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SNOWDEN v. STATE OF MARYLAND:

Introduction of Testimonial Hearsay Statements Made by an Available Witness who Does Not Testify Violates the Sixth Amendment's Confrontation Clause

By: Larna Cutter

The Court of Special Appeals of Maryland held that the introduction of testimonial hearsay statements made by an available witness who does not testify violates the Sixth Amendment's Confrontation Clause. *Snowden v. State*, 156 Md. App. 139, 846 A.2d 36 (2004). In so holding, the court ruled that a social worker's testimony encompassing statements from children she previously interviewed, who did not testify, were barred from being introduced against the children's alleged abuser. *Id.*

In late January 2002, three young girls, all under the age of twelve, told their mothers that Michael Snowden ("Snowden") touched them inappropriately. Snowden adamantly denied the accusations. The police were notified of the incidents and Snowden was arrested. During police questioning, Snowden wrote letters of apology to the children, explaining that he never intended to touch them improperly. Snowden was later charged with six counts of third degree sexual offense and one count of child abuse. Eleven days after the arrest, Amira Abdul-Wakeel, a social worker employed by the Child Protective Services Division of the Montgomery County Department of Health and Human Services, interviewed the three children.

Prior to trial, the State filed a motion pursuant to MD. CODE ANN., CRIM. PROC. § 11-304, to introduce Abdul-Wakeel's testimony in place of the children's testimony. Snowden objected to Abdul-Wakeel's testimony on the ground that the testimony would violate his right of confrontation, but the circuit court overruled his objection. Snowden was convicted of all charges, then filed an appeal to the Court of Special Appeals of Maryland. Snowden challenged the constitutionality of section 11-304 and the trial court's admission of

Abdul-Wakeel's testimony. Snowden also alleged that there was insufficient evidence to prove he touched the girls for the purpose of sexual arousal.

The court of special appeals first noted the implications of the Sixth Amendment's Confrontation Clause, specifically a criminal defendant's right to confront and cross-examine witnesses testifying against them. *Id.* at 149-50, 846 A.2d at 42-43. The court recognized that hearsay statements may be introduced without violating a defendant's rights when the statement is either a firmly rooted hearsay exception or has particularized guarantees of trustworthiness. *Id.* at 150, 846 A.2d at 43.

The Maryland Legislature responded to the particularized guarantee of trustworthiness exception by enacting section 11-304, also known as the "tender years statute." *Id.* at 151, 846 A.2d at 44. section 11-304 permits hearsay declarations to be introduced regardless of whether the child testifies. *Id.* at 146, 846 A.2d at 40. If the child does not testify, however, section 11-304 requires the existence of corroborative evidence that the defendant had the opportunity to commit the alleged crime. *Id.* In determining whether a statement contains particularized guarantees of trustworthiness, section 11-304 mandates that a court evaluate thirteen factors, interview the child, then record a finding specifically stating the statement's guarantees of trustworthiness. *Id.* at 151, 846 A.2d at 43. In this case, the court, without explanation, was satisfied that the circuit court completed the statutory procedures. *Id.* at 151, 846 A.2d at 44.

Before reaching a conclusion, the court recognized the mandates of witness unavailability and previous opportunity for cross examination that were established by the recent Supreme Court case, *Crawford v. Washington*, 124 S. Ct. 1354 (2004). *Snowden*, 156 Md. App. at 156, 846 A.2d at 46. In *Crawford*, the defendant's conviction was reversed based on the violation of his confrontation rights. *Id.* at 153-54, 846 A.2d at 44. The trial judge allowed police officers to testify about disclosures made to them by the defendant's wife. *Id.* at 153, 846 A.2d at 45 (discussing *Crawford*, 124 S. Ct. at 1358). The trial court in *Crawford* found the statements contained particularized guarantees of trustworthiness, but the Washington Court of Appeals disagreed and reversed the conviction. *Snowden*, 156 Md. at 153, 846 A.2d at 45. Thereafter, the Supreme Court of Washington reversed by concurring

with the trial court's finding of trustworthiness. *Id.* Crawford challenged the conviction's reinstatement and appealed to the United States Supreme Court. *Id.*

The United States Supreme Court, in *Crawford*, distinguished two types of out-of-court statements: "those that are 'testimonial' and those that are not." *Id.* at 155, 846 A.2d at 46. Simplistically reasoned, testimonial statements violate the Confrontation Clause because the Confrontation Clause only deals with testimony. *Id.* Although the court never provided a concrete list of testimonial or non-testimonial statements, it did consider *ex parte* in-court testimony, or its equivalent (i.e. affidavits, custodial examinations) and "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" to be testimonial statements. *Id.* at 155 n.26, 846 A.2d at 46.

In the case at bar, the court of special appeals found Abdul-Wakeel's statements to be testimonial, and therefore, they violated the Confrontation Clause. *Id.* at 157, 846 A.2d at 47. The court reasoned the children were only interviewed with the purpose of developing Abdul-Wakeel's testimony. *Id.* Further, the court noted that the State did not establish that the children were unavailable to testify, and as such, failed to satisfy *Crawford's* foundational requirements of the declarant's unavailability and the accused's prior opportunity for cross-examination. *Id.* at 157 n.31, 846 A.2d at 47. The court, in examining whether section 11-304 violated the Confrontation Clause, only stated that

when the admissibility of nontestimonial hearsay is at issue, the individual states are entitled to determine what statements should be admitted and what statements should be excluded, but when testimonial evidence is at issue . . . the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross examination.

Id. at 156-57, 846 A.2d at 47.

Finally, the court held that sufficient evidence did exist to convict Snowden of child abuse and third-degree sexual offense. *Id.* at 158, 846 A.2d at 48. The court noted the facts of the case. First, the children were interviewed by Abdul-Wakeel only in regards to a child sexual abuse case, pursuant to statutory provisions. *Id.* Second, the children believed they were improperly touched by Snowden, regardless of whether the incidents actually occurred. *Id.* at 159, 846 A.2d at 48. Third, Snowden was arrested and voluntarily wrote letters of apology to the children, which indicated the incidents did occur in the manner and locations Abdul-Wakeel described. *Id.* at 159, 846 A.2d at 48-49. Finally, Snowden, by writing the letters, hoped the children, or more importantly, their mothers, would accept his apology and forgo pursuing the charges. *Id.*

Accordingly, the court explored the issue of double jeopardy and concluded that when an appellate court reverses on the basis of an erroneous admission of hearsay testimony, rather than on the basis of insufficient evidence, the accused is entitled to a new trial. *Id.* at 161, 846 A.2d at 50 (See *State v. Boone*, 284 Md. 1, 393 A.2d 1361 (1978)). Hence, the court remanded the case and ordered a new trial, which barred the introduction of Abdul-Wakeel's testimony. *Id.* at 161-62, 846 A.2d at 50.

In *Snowden v. State*, the Court of Special Appeals of Maryland clearly followed the new requirements concerning hearsay declarations set by *Crawford v. Washington*. Maryland courts must follow the rigid preconditions of the declarant's unavailability and the accused's prior opportunity for cross-examination in order to allow the introduction of hearsay testimony without violating the accused's Sixth Amendment rights. Because of these prerequisites, and because the court failed to formally address whether section 11-304 was unconstitutional, Maryland may now have to reconsider its evidentiary guidelines. Consequently, in order to comply with the recent federal transformation in evidentiary rules, Maryland may have to either revise section 11-304 or propose a new statute to replace section 11-304 altogether.

Editor's Note: The Court of Appeals of Maryland heard the State's appeal on December 3, 2004. This journal will report on that decision in Volume 35.2, which will be published in the spring of 2005.