused the witness' unavailability, the forfeiture by wrongdoing hearsay exception was not applicable).

223. Letter from Lynn McLain to Joseph F. Vallario, Jr., *supra* note 165, at 4. "The [statute's] language, on this point, like that of the federal rule, is in fact narrower than that of the common law doctrine in California, Colorado, Kansas, and Texas." *Id. See e.g.*, Gonzalez v. State, 155 S.W.3d 603, 611 (Tex. App. 2004) (holding that the rule of forfeiture applies "whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable").

224. Letter from Lynn McLain to Joseph F. Vallario, Jr., *supra* note 165, at 5. Professor McLain explains:

> [Other jurisdictions'] case law shows, without exception, that the judge will be required to exclude the evidence if it appears that the evidence is irrelevant (Md. Rules 5-401 and 5-402), or the witness had no first-hand knowledge (Md. Rule 5-602), or the witness was engaging in conjecture or speculation (Md. Rules 5-701 and 5-702), or for other reasons the statement is so unreliable that its

While the standard of proof for admissibility of testimonial hearsay statements under the forfeiture by wrongdoing exception was a preponderance of evidence, the statute requires the application of the clear and convincing evidence to the three steps discussed *supra*.[225] Specifically, the judge will hear testimony, outside of the hearing of the jury, as to all of the preliminary facts that go to prove the witness' unavailability and the defendant's intentional wrongful procurement of the witness, and will then decide whether the statement is admissible.[226]

Before codification, Professor McLain was a committed advocate of the aforementioned Witness Intimidation Bills. For example, in a letter to the Chair of the Maryland House Judiciary Committee, Professor McLain argued that merely increasing the penalty will not solve Maryland's witness intimidation problems because "[p]rosecution of an intimidator is not as effective as obtaining a conviction on the original, underlying crime."[227] If a defendant succeeds in keeping a witness from testifying, he is then likely only facing prosecution of witness intimidation charges, and has succeeded in avoiding prosecution for the underlying crime. Moreover, Professor McLain asserted that "[t]he heart of these bills is the hearsay provision [forfeiture by wrongdoing], which makes witness intimidation ineffective, in that it will no longer achieve the intimidator's goal, to escape punishment for the original crime."[228] Thus, as long as defendants know that the procurement of a witness's unavailability will secure their ability to keep out

---

admission would cause unfair prejudice to the party who caused the witness to be unavailable (Md. Rule 5-403).

Id. See also supra notes 85 & 125 and accompanying text.

225. Letter from Lynn McLain to Joseph F. Vallario, Jr., *supra* note 165, at 8-9. McLain, *supra* note 10 at §804(6):1.

226. McLain, *supra* note 10 at § 804(6):1. Interestingly, while public defenders and defense attorneys seem to favor a clear and convincing standard of proof, Professor McLain notes that the Federal Rules clearly reject a clear and convincing evidence standard. She points out that:

> [t]he federal Advisory Committee Note states: "[t]he usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage." Because witness intimidation and murder "strikes at the [very] heart of the . . . [criminal] justice [system]," we do not want to protect those who engage in it by shielding them with a higher burden of proof than that which applies generally to other preliminary facts of admissibility, including all other hearsay exceptions.

Letter from Lynn McLain to Joseph F. Vallario, Jr. *supra* note 165, (alterations in original) (citation omitted) (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)). *See also* FED. R. EVID. 804(b)(6); United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001) (adopting the preponderance of the evidence standard when determining whether a defendant waived his right to object to evidence based on his involvement in the procurement of the witness' unavailability).

227. Letter from Lynn McLain to Joseph F. Vallario, Jr., *supra* note 165 at 1-2.

228. *Id.* at 2.

that witness's previous testimonial statement implicating them (under the Sixth Amendment as explicated in *Crawford*), they will have "a great incentive to engage in intimidation, or even murder, of witnesses."[229]

However, according to Professor McLain, the statute currently in force in Maryland codifying the common law forfeiture by wrongdoing doctrine "is far narrower than both the federal rule and the Rules Committee's original proposal in" three critical ways.[230] To begin, "the Maryland statute is restricted so as to apply only to trials for certain crimes: those involving either drug distribution ('felonious violations of Title 5 of the Criminal Law Article') or those that qualify as 'crimes of violence as defined in 14-101 of the Criminal Law Article.'"[231] Professor McLain explains that "the latter category does not include crimes of physical child abuse, even if resulting in serious physical injury; sexual child abuse; sex offenses in the third or fourth degree (including so-called 'statutory rape'); or second degree assault (which is often charged in domestic violence cases)."[232] Also, the statute provides that the other Maryland Rules will be "strictly applied."[233] Professor McLain argues that "[a]s it is obviously unlikely that an intimidated (or murdered) witness will appear in court to testify to the intimidation . . . this provision will create an insuperable catch-22 for the proponent of the evidence . . . ."[234] Finally, the statute utilizes the clear and convincing evidence burden of proof at this preliminary stage, clearly departing from Maryland case law.[235]

V. CONCLUSION

The impact *Crawford v. Washington* will have on domestic and child abuse prosecutions will not be fully realized until well into the future. In the interim, prosecutors are left to litigate the non-testimonial nature of evidence that may now, under *Crawford*, pose a question as to admissibility. While one court may find a call to 911 testimonial, another court, based on differing facts and analyses, may find a call to 911 non-testimonial.[236]

Domestic and child abuse prosecutors must learn how to use the forfeiture by wrongdoing exception effectively. In domestic abuse cases, prosecutors should continue teaching courts about the enduring effects of domestic violence, and thus argue that domestic vio-

229. *Id.*
230. McLain, *supra* note 10 at §804(6):1. Includes a discussion of how "[t]he statute also contains three differences from the federal rules that are shared by the Rules Committee's proposal[ ]."
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *See id. See also supra* notes 225-26 and accompanying text.
236. *See supra* notes 96-111 and accompanying text.

lence inherently creates a victim's unavailability.[237] In child abuse cases, prosecutors must attempt to build a strong case by educating themselves, as well as all potential persons who are involved in a child's life and those who will become involved upon allegations of abuse, regarding acts or words that may illustrate unlawful procurement of the child's unavailability.[238] Then, they must convince the courts that the defendant procured the child's unavailability.

As a long-term solution, prosecutors, law professors, and other interested parties must advocate for the use of the forfeiture by wrongdoing hearsay exception as a method to ensure the admissibility of out-of-court statements made by victims and witnesses.[239] While Maryland has codified the common law doctrine of forfeiture, the current statute is inadequate. It is thus important for all of those interested in successful domestic and child abuse prosecutions to lobby for modifications to this statute, allowing for more crimes to fall under its provisions, a less strict application of the Maryland Rules of evidence, and a lower burden of proof.

Nevertheless, the forfeiture by wrongdoing exception has the potential to prove to be an effective tool for child and domestic abuse prosecutors. It is now up to prosecutors and those interested parties in the legal community and beyond to convince the legislatures to enact *effective* codifications of the forfeiture by wrongdoing doctrine, and to convince the courts that the same is a legally sound evidentiary argument.

*Tracey L. Perrick**

237. Krischer, *supra* note 88, at 10.
238. Harbinson, *supra* note 172.
239. *See supra* Parts III.B and IV.

* J.D. expected May 2006, University of Baltimore School of Law. Thank you to Professor Lynn McLain, for her invaluable insight and guidance.