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## Recommended Citation

Jon S. Stefanuca, *Crawford v. Washington: The Admissibility of Statements to Physicians and the Use of Closed-Circuit Television in Cases of Child Sexual Abuse*, 5 U. Md. L.J. Race Relig. Gender & Class 411 (2005).

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# **CRAWFORD v. WASHINGTON: THE ADMISSIBILITY OF STATEMENTS TO PHYSICIANS AND THE USE OF CLOSED-CIRCUIT TELEVISION IN CASES OF CHILD SEXUAL ABUSE**

JON SIMON STEFANUCA\*

In *Crawford v. Washington*,<sup>1</sup> the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment bars all out-of-court testimonial evidence<sup>2</sup> unless the declarant is unavailable and the person against whom the evidence is introduced had a prior opportunity to cross-examine the declarant.<sup>3</sup> By excluding all testimonial evidence unless the above conditions are met, regardless of whether such evidence could be admitted under a well-established hearsay exception or court procedure,<sup>4</sup> the Court created a significant risk that minor victims of sexual abuse will neither be able to testify via Closed-Circuit Television (CCT) nor be able to introduce statements made to treating physicians in the aftermath of the sexual abuse. Where the goal of the Confrontation Clause is to insure a reliable fact-finding process in criminal trials,<sup>5</sup> an extension of the *Crawford* holding to bar the use of CCT and statements to physicians would deny minors the ability to effectively and truthfully testify against their abusers and thus undermine the purpose of the Confrontation Clause—to insure the reliability of evidence.

## I. THE CASE

Michael Crawford (“Petitioner”) was arrested and convicted of first-degree assault with a deadly weapon for stabbing another who attempted to rape his wife.<sup>6</sup> When the Petitioner learned about the

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1. 541 U.S. 36 (2004).

2. *Id.* at 51. Testimonial evidence is an affirmation or declaration “for the purpose of proving some fact.” *Id.* When the testimonial statement is made, the declarant reasonably expects that the statements will be used at trial. *Id.* Examples of testimonial evidence include *ex parte* testimony at a preliminary hearing and statements to police officers during an interrogation. *Id.* at 53.

3. *Id.* at 68-69.

4. *Id.* at 51-52.

5. *Id.* at 61.

6. *Crawford*, 541 U.S. at 38.

attempted rape, he and his wife went looking for the alleged perpetrator.<sup>7</sup> They drove to the apartment of Kenneth Lee, the alleged perpetrator, where a fight between the Petitioner and the Mr. Lee ensued.<sup>8</sup> As a result of the fight, the Petitioner suffered a cut to the hand and the victim was stabbed in the torso.<sup>9</sup>

Later the same day, the Petitioner and his wife were arrested.<sup>10</sup> The police read both their *Miranda* rights and subsequently interrogated both.<sup>11</sup> In the trial court, Petitioner testified that the victim reached into his pocket before the Petitioner proceeded to stab the victim.<sup>12</sup> He testified that he was never sure as to whether the victim reached for a knife, but argued that he cut his hand on an object that the victim produced.<sup>13</sup>

Petitioner's wife, Sylvia, testified as well.<sup>14</sup> The police tape-recorded her testimony.<sup>15</sup> During her testimony, the Petitioner was not given the opportunity to cross-examine his wife.<sup>16</sup> Furthermore, her testimony, while significantly similar to her husband's, differed slightly.<sup>17</sup> Her testimony suggested that the victim did not attempt to pull an object out of his pocket.<sup>18</sup> She also testified that the victim was stabbed and fell to the ground with empty hands.<sup>19</sup>

At the trial, Petitioner argued self-defense.<sup>20</sup> His wife did not testify because she was barred from testifying by the marital privilege.<sup>21</sup> She could not waive the privilege because, in Washington state, the husband and wife both hold the privilege.<sup>22</sup> As such, Petitioner would have to consent in order for his wife to testify.<sup>23</sup> However, under Washington law, the marital privilege does not apply to out-of-court statements that could be admitted under a hearsay

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7. *Id.*  
 8. *Id.*  
 9. *Id.*  
 10. *Id.*  
 11. *Id.*  
 12. *Crawford*, 541 U.S. at 39.  
 13. *Id.*  
 14. *Id.*  
 15. *Id.*  
 16. *Id.* at 39-41.  
 17. *Id.* at 39.  
 18. *Crawford*, 541 U.S. at 39.  
 19. *Id.*  
 20. *Id.* at 40.  
 21. *Id.*  
 22. *Id.*  
 23. *See id.*

exception.<sup>24</sup> Accordingly, the state moved to introduce the wife's tape-recorded testimony as a statement against interest.<sup>25</sup>

During the trial, the Petitioner argued that admitting the recorded testimony into evidence would violate his constitutional right to confront the witnesses against him.<sup>26</sup> Specifically, he argued that he lacked an opportunity to cross-examine his wife at the time the statement was made.<sup>27</sup> The trial judge, relying on the United States Supreme Court's decision in *Ohio v. Roberts*,<sup>28</sup> admitted the testimony into evidence.<sup>29</sup> The court reasoned that, under *Roberts*, regardless of whether the declarant is available, hearsay evidence may be admitted if it falls under an established hearsay exception or manifests "particularized guarantees of trustworthiness."<sup>30</sup> Because the wife had first-hand knowledge about the events, did not try to shift blame, and her story was sufficiently similar to that of the Petitioner, the court found her testimony trustworthy.<sup>31</sup> Subsequently, the jury rendered a conviction, and the Petitioner appealed.<sup>32</sup>

The Washington Court of Appeals reversed the District Court decision, finding that the wife's testimony was not reliable.<sup>33</sup> The court reasoned that, "the statement contradicted one that she had previously given; it was made in response to specific questions; and, at one point, she admitted shutting her eyes during the stabbing."<sup>34</sup> The court also noted that, while the wife's testimony is similar to that of the Petitioner, it differs on a crucial detail—whether the victim tried to reach for an object before the stabbing.<sup>35</sup>

The Washington Supreme Court reversed and reinstated the conviction.<sup>36</sup> The court reasoned that there was sufficient overlap between Petitioner's testimony and that of his wife.<sup>37</sup> Specifically, because of the great similarity between the two statements, the court deemed the wife's statement reliable.<sup>38</sup> Subsequently, the United

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24. *Crawford*, 541 U.S. at 40. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

25. *Crawford*, 541 U.S. at 40. The State argued that she was a co-conspirator. *Id.*

26. *Id.*

27. *Id.*

28. *Ohio v. Roberts*, 448 U.S. 56 (1980).

29. *Crawford*, 541 U.S. at 40.

30. *Id.*

31. *Id.*

32. *Id.* at 41.

33. *Id.*

34. *Id.*

35. *Crawford*, 541 U.S. at 41.

36. *Id.*

37. *Id.* at 41-42.

38. *Id.*

States Supreme Court granted *certiorari* to decide whether the admission of the wife's tape-recorded statement violated the Confrontation Clause of United States Constitution.<sup>39</sup>

## II. LEGAL BACKGROUND

### A. *The Confrontation Clause and Hearsay Generally*

The Confrontation Clause of the United States Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."<sup>40</sup> This constitutional requirement is made applicable to the states via the Due Process Clause of the Fourteenth Amendment of the United States Constitution.<sup>41</sup>

The historical background of the clause reveals its purpose. The intent of the founders in adopting the Confrontation Clause was to prohibit the use of *ex parte* testimony in criminal trials.<sup>42</sup> The founders' intended to eliminate the use of *ex parte* affidavits as substitutes for cross-examination, which provides the accused with an opportunity to directly question the testimony and the credibility of the witnesses against him.<sup>43</sup> Similarly, given this historical context, the Constitution permits the use of out-of-court testimonial evidence if the defendant had an opportunity to cross-examine the declarant.<sup>44</sup>

Consistent with the founders' intent, the United States Supreme Court interprets the Confrontation Clause to grant the accused two distinct rights: the right to cross-examine the witnesses against him and the right to confront the witnesses face-to-face.<sup>45</sup> Also, while these are two distinct rights, the Court pronounced that they are of somewhat equal importance.<sup>46</sup> Recently, however, the Court

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39. *Id.* at 36.

40. U.S. Const. amend VI.

41. *Maryland v. Craig*, 497 U.S. 836, 844 (1990).

42. *See Mattox v. U.S.*, 156 U.S. 237, 242 (1895); *California v. Green*, 399 U.S. 149, 157 (1970).

43. *See Mattox*, 156 U.S. at 242.

44. *Green*, 399 U.S. at 166-67.

45. *See Coy v. Iowa*, 487 U.S.1012, 1015-16 (1988); *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). Note that the Court in *Crawford* effectively overruled the *Roberts* case. However, the *Roberts* case represents the prevailing view on the issue of hearsay admissibility employed in numerous cases for twenty-four years and could be resurrected if the *Crawford* decision fails to withstand the scrutiny of time. *See, e.g., Manocchio v. Moran*, 919 F.2d 770, 773 (5th Cir. 1990); *United States v. Inadi*, 475 U.S. 387 (1985); *White v. Illinois*, 502 U.S. 346 (1992). Furthermore, the *Roberts* holding could still apply in cases of non-testimonial hearsay.

46. *Coy*, 487 U.S. at 1020-21.

questioned this assumption by holding that the right of the accused to confront a witness face-to-face is not absolute.<sup>47</sup>

The purpose of the accused's right to face the witness against him is to insure and validate the accuracy of the trial fact-finding process.<sup>48</sup> That is, a face-to-face confrontation is required because the witness is more likely to take the testimony seriously in the presence of the judge, jury and the defendant.<sup>49</sup> As such, the Confrontation Clause makes it more difficult for a witness to get away with lying where the jury observes the demeanor and evaluates the credibility of the testifying witness.<sup>50</sup> The witness herself is more likely to provide accurate testimony, as the confrontation will remind her of the possible impact her testimony may have on the accused's life.<sup>51</sup>

However, it is not always clear what a face-to-face confrontation entails. It is undisputed that it requires the jury and the judge to observe the demeanor of a witness during the testimony.<sup>52</sup> The Court in the *Coy* case held that the right of face-to-face confrontation presumes the ability of the accused to observe the witness against him and to cross-examine and impeach such a witness.<sup>53</sup> In the *Mattox* case, the Court adds that the right of face-to-face confrontation exists to compel a witness against the accused to face the jury so that it may ascertain his credibility.<sup>54</sup> Compelling the witness to testify in front of the jury means that the judge has an opportunity to observe the demeanor of the witness as well.<sup>55</sup> These subtleties are important because the court has never explicitly held that a witness against the accused, while being observed by the accused and facing the jury and the judge, has to physically observe the accused as well.

The more certain protection in the Confrontation Clause is the accused's right to cross-examine the witness against him both as to the substance of the testimony and the credibility of the witness.<sup>56</sup> Sometimes, the Court explicitly refers to this right as the primary protection of the Confrontation Clause.<sup>57</sup> The Court in *Green* stated that cross-examination is the "greatest legal engine ever invented for

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47. *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

48. *See id.* at 846; *Roberts*, 448 U.S. at 64-65.

49. *See Roberts*, 448 U.S. at 64-65; *Craig*, 497 U.S. at 847-48.

50. *See California v. Green*, 399 U.S. 149, 158 (1970).

51. *See Coy*, 487 U.S. at 1020.

52. *Id.* at 1020.

53. *Id.*

54. *Mattox v. U.S.*, 156 U.S. 237, 243-44 (1895).

55. *See id.*

56. *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980); *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

57. *Roberts*, 448 U.S. at 63 (citing *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

the discovery of truth” precisely because it exposes the witness against the accused to the collective scrutiny of the jury, judge, and the defendant.<sup>58</sup> But the Court also placed limits on the accused’s right to cross-examine his accuser by holding that the Constitution requires effective cross-examination and not cross-examination that may be convenient for the accused.<sup>59</sup>

A corollary of the accused’s right to face and cross-examine a witness against him is the right not to be confronted with hearsay evidence.<sup>60</sup> Generally, courts refuse to admit hearsay evidence because it consists of out-of-court statements where the declarant is not under oath, in the presence of the jury, or subject to cross-examination.<sup>61</sup> As such, the admission of hearsay evidence would be a violation of the Confrontation Clause unless the witness is willing to testify at trial.<sup>62</sup>

But, it is important to note that, despite the significant overlap between hearsay and confrontation, they are separate legal notions.<sup>63</sup> The Court in *Green* stated:

Our decisions have never established such congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.<sup>64</sup>

## *B. Exceptions*

### *1. Hearsay and the Requirement of Cross-Examination*

While the Constitution discourages the use of hearsay in criminal trials, it does not intend a complete bar on hearsay evidence.<sup>65</sup>

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58. *California v. Green*, 399 U.S. 149, 158 (1970) (citing 5 HENRY WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).

59. *See Craig*, 497 U.S. at 849-50. For example, where the defendant can observe the witness testifying and can communicate with his counsel, requiring the witness to also face the defendant is not mandatory for effective cross-examination of the witness. *See id.*

60. *Green*, 399 U.S. at 154-55.

61. *Id.*

62. *See id.*

63. *Id.* at 155.

64. *Id.* at 155-56 (citing *Barber v. Page*, 390 U.S. 719 (1968)); *Pointer v. Texas*, 380 U.S. 400 (1965).

65. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *see also Green*, 399 U.S. at 156-57.

The United States Supreme Court has held that the Confrontation Clause must account for the necessities of the trial.<sup>66</sup> As such, hearsay can come in when the proponent of the evidence is able to demonstrate a necessity requiring the use of hearsay evidence.<sup>67</sup> Such a necessity may exist when the declarant is unavailable<sup>68</sup> and the declarant's out-of-court statement is "marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'"<sup>69</sup>

A presumption of trustworthiness is generally applied when the out-of-court statement of an unavailable declarant falls within a well-established hearsay exception.<sup>70</sup> Otherwise, to avoid the requirement of cross-examination (when the statement was uttered and even at trial in some circumstances), the proponent of the evidence must show that the evidence is supported by particularized guarantees of trustworthiness.<sup>71</sup> The reason underlying this rule is to allow the use of hearsay evidence that does not fit into an established hearsay exception only when it is as reliable as testimony subject to cross-examination.<sup>72</sup>

## 2. Hearsay and the Requirement of Face-to-Face Confrontation

The Confrontation Clause does not guarantee a criminal defendant the absolute right to face the witnesses against him.<sup>73</sup> The Court seems willing to create exceptions to the right of confrontation when making the exception is "necessary to further an important public policy."<sup>74</sup> Furthermore, the face-to-face requirement should not be absolute because giving the requirement its "literal meaning" would eliminate all hearsay exceptions.<sup>75</sup> Nevertheless, aware of these considerations, courts avoid making rules that would completely mitigate the importance of the face-to-face requirement by making findings of necessity on a witness-specific basis.<sup>76</sup>

Also, sometimes, "substantial compliance" with the Confrontation Clause may excuse the lack of face-to-face

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66. *Roberts*, 448 U.S. at 63; see also *Mattox v. U.S.*, 156 U.S. 237, 243 (1895).

67. *Roberts*, 448 U.S. at 64.

68. *Id.*; *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Green*, 399 U.S. at 162.

69. *Roberts*, 448 U.S. at 65 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

70. *Id.* at 66.

71. See *id.* at 65-66.

72. *Id.* (citing *Mattox v. U.S.*, 156 U.S. 237, 244 (1895)); *Green*, 399 U.S. at 155; *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

73. *Maryland v. Craig*, 497 U.S. 836, 849-50 (1990).

74. *Id.* at 850.

75. *Id.* at 848.

76. *Id.*



confrontation.<sup>77</sup> For example, in *Delaware v. Fensterer*, the Court held that the Confrontation Clause is satisfied “when the defense is given a full and fair opportunity to probe and expose . . . infirmities [in the testimony] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.”<sup>78</sup>

The following two uses of evidence—hearsay statements to physicians and CCT testimony—illustrate that the Confrontation Clause does not impose an absolute requirement of face-to-face confrontation and cross-examination on the admissibility of hearsay evidence.

(a). *Statements to Physicians*

The use of out-of-court statements made to physicians for the purpose of treatment is a well-recognized exception to the general bar against the use of hearsay evidence.<sup>79</sup> This exception is particularly relevant in cases involving minor victims of child abuse. Courts reason that as long as the purpose for making the statement is medical, the statement should be admitted into evidence.<sup>80</sup> This includes statements by minors, identifying the sexual predator where the identification is necessary for medical treatment.<sup>81</sup> A justification for the admissibility of such evidence is that children are inherently unlikely or unable to lie about sexual matters.<sup>82</sup> In some jurisdictions, the court must make a determination of unavailability (i.e., that the child is incompetent to testify) before admitting hearsay evidence into the record.<sup>83</sup> But even if the witness is available and the statement is not made for the sole purpose of treatment, the statement may still come into evidence if it manifests particularized guarantees of trustworthiness.<sup>84</sup>

(b). *The Confrontation Clause and Testimony via Closed-Circuit Television*

In many cases of child sexual abuse, judges have used their discretion to allow minor victims to testify via CCT, thus giving the

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77. *Id.* at 851.

78. 474 U.S. 15, 22 (1985) (per curiam); see also *Kentucky v. Stincer*, 482 U.S. 730, 744 (1987) (holding that exclusion of the defendant from a competency hearing did not violate the Confrontation Clause); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

79. See Fed. R. Evid. 803(4).

80. See, e.g., *U.S. v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985).

81. *Id.* at 438; see also *U.S. v. Whitted*, 11 F.3d 782 (8th Cir. 1993).

82. *State v. Myatt*, 697 P.2d 836, 841 (Kan. 1985).

83. See *id.* at 843.

84. *U.S. v. George*, 960 F.2d 97, 100 (9th Cir. 1992).

victims an opportunity to testify without physically observing their abusers.<sup>85</sup> Many states have gone beyond the mere discretion of judges and passed statutes providing for CCT testimony when there is a showing of necessity.<sup>86</sup> The Court has recognized that a state may determine that it has a substantial interest in “protecting children who are . . . victims of child abuse from the trauma of testifying against the . . . perpetrator . . . .”<sup>87</sup> Furthermore, the Court clarified that protecting “minor victims of sex crimes from . . . trauma and embarrassment . . .” is a compelling interest.<sup>88</sup> Also, while recognizing the importance of a defendant’s right to face his accuser, the Court in *Craig* pronounced that the state’s interest in protecting minor victims of sex crimes might outweigh an accused’s right to face the accuser.<sup>89</sup>

However, in the absence of face-to-face confrontation, a court, considering the use of CCT, must make a case-specific finding that “protecting [a] child . . . from the trauma of testifying in a child abuse case” is necessary.<sup>90</sup> To do so, a court must find: (1) that the CCT testimony is necessary to protect the welfare of the child; (2) that “the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant;” and (3) that “the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis* . . .” (nervousness, excitement, or general excitement to testify in court do not suffice).<sup>91</sup>

In addition, courts may approve CCT testimony in the interest of providing accurate testimony at trial.<sup>92</sup> The judge, often with the aid of an expert, may determine that confronting the child with the sexual predator may make the child unable to testify.<sup>93</sup> In *Craig*, the Court determined that the emotional trauma caused by the defendant’s presence is likely to impair the child victim’s ability to communicate.<sup>94</sup> In *State v. Rupe*, the court relied on the testimony of a child physiologist to determine that confronting the abuser (defendant) will cause the child severe trauma such that the child witness may not give truthful testimony.<sup>95</sup>

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85. *Maryland v. Craig*, 497 U.S. 836, 851-52 (1990).

86. *See id.*; e.g., Md. Code Ann., Crim. Proc. § 11-303 (2002).

87. *Craig*, 497 U.S. at 852.

88. *Id.* (quoting *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607 (1982)).

89. *Id.* at 853.

90. *Id.* at 855.

91. *Id.* at 855-56.

92. *See id.* at 853-54.

93. *Craig*, 497 U.S. at 856.

94. *Id.* at 857.

95. *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995).

Furthermore, courts are more likely to allow CCT testimony when there is a showing that the use of CCT has a minimal impact on the defendant's right to confront the witness against him.<sup>96</sup> The CCT testimony must closely resemble the in-court testimony.<sup>97</sup> Similarly, the use of CCT is more likely to be constitutional if, during the testimony, the accused is able to communicate with his attorney.<sup>98</sup> Similarly, courts are more likely to uphold CCT testimony where the CCT system provides a proper transmission of the sound and image from the place of the witness's physical presence.<sup>99</sup>

At this juncture, it must be noted that the Court has not yet had the opportunity to decide whether the CCT testimony constitutes hearsay. Nevertheless, the majority in *Craig* noted that even if CCT testimony were hearsay, it would pass muster because its indicia of reliability are far greater than that of traditional hearsay.<sup>100</sup>

### 3. *The Discretion of the Trial Judge*

Finally, it is important to comment on the discretion of the trial judge regarding issues of trial procedure and evidence. Federal Rule of Evidence 611, among other sources, provides that the court must protect witnesses from "harassment or undue embarrassment" and must provide effective procedures for the "ascertainment of truth."<sup>101</sup> Also, issues in the discretion of the trial court are reviewed for abuse of discretion.<sup>102</sup> And the importance of judicial discretion in criminal cases calls for "exceptionally clear proof" to conclude that a trial court abused its discretion.<sup>103</sup> Furthermore, the Federal Rules of Evidence provide that, in making evidentiary decisions, the court must act to insure the "promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."<sup>104</sup>

In *State v. Tarrago*, the court explicitly held that the judge retains the discretion to implement trial procedures not expressly authorized by the United States Supreme Court to further "important

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96. *State v. Warford*, 389 N.W.2d 575, 580-81 (Neb. 1986).

97. *Id.* at 581-82.

98. *Id.*

99. *Commonwealth v. Bergstrom*, 542 N.E.2d 366, 375-76 (1988). For more information relating to requirements for proper CCT testimony, see generally *Closed-Circuit Television Witness Examination*, 61 A.L.R. 4th 1155 (2005).

100. *See Maryland v. Craig*, 497 U.S. 836, 851 (1990).

101. Fed. R. Evid. 611.

102. *See State v. Widdison*, 28 P.3d 1278, 1287 (Utah 2001).

103. *See McCleskey v. Kemp*, 481 U.S. 279, 280 (1987).

104. Fed. R. Evid. 102.

public interests.”<sup>105</sup> This includes a court’s power to protect minor witnesses.<sup>106</sup> In trials where testimony via CCT is necessary to protect children, the discretion of the judge is particularly important because neither the Federal Rules of Evidence nor the Federal Rules of Criminal Procedure provide clear guidelines for the use of CCT testimony.<sup>107</sup>

### III. THE COURT’S REASONING

In *Crawford v. Washington*, the United States Supreme Court, in an opinion written by Justice Scalia, reversed the decision of the Washington Supreme Court<sup>108</sup> and overruled *Ohio v. Roberts*.<sup>109</sup> The Court held that the Confrontation Clause of the Sixth Amendment bars out-of-court testimonial evidence unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.<sup>110</sup>

The Court argued that the Confrontation Clause guarantees the defendant the right to confront witnesses against him.<sup>111</sup> Furthermore, this constitutional right is operative in all federal criminal prosecutions and is made applicable to state criminal prosecutions via the Fourteenth Amendment.<sup>112</sup> Because the Confrontation Clause could be read to apply only to witnesses at trial, the Court relies on the clause’s historical background to ascertain its meaning.<sup>113</sup>

The court noted that English courts began the development of the ideas embodied in the Confrontation Clause.<sup>114</sup> While the common law tradition was to require in-court testimony subject to cross-examination, many English courts started to absorb the civil law practice of admitting pretrial examinations not subject to cross-examination by the defendant.<sup>115</sup> As the use of such pretrial examinations became widespread, so did their shortcomings, resulting

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105. 800 So.2d 300, 302 (Fla. Dist. Ct. App. 2001) (quoting *State v. Ford*, 626 So.2d 1338, 1345 (Fla. 1993)).

106. *See id.* at 302; *see also Harrell v. State*, 709 So.2d 1364, 1371-72 (Fla. 1998), *cert. denied*, 525 U.S. 903 (1998).

107. *See generally Closed-Circuit Television Witness Examination*, 61 A.L.R. 4th 1155 (2005).

108. *Crawford v. Washington*, 541 U.S. 36, 69 (2004).

109. *Id.* (abrogating *Roberts*, 448 U.S. 56 (1980)).

110. *Id.* at 68.

111. *Id.* at 42.

112. *Id.*

113. *Id.* at 43-50.

114. *Crawford*, 541 U.S. at 43-47.

115. *Id.* at 43-44.

in false convictions.<sup>116</sup> Consequently, English law required that an accused be confronted with the witnesses against him.<sup>117</sup> At the same time, the law developed to allow such examination only upon a showing of unavailability of the declarant.<sup>118</sup> Later, the English courts added an additional safeguard that allowed the testimony of an unavailable witness only if the accused had a prior opportunity to cross-examine the witness.<sup>119</sup>

Furthermore, the Court argues that judicial practices in the Colonies support requiring unavailability and an opportunity to cross-examine.<sup>120</sup> Numerous declarations of rights at the time of the Revolution mentioned the right to confrontation in criminal trials.<sup>121</sup> Finally, while the Constitution did not include a Confrontation Clause, the Court argues, the founders made sure to include it in the Bill of Rights.<sup>122</sup> Additionally, the Court refers to several early U.S. decisions where courts required cross-examination of evidence introduced against the accused.<sup>123</sup>

Subsequently, the court argues that the history of the Confrontation Clause supports two inferences.<sup>124</sup> First, it supports the notion that the Confrontation Clause bars out-of-court testimonial evidence.<sup>125</sup> The Court notes that cases leading up to the adoption of the Confrontation Clause required confrontation of testimonial evidence.<sup>126</sup> As such, the Confrontation Clause does not bar all hearsay, but bars only testimonial hearsay to be used against the accused at the trial.<sup>127</sup> The Court notes that *ex parte* testimony and statements to police officers during interrogations represent the kind testimonial hearsay the Confrontation Clause is meant to bar.<sup>128</sup>

The second inference is that the Confrontation Clause excludes all testimonial evidence unless the declarant is unavailable and the accused had a prior opportunity to cross-examine the declarant.<sup>129</sup> The Court notes that the founders did not intend any exceptions to this rule except those present at common law at the time the Sixth Amendment

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116. *See id.*

117. *See id.* at 44.

118. *See id.* at 45.

119. *See id.*

120. *Crawford*, 541 U.S. at 47-50.

121. *Id.* at 47-48.

122. *Id.* at 48.

123. *Id.* at 49-50.

124. *Id.* at 50.

125. *Id.* at 50-51.

126. *Crawford*, 541 U.S. at 51.

127. *Id.* at 50-52.

128. *Id.* at 51-52.

129. *Id.* at 53-54.

was adopted.<sup>130</sup> Furthermore, the Court interprets the Confrontation Clause as a necessary condition not to be disposed of.<sup>131</sup>

Finally, the majority argues that recent case law supports its holding.<sup>132</sup> It cites cases where the Court required a prior opportunity to cross-examine even when the witness was unavailable at trial.<sup>133</sup> It also cites cases in which the Court rejected evidence where there was a prior opportunity to cross-examine but no showing of unavailability.<sup>134</sup> The Court then overrules the *Roberts* case, arguing that allowing testimonial hearsay on a showing of reliability or trustworthiness represents a departure from the letter of the Confrontation Clause.<sup>135</sup> Furthermore, admitting testimonial hearsay based on a showing of reliability is subjective and therefore inherently unpredictable.<sup>136</sup>

Chief Justice Rehnquist, joined by Justice O'Connor, only concurred in the judgment of the Court.<sup>137</sup> While they agree that the founders were concerned with the admissibility of *ex parte* affidavits, they argue that the Court's distinction between testimonial and non-testimonial evidence is without merit.<sup>138</sup> Chief Justice Rehnquist notes that, historically, courts were skeptical about allowing testimonial evidence, not necessarily because the evidence was testimonial, but because the testimony was not made under oath.<sup>139</sup> Furthermore, at the time the Sixth Amendment was adopted, the law regarding hearsay was still in its developmental stages.<sup>140</sup> Courts generally were not consistent in excluding testimonial hearsay.<sup>141</sup> In fact, out-of-court testimonial hearsay was often used as substantive evidence in criminal trials.<sup>142</sup> Simply put, the founders did not make the distinction between testimonial and non-testimonial evidence as explained in the majority opinion.<sup>143</sup>

Furthermore, at the time the Sixth Amendment was adopted, courts around the country did not make the distinction between testimonial and non-testimonial hearsay.<sup>144</sup> Merely because some jurisdictions made this distinction does not mean that the distinction

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130. *Id.* at 54.

131. *Id.* at 54-55.

132. *Crawford*, 541 U.S. at 58-60.

133. *Id.* at 57-59.

134. *Id.*

135. *Id.* at 60-61.

136. *Id.* at 61.

137. *Id.* at 79 (Rehnquist, O'Connor, J.J., concurring in judgment).

138. *Crawford*, 541 U.S. at 70-71 (Rehnquist, O'Connor, J.J., concurring in judgment).

139. *Id.* at 70-71 (Rehnquist, O'Connor, J.J., concurring in judgment).

140. *Id.* at 73-74 (Rehnquist, O'Connor, J.J., concurring in judgment).

141. *Id.* at 72-73 (Rehnquist, O'Connor, J.J., concurring in judgment).

142. *Id.* (Rehnquist, O'Connor, J.J., concurring in judgment).

143. *Id.* at 71 (Rehnquist, O'Connor, J.J., concurring in judgment).

144. *Crawford*, 541 U.S. at 71-72 (Rehnquist, O'Connor, J.J., concurring in judgment).

had widespread approval.<sup>145</sup> Courts were generally more concerned with whether a declarant testified under oath.<sup>146</sup> Also, hearsay was admissible as long as it satisfied an established hearsay exception.<sup>147</sup>

Also, Rehnquist continued, the Sixth Amendment was adopted at a time when hearsay law was uncertain and developing.<sup>148</sup> What some courts excluded, other courts admitted into evidence.<sup>149</sup> Therefore, the proposition that the adoption of the Sixth Amendment represented the inclusion of only then-existing hearsay exceptions is inconclusive.<sup>150</sup> It could well be that the founders intended the law of evidence to evolve and to include hearsay exceptions that were not fully settled at the time the Amendment was adopted.<sup>151</sup>

The Chief Justice further argues that the wisdom and the motivating force behind all hearsay exceptions is that some out-of-court statements have such indicia of reliability that the risks, which cross-examination is meant to expose, are not at issue.<sup>152</sup> This statement is no less applicable to testimonial evidence that manifests reliability or guarantees of trustworthiness.<sup>153</sup>

The concurring opinion concludes by arguing that the majority unnecessarily overrules the *Roberts* case.<sup>154</sup> By overruling the *Roberts* case, the Court creates immense uncertainty by failing to elaborate on the meaning of testimonial evidence.<sup>155</sup> The Chief Justice notes that the case could have been decided on less volatile grounds.<sup>156</sup> Mainly, the court could have referred to past precedent to hold that the mere fact that the evidence at trial corroborates certain other evidence does not make such evidence admissible.<sup>157</sup>

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145. *Id.* at 72 (Rehnquist, O'Connor, J.J., concurring in judgment).

146. *Id.* at 72-74 (Rehnquist, O'Connor, J.J., concurring in judgment).

147. *See id.* at 73 (Rehnquist, O'Connor, J.J., concurring in judgment).

148. *Id.* at 73 (Rehnquist, O'Connor, J.J., concurring in judgment).

149. *See id.* (Rehnquist, O'Connor, J.J., concurring in judgment).

150. *Crawford*, 541 U.S. at 73-74 (Rehnquist, O'Connor, J.J., concurring in judgment).

151. *Id.* at 74 (Rehnquist, O'Connor, J.J., concurring in judgment).

152. *Id.* at 74-75 (Rehnquist, O'Connor, J.J., concurring in judgment).

153. *See id.* (Rehnquist, O'Connor, J.J., concurring in judgment).

154. *Id.* at 76 (Rehnquist, O'Connor, J.J., concurring in judgment).

155. *Id.* at 75 (Rehnquist, O'Connor, J.J., concurring in judgment).

156. *Crawford*, 541 U.S. at 76 (Rehnquist, O'Connor, J.J., concurring in judgment).

157. *Id.* (Rehnquist, O'Connor, J.J., concurring in judgment).

## IV. ANALYSIS

The *Crawford* decision created the risk that the rules of evidence and criminal procedure will no longer be able to shield minor victims of sexual abuse from being traumatized by their abusers at trial.<sup>158</sup> On its face, the Confrontation Clause requires that all testimonial evidence in criminal trials be subject to effective cross-examination.<sup>159</sup> However, in light of this constitutional mandate, the Court has previously approved of rules and procedures that depart from this rigid application of the Confrontation Clause.<sup>160</sup> Statements to physicians for the purpose of medical treatment and testimonies via CCT in cases of child abuse are arguably in danger of becoming inadmissible as departures from the command of the Confrontation Clause.<sup>161</sup>

*A. The Crawford Holding Should Not Inhibit the Development of the Law of Evidence to Protect Minor Victims of Sexual Abuse*

These departures from the literal or mechanical application of the Confrontation Clause illustrated the Court's attempts to develop the rules of evidence and trial procedure consistent with the Constitution. Specifically, the use of CCT testimony and the admissibility of certain out-of-court statements represent the long-standing notion that the mandate of the Confrontation Clause is not impermeable and that there are instances where the clause must yield to important public interests and trial necessities.<sup>162</sup> This interpretation is consistent with the idea that the founders did not intend for a rigid, literal, and mechanical application of the Confrontation Clause.<sup>163</sup> While the language of the Confrontation Clause does not mention any exceptions, the Court in *Crawford* noted that the founders intended to preserve certain hearsay exceptions existing at common law.<sup>164</sup>

Also, this interpretation is consistent with the intent of Congress in passing the Federal Rules of Evidence. Rule 611 specifically provides that judges should adopt such trial procedures as are necessary to protect witnesses from harassment or undue

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158. *Id.* at 68-69.

159. *Maryland v. Craig*, 497 U.S. 836, 847-48 (1990).

160. *Crawford*, 541 U.S. at 60.

161. Fed. R. Evid. 803(4); *see also Craig*, 497 U.S. at 861-62.

162. *Craig*, 497 U.S. at 850.

163. *See Crawford*, 541 U.S. at 54-55.

164. *Id.* However, it is debatable whether the founders intended to preclude the introduction of new hearsay exceptions over time. Chief Justice Rehnquist persuasively argues that the founders intended hearsay law to develop over time, thus not precluding the introduction of new hearsay exceptions. *Id.* at 71-76 (Rehnquist, O'Connor J.J., concurring in judgment).



embarrassment and as are necessary “for the ascertainment of truth.”<sup>165</sup> The Court and the United States Congress provided that judges should make evidentiary decisions as are necessary for the “promotion of the growth and development of the law of evidence.”<sup>166</sup>

Furthermore, judges retain wide discretion to implement procedures to advance important public interests.<sup>167</sup> One such interest is the protection of minor victims of sexual abuse.<sup>168</sup> Additionally, the Court has also held that this interest is compelling and may outweigh a defendant’s right to confrontation.<sup>169</sup> Therefore, to the extent that statements to physicians and CCT testimony represent the growth of the law of evidence consistent with the founders intent, the Court’s precedent, and the Congressional mandate, any future Court decision, applying the *Crawford* rational to preclude the use of CCT and statements to physicians, will stagnate the growth of the law of evidence.

Additionally, any future case extending the *Crawford* rational to require that minor victims of sexual abuse testify in the actual courtroom and before the defendant would deny the efforts of the majority of the states to shield children from the trauma of testifying in the physical presence of their sexual predators. Thirty-seven states currently permit testimony via CCT.<sup>170</sup> Of these, twenty-four states permit the use of one-way CCT testimony (the child cannot see the courtroom but the jury and the defendant can see the child).<sup>171</sup> Thus, a Supreme Court decision expanding the applicability of the *Crawford* decision would invalidate the efforts of a great many states to promote the important public interest of protecting their youth from trauma resulting from confronting their abusers in court.

The likelihood that that a *Crawford* successor would invalidate the use of CCT testimony and statements to physicians is not wide of the mark. CCT testimony could be subjected to the Court’s reasoning in *Crawford* because a child testifying via CCT could be considered out-of-court, and the evidence obtained may be testimonial.<sup>172</sup> This argument is supported by cases that admit a child’s statements that identify the perpetrator or that are otherwise trustworthy under the

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165. Fed R. Evid. 611.

166. See *McCleskey v. Kemp*, 481 U.S. 279, 281 (1987); *State v. Tarrago*, 800 So.2d 300, 302 (Fla. Dist. Ct. App. 2001); Fed. R. Evid. 102.

167. See *Craig*, 497 U.S. at 850.

168. *Id.* at 852-56.

169. *Id.* at 853.

170. *Id.* at 853-56.

171. *Id.*

172. *Id.* at 851; see also *Crawford v. Washington*, 541 U.S. 36, 52-54 (2004).

circumstances.<sup>173</sup> For example, a judge applying the *Crawford* analysis could find that a child's statement to a doctor about the identity of the abuser and the abuse are not just for effective treatment but are also reasonably expected to be introduced by the victim at trial against the abuser. Because such statements are often used against the abuser at trial, they are testimonial. In addition, a defendant could argue that the use of CCT violates the Confrontation Clause because it deprives him of face-to-face confrontation.<sup>174</sup> Thus, if deemed testimonial, statements to physicians would be subject to criticism because they are made out-of-court, without subjecting the child to an oath and cross-examination at the time the statement is made.<sup>175</sup>

Also, Justice Scalia's dissent in *Craig* arguably predicts the possibility that *Crawford* may invalidate the use of CCT testimony and statements to physicians.<sup>176</sup> This dissent is of particular importance because Justice Scalia is also the author of the *Crawford* decision.<sup>177</sup> In *Craig*, Justice Scalia argues that the right of the accused to have a face-to-face confrontation with the witness against him is a "categorical guarantee of the Constitution" which should not yield to policy interests calling for exceptions to the Confrontation Clause (even in cases involving minor victims of sexual abuse).<sup>178</sup> Justice Scalia further argued, "The Confrontation Clause guarantees not only what it explicitly provides for—'face-to-face' confrontation—but also implied . . . collateral rights such as cross-examination."<sup>179</sup> Therefore, it is likely that the *Crawford* decision places equal importance on subjecting testimonial evidence to cross-examination and face-to-face confrontation. As such, a future case could deny a child victim the ability to testify via CCT and introduce statements made to physicians. It is also important to note that four justices sided with Scalia in *Craig*.<sup>180</sup> This matter is further complicated by the appointment of Chief Justice Roberts (possibly sharing Justice Scalia's view) and the retirement of Justice O'Connor, the author of the Court's opinion in *Craig*.<sup>181</sup>

Furthermore, while neither the majority nor the dissent in *Craig* answered whether testimony of a minor victim of sexual abuse

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173. *U.S. v. Renville*, 779 F.2d 430, 439 (8th Cir. 1985); *see U.S. v. Whitted*, 11 F.3d 782 (8th Cir. 1993).

174. *See Crawford*, 541 U.S. at 57-58.

175. *Renville*, 779 F.2d at 436.

176. *Craig*, 497 U.S. at 860 (Scalia, Brennan, Marshall & Stevens, J.J., dissenting).

177. *Crawford*, 541 U.S. at 38.

178. *Craig*, 497 U.S. at 861-62 (Scalia, Brennan, Marshall & Stevens, J.J., dissenting).

179. *Id.* at 862 (Scalia, Brennan, Marshall & Stevens, J.J., dissenting).

180. *See id.* at 860 (Scalia, Brennan, Marshall & Stevens, J.J., dissenting).

181. *Id.* at 836.

via CCT constitutes hearsay, Justice Scalia has already taken a position on the issue.<sup>182</sup> He argued that, if CCT testimony is hearsay, it is hearsay that does not measure up to live testimony, “and can be employed only when the [witness] is unavailable.”<sup>183</sup> While this position may allow for the admissibility of some statements made to physicians, it is harder to argue that a witness testifying via CCT is unavailable at the time of trial.<sup>184</sup>

*B. The Continued Admissibility of Statements to Physicians and Use of Testimony via CCT is Necessary to Protect Minor Victims of Sexual Abuse and Insure the Reliability of Evidence*

As such, the *Crawford* decision represents a clear risk that a state may no longer promote the important interest of protecting minor victims (witnesses) of child abuse. A future case invalidating the use of CCT testimony and the introduction of statements made to physicians would ignore the fact that the state has a compelling interest in protecting its vulnerable youth.<sup>185</sup> On prior occasions, courts found that a child might suffer severe trauma and long-term damage if confronted face-to-face with the sexual predator.<sup>186</sup> Courts have also found that, as a result of the trauma, a minor witness may not be able to testify accurately or testify at all.<sup>187</sup> And in some cases, evidence was introduced to suggest that minors, when confronted with the abuser, might distort and minimize their abominable experiences.<sup>188</sup> In this respect, the state will not only fail to protect minors from additional trauma, but will also fail to maintain the validity and the accuracy of the fact-finding process—the very thing that the Confrontation Clause is meant to guarantee.

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182. *Id.* at 851-852, 865.

183. *Id.* at 865-66.

184. It is hard to argue that a witness is unavailable when the witness is present in court and testifying via CCT. However, an argument could be made that a minor witness, although testifying via CCT, is unavailable to testify in front of the abuser due to the stress and trauma that may arise if confronted by the abuser.

185. *Craig*, 497 U.S. at 837.

186. *Id.* at 856-57. *See also* *People v. Handerson*, 503 N.Y.S.2d 238 (N.Y. Sup. Ct. 1986).

187. *Craig*, 497 U.S. at 841-42.

188. *See Danner v. Com.*, 963 S.W.2d 632 (Ky. 1998), *cert. denied* 525 U.S. 1010 (1998). *See also Craig*, 497 U.S. at 841-42.

*C. Applying the Crawford Analysis Is Not the Only Way to Meet the Requirements of the Confrontation Clause—Courts Have Alternative Criteria to Determine Reliability*

A reading of the Confrontation Clause that precludes the use of CCT testimony and out-of-court statements to physicians would ignore that the admissibility of such statements is narrowly tailored. Over the years, courts have developed procedures and rules to insure that the admissibility of evidence stays within the spirit of the Confrontation Clause.<sup>189</sup> Because the purpose of the Confrontation Clause is to insure the reliability of the fact-finding process, the Court allows evidence that substantially complies with this constitutional mandate.<sup>190</sup>

Because CCT testimony substantially complies with the Confrontation Clause, most jurisdictions approve of CCT testimony.<sup>191</sup> The Supreme Court has held that CCT testimony is significantly more reliable and trustworthy than other types of hearsay.<sup>192</sup> Specifically, when testimony is provided via CCT, the witness is under oath and is subject to immediate cross-examination.<sup>193</sup> Also, while the witness (in one-way CCT) cannot see the defendant, the judge, the jury, and the defendant can observe the demeanor of the witness, and the defendant has the ability to communicate with his attorney during the testimony.<sup>194</sup> In addition, courts that permit the use of CCT also find that the minor will be adversely affected by providing live testimony, not because of the courtroom atmosphere, but because of defendant's physical presence.<sup>195</sup>

