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Playing by All the Rules: How to Define and Provide a Prior Opportunity for Cross-Examination in Child Sexual Abuse Cases after Crawford V. Washington

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COMMENTS

PLAYING BY ALL THE RULES: HOW TO DEFINE AND PROVIDE A "PRIOR OPPORTUNITY FOR CROSS-EXAMINATION" IN CHILD SEXUAL ABUSE CASES AFTER *CRAWFORD V. WASHINGTON*

PRUDENCE BEIDLER CARR*

In 2004, the Supreme Court decided Crawford v. Washington *and announced a new rule of confrontation under the Sixth Amendment of the United States Constitution. Under* Crawford, *courts must exclude all out-of-court statements when those statements were (1) given by a witness who is unavailable to testify at trial and (2) considered "testimonial" in nature, unless (3) the defendant had a prior opportunity to cross-examine the witness who offered the statements.* Crawford *has introduced a challenging problem in child sexual abuse cases where children are often unavailable to testify at trial; their out-of-court allegations of abuse are now regularly excluded for their "testimonial" nature. This development is problematic because children's recollections of events constitute critical evidence in child sexual abuse prosecutions. The question thus arises: how can prosecutors continue to hold child sexual abusers accountable for their crimes while upholding the* Crawford *rule of confrontation? Many scholars have explored solutions to this dilemma by examining the first two prongs of the* Crawford *rule—witness unavailability and the testimonial nature of ex parte statements. This Comment suggests, however, that the solution lies in the third prong—the "prior opportunity for cross-examination." Specifically, this Comment recommends that state legislatures implement a rule of criminal procedure that allows both prosecutors and defendants in*

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sexual abuse cases an opportunity to record a child's pretrial testimony and cross-examination on videotape. This rule would safeguard criminal defendants' confrontation rights while also protecting against the Crawford *rule's overly burdensome effects on child sexual abuse prosecutions.*

I. INTRODUCTION

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .[1]

> [A] State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.[2]

In 2004, the Supreme Court decided *Crawford v. Washington*[3] and reassessed the standards for admitting ex parte statements in criminal trials under the Sixth Amendment's Confrontation Clause. Writing for the majority, Justice Scalia introduced the following rule: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[4] The *Crawford* rule of confrontation has had an enormous impact throughout criminal law. Its effects have been felt perhaps most dramatically, however, in child sexual abuse (CSA) cases.

A. VICTIM TESTIMONY: THE SOURCE OF THE PROBLEM

Child sexual abuse typically occurs in private locations without other witnesses, and the passage of time between the alleged abuse and its disclosure often precludes conclusive physical examinations.[5] Consequently, it is common for victim testimony to constitute the principal evidence on which CSA prosecutions rely. It is difficult to ensure that a child will be able to relay this evidence at trial, however, because children

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[1] U.S. CONST. amend. VI.

[2] Maryland v. Craig, 497 U.S. 836, 853 (1990).

[3] 541 U.S. 36 (2004).

[4] *Id.* at 68. *But see id.* at 69 (Rehnquist, C.J., concurring in judgment) (arguing that the adoption of a new rule was not well-founded and introduced new types of uncertainty in interpreting the Confrontation Clause).

[5] *See* Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."); *see also* John C. Yuille et al., *Interviewing Children in Sexual Abuse Cases*, *in* CHILD VICTIMS, CHILD WITNESSES 95, 95-96 (Gail Goodman & Bette Bottoms eds., 1993) (commenting that child sexual abuse usually takes place in private settings where there are no witnesses, and physical evidence of abuse is typically inconclusive, since children heal quickly and do not always disclose details of the abuse immediately).

are regularly "unavailable" to testify in court.[6] Children's unavailability to testify at trial stems from a variety of causes, including fear of the courtroom and of the defendant,[7] diminished memory of events,[8] and an inability to answer questions and articulate details clearly.[9] Children's unavailability is also often tied to their age at the time of the alleged abuse and at the time of trial.[10] Because these causes of children's unavailability are typically not remediable, they can often serve to exclude children's voices from being heard altogether in CSA cases, even when the child's testimony is the primary evidence on which the CSA prosecution relies.

Prior to the *Crawford v. Washington* decision in 2004, courts across the country recognized the risk that excluding children's voices from CSA trials could undermine CSA prosecutions. They responded to this risk by applying looser standards for admitting out-of-court or ex parte testimony in CSA cases. If a child was unavailable to testify in court during a CSA trial, courts chiefly adopted two specific methods for ensuring that her

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[6] NANCY WALKER PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS 138 (1991) (explaining that children are often unavailable to testify at trial because they would be traumatized by the courtroom experience); *see* 18 U.S.C. § 3509(b)(1)(B) (2000) (listing grounds for finding unavailability).

[7] *See, e.g.*, Contreras v. State, 910 So. 2d 901, 903 (Fla. Dist. Ct. App. 2005) (finding a child witness unavailable because testifying against her father in a CSA trial would likely have led to her suffering severe trauma); People v. T.T. (*In re* T.T.), 815 N.E.2d 789, 795-96 (Ill. App. Ct. 2004) (finding a child witness unavailable when she froze on the stand and could not answer any more questions from the prosecution after saying that the defendant had tried to unbutton her pajama suit); *see also* Gail S. Goodman & Alison Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations*, *in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS 92, 102 (John Doris ed., 1991) (explaining that abusers often make children promise to keep the abuse a "secret" from others); L. Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. the Accused's Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439, 439 (1994) (citing studies that show how testifying against an assailant in court, especially if the abuser is a family member, is the most traumatic aspect of the legal process for child victims of sexual abuse).

[8] *See, e.g.*, State v. Blue, 717 N.W.2d 558, 561 (N.D. 2006) (finding a child unavailable as a witness because she lacked a sufficient memory of events).

[9] *See, e.g.*, State v. Henderson, 129 P.3d 646, 649 (Kan. Ct. App. 2006) (finding a child unavailable as a witness because she did not understand the proceedings, the questions, or her duty to testify truthfully).

[10] *See, e.g.*, People v. Sisavath, 13 Cal. Rptr. 3d 753, 756 (Cal. Ct. App. 2004) (finding a four-year-old child unavailable in a preliminary hearing after she "failed to respond to most of the questions that she was asked" and "could not express herself so as to be understood"); State v. Scacchetti, 690 N.W.2d 393 (Minn. Ct. App. 2005), *aff'd*, 711 N.W.2d 508 (Minn. 2006) (CSA case involving a three-year-old unavailable victim); *Blue*, 717 N.W.2d at 561 (attributing a five-year-old child witness's unavailability to her lack of memory concerning the incidents); State v. Mack, 101 P.3d 349, 352 (Or. 2004) (CSA case involving a three-year-old victim who was unavailable to testify).

voice could still be heard. First, government agents such as police officers and caseworkers who had interviewed the child about the alleged abuse could relay the contents of their interviews through broad hearsay exceptions.[11] Second, prosecutors could introduce children's videotaped pretrial statements even if the defendant had not had an opportunity to cross-examine the child.[12]

Both of these methods—the relay of ex parte testimony through another's testimony and the use of prerecorded video statements—ensured that a child's voice could be heard at trial. However, these methods also overly benefited CSA prosecutors and infringed on criminal defendants' constitutional right to confront all witnesses against them. For example, when prosecutors used government agents to relay a child's ex parte testimony, the defendant could only cross-examine the messenger, rather than the source of information.[13] Moreover, the use of government agents to relay a child's statements gave prosecutors the opportunity to shape their victims' voices in a way that would best suit their case.[14] Prosecutors also gained unfair advantages when they used a videotaped statement to relay a child's pretrial testimony because defendants could not cross-examine the video statement.[15]

Prior to *Crawford*, trial judges could apply these looser evidentiary rules in CSA cases because the Supreme Court gave them broad discretion to admit ex parte testimony that met certain "particularized guarantees of

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[11] *See, e.g.*, *In re T.T.*, 815 N.E.2d at 793 (before *Crawford*, the trial court allowed an investigating social worker and police officer to testify about what they had heard from the CSA victim because the child was unavailable to testify); *see also* Robert P. Mosteller, Crawford*'s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 412 (2005) [hereinafter Mosteller, Crawford*'s Impact*] (noting that before *Crawford*, prosecutors often admitted children's hearsay statements through police, government investigators, and specialized medical investigating team witnesses).

[12] *See, e.g.*, *Contreras*, 910 So. 2d at 903 (prior to the *Crawford* decision, upon finding the child unavailable to testify, the trial court admitted the child's videotaped interview with a child protection worker in which she alleged that her father had sexually abused her).

[13] *See, e.g.*, *id.* The Sixth Amendment Confrontation Clause was designed to prevent the government from abusing its prosecutorial powers by ensuring that criminal defendants have an opportunity to test the reliability of all testimony offered against them. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); Crawford v. Washington, 541 U.S. 36, 49 (2004).

[14] *See, e.g.*, *Sisavath*, 13 Cal. Rptr. 3d at 755 (prior to *Crawford*, the prosecutor admitted an unavailable child victim's ex parte statements in part through a police officer's trial testimony).

[15] *See, e.g.*, *Contreras*, 910 So. 2d at 903.

trustworthiness."[16] Additionally, state legislatures condoned the use of looser standards in CSA cases because they served the greater public policy goal of protecting children while prosecuting CSA crimes.[17] Despite the compelling public interests at issue, however, there remained a key problem with allowing prosecutors to circumvent the Confrontation Clause in CSA cases: children's allegations about sexual abuse are not always true.[18] In fact, children's testimony can become heavily influenced by parental influence, suggestