Cases to which Crawford does not apply

Although Crawford is a watershed decision, it may not impact most child abuse cases. Specifically, the case does not apply to the following:

Civil child protection proceedings. The confrontation clause applies to “criminal prosecutions.”10 In most states, child hearsay statements are admitted in civil child protection proceedings under both firmly rooted as well as residual exceptions to the hearsay rule.11 Although the due process clause of the 14th amendment accord parents a right to confront accusatory witnesses, confrontation rights under the due process clause if the witness is unavailable and the statements have “particularized guarantees of trustworthiness” that are shown from “the totality of the circumstances” surrounding the making of the statement.12

Cases to which Crawford does apply: Defining “testimonial” statements

In a criminal case of 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. Unfortunately, the Crawford Court chose to “leave for another day any effort to spell out a comprehensive definition of “testimonial”.”13 The Court did, however, provide some clues as to how statements that will be deemed “testimonial.” The Court cited an 1828 Webster’s dictionary definition of testimony as being a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”14 The Court went on to explain that an “accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”15

The Court also gave specific examples of statements that are testimonial. The Court cited “extrajudicial statements… contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”16 The Court also suggested testimonial statements include those “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”17 In applying these definitions, the Court said statement “taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive.”18

Crawford’s applicability to firmly rooted hearsay exceptions

Crawford may apply to child statements admitted under firmly rooted hearsay exceptions such as excited utterances or statements for purposes of medical diagnosis. Indeed, the Court specifically referenced White v. Illinois,20 a case in which child hearsay statements were admitted under these very exceptions, and questioned whether the statements admitted in White could survive the Court’s new confrontation clause analysis.21 Whether or not Crawford applies in a given case depends on the circumstances surrounding the statement. A child blurted out a statement to a parent, teacher or friend is likely making a “casual remark” and thus is not appropriate that the statement might be available at a trial. Statements made to a doctor may be viewed, if anything, as statements for purposes of treatment and not for trial. If so, the statements should be admissible under traditional hearsay rules even if the child does not testify.

The issue becomes more complex if the child’s statement is made to a government official such as a police officer. Crawford specifically called into question the excited utterances made to a police officer in White v. Illinois that were in response to questioning.22 Keep in mind, though, that this language in Crawford is merely dicta. Prosecutors
must be prepared to argue in future cases that a particular child did not appreciate that his statements would be used for testimonial purposes—whether or not the statement was made to an investigator.

**Crawford’s applicability to forensic interviews admitted under residual hearsay exceptions**

In cases in which the child is unavailable for trial, defendants may challenge the admissibility of forensic interviews under residual exceptions to the hearsay rule on the basis these statements are “testimonial” in nature. In response to this challenge, prosecutors have several arguments at their disposal.

First, forensic interviews are not primarily for the purpose of criminal litigation. If done as part of a multi-disciplinary response to the possibility of abuse, the interview serves 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. States following the _CornerHouse v. Finding Words_ protocol for interviewing children can cite the “child’s first doctrine” upon which the interview is based. Pursuant to this doctrine, the “child is our first priority. Not the needs of the family. Not the child’s story.” Not the evidence. **Not the needs of the courts. Not the needs of the police, child protection, attorneys, etc. The child is our first priority** (emphasis added).

Moreover, forensic interviewers are specifically taught not to focus only on the possibility a child was abused by a given person. For example, forensic interviewers trained through _CornerHouse v. Finding Words_ are taught to explore “alternative hypotheses” including an innocent explanation for a child’s account of genital touching, or to identify a perpetrator other than one named by the child.

These and other safeguards distinguish forensic interviews from the “formalized testimonial materials” for criminal trials cited by the Court in _Crawford_. Second, young children are unlikely to comprehend that a forensic interview may be used at trial. Again, _Crawford_ suggested a testimonial statement is one “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” As one commentator notes, young children making a statement to the authorities may not understand that sexual abuse is wrong or that a perpetrator is subject to punishment as a result. “If so,” it seems dubious to say that the children acting in these cases were acting as witnesses.”

**Third, even older children may not understand that a forensic interview may be used for testimonial purposes. Studies indicate that many children do not understand the roles of police officers, judges or lawyers in handling a case of child abuse—or any other case for that matter.** Even children as old as eleven “remain confused about what goes on in Court.” This is why there is a plethora of written material to help professionals explain the Court process to children. Obviously, if children cannot understand even the purposes of a trial, it is ludicrous to suggest they understand that a neutral fact-finding forensic interview would, in the words of _Crawford_, “be available for use at a later trial.”

**Fourth, _Crawford_ does not apply if the defendant’s conduct made the child unavailable for trial.** The Court in _Crawford_ said “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims…” As stated by one legal scholar, “be available for use at a later trial.”

**Conclusion**

Although _Crawford_ is a seminal 6th amendment case, it may not impact most child abuse trials. This is because the case only applies to criminal cases in which the child victim will not testify. Even when the case is invoked by defendants objecting to the admission of child hearsay; prosecutors have a number of arguments to distinguish child hearsay statements from the solemn, formalized statements discussed in _Crawford_. Finally, since many child abuse victims are unavailable for trial because of the abuse, these offenders may have forfeited their right to confront the children they have harmed.

---

1. Director, APRI’s National Center for the Prosecution of Child Abuse (Alexandria, VA) and the National Child Protection Training Center (at Winona State University, Winona, MN). The author thanks APRI staff attorney Jodi Furrer for her research assistance.
4. This clause provides that “in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.” UNITED STATES CONSTITUTION, SIXTH AMENDMENT. The procedural guarantee applies to both federal and state prosecutions. _Crawford_ v. _Hollington_, 2004 U.S. Lexis 1838 at *112.
5. _Crawford_, 2004 Lexis 1838.
7. Id. at 66.
8. Id. Furtly rooted exceptions to the hearsay rule include statements for the purposes of medical diagnosis and excited utterances.
10. Id. at 819.
11. Id. at 819.
12. United States Constitution, Sixth Amendment.
15. Id. at 56.
16. Id. at *72.
17. Id. at *72-78.
18. Id. at *28.
19. Id. at *29.
21. _Crawford_ at *76.
22. Id.
23. A majority of states have statutory exceptions that admit child hearsay statements that are deemed reliable or they follow the federal rules of evidence which provide that statements not admitted under _Crawford_ “be available for use at a later trial.”
26. See e.g., Lynne Copin, Preparing Children for Court (2000).
27. _Crawford_ at *28.
29. Id.
30. _Crawford_ at *42.
31. _Crawford_ supra note 28 at 252.
32. Id. at 253.