Furthermore, courts have repeatedly admitted out-of-court statements to physicians because they substantially comply with the Confrontation Clause.<sup>196</sup> Generally, for hearsay evidence to be admissible the declarant must be unavailable and the evidence must have indicia of reliability.<sup>197</sup> Courts generally presume reliability

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189. *Craig*, 497 U.S. at 855-856. In *Craig*, the Court examines: (1) whether the use of CCT is necessary to protect the child, (2) whether the child will experience trauma by the presence of the defendant and not by virtue of being in the courtroom, and (3) whether the child will suffer minimal trauma. *Id.*

190. *Id.*

191. *Id.* at 853-54, 856-57.

192. *Id.* at 851.

193. *Id.*

194. *Id.*

195. *Craig*, 497 U.S. at 855-56.

196. See *U.S. v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985); *U.S. v. Whitted*, 11 F.3d 782 (8th Cir. 1993); *U.S. v. George*, 960 F.2d 97, 100 (9th Cir. 1992).

197. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

when the statement falls into a well-recognized hearsay exception.<sup>198</sup> If these conditions are not met, courts still admit hearsay that manifests particularized guarantees of trustworthiness.<sup>199</sup> These safeguards effectively prevent any meaningful departure from the command of the Confrontation Clause.

Statements made by minor victims of sexual abuse to treating physicians frequently meet the above conditions.<sup>200</sup> Courts admit such statements because they are necessary for medical treatment.<sup>201</sup> And, even when they are not necessary for medical treatment, courts sometimes admit them because of their manifest reliability.<sup>202</sup> Courts have commented that minor children have neither the motive nor the inclination to lie about sexual abuse—a matter generally unknown to a minor.<sup>203</sup> Also, courts often find that a statement is admissible because the minor victim is unavailable.<sup>204</sup> Here, one could make the argument that a minor is unavailable when the trauma and stress in the aftermath of the abuse render the child unable to communicate at trial. Therefore, the United States Supreme Court should not apply the *Crawford* decision to preclude the use of statements to physicians and testimony via CCT when both substantially comply with the Confrontation Clause.

*D. The Confrontation Clause Asks Whether the Evidence is Reliable and Not Whether the Evidence Is Testimonial*

Finally, the policy rational behind the Confrontation Clause is to provide and insure that there is a reliable fact-finding mechanism in criminal trials.<sup>205</sup> However, the Constitution also provides protection to victims and gives them recourse when others commit unthinkable crimes against them. Indeed, the future welfare of a child may depend on the kind of evidence that he can present against the sexual predator. Where the best or the most reliable evidence is the testimony of the child, and where such child may effectively present this evidence only under certain circumstances as a result of the sexual abuse, to deny the child's testimony is to undermine the validity of the fact-finding process and the meaning of the Confrontation Clause.

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198. See, e.g., *id.*

199. *Id.*

200. *George*, 960 F.2d at 100.

201. *Renville*, 779 F.2d at 436.

202. *George*, 960 F.2d at 100.

203. See *State v. Myatt*, 697 P.2d 836, 842 (Kan. 1985).

204. See *id.* at 844-845.

205. *California v. Green*, 399 U.S. 149, 158 (1970).

Still, any future case challenging to the admissibility of hearsay statements to physicians or the use of CCT testimony may succeed under the holding in *Crawford*. The continued acceptance of out-of-court statements to physicians and CCT testimonies will depend on whether the Court will revert back to a philosophy symbiotic with the Confrontation Clause that favors the development of the rules of evidence to accommodate all relevant interests and not just those of the defendant. One venue for doing so is to adopt Chief Justice Rehnquist's view in *Crawford*.<sup>206</sup> That is, the concern of the Confrontation Clause is not whether the evidence is testimonial but whether the evidence is reliable and trustworthy.<sup>207</sup>

On the issue of reliability, courts traditionally admitted testimonial evidence given under oath because the oath itself gave rise to a presumption of reliability. Nevertheless, even beyond the oath requirement or the cross-examination requirement (mechanisms to insure reliability), the fundamental role of the Confrontation Clause remains to insure the reliability of evidence. That is and should be the threshold issue when considering the admissibility of evidence. Whether the evidence is given under oath or is subject to cross-examination are mere means to insure reliability that are not mutually exclusive with other similar criteria that a court may deem appropriate.

But even if the Court does not abandon the distinction between testimonial and non-testimonial evidence, the Court should approach the problem as it does in other cases involving fundamental procedural and substantive rights and compelling state interests.<sup>208</sup> Therefore, even if Justice Scalia's analysis in *Crawford* prevails, there is no reason why the Court should not make room for compelling state interests when the means to achieve such interests are narrowly tailored.<sup>209</sup> The Court has already declared that protecting minor witnesses from trauma is a compelling interest.<sup>210</sup> If the use of hearsay statements to physicians and CCT is narrowly tailored, the Court should give its blessing. But if not, the Court should provide guidelines, and federal and state legislators should draft rules that would make these evidentiary practices narrowly tailored.

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206. See *Crawford v. Washington*, 541 U.S. 36, 69-76 (2004).

207. See *id.*

208. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

209. See *id.*

210. *Maryland v. Craig*, 497 U.S. 836, 837-38 (1990).

## V. CONCLUSION

While the *Crawford* decision attempts to insure the reliability of the fact-finding process under the Confrontation Clause, it has produced certain undesired side effects. Specifically, by allowing the use of hearsay testimonial evidence only when the defendant had a prior opportunity to cross-examine the declarant, and where the declarant is unavailable to testify at trial, the court has effectively barred the use of CCT and hearsay statements for the purpose of medical diagnosis and treatment. Courts often admit these forms of evidence to avoid forcing minor victims of sexual abuse to testify in the presence of their alleged abusers. By making the future use of these practices uncertain, the court risks traumatizing minor victims by requiring their testimony in the presence of their sexual predators. Consequently, the Court also risks undermining the validity of the fact-finding process by making it hard or impossible for minor victims to testify honestly, accurately and confidently against their abusers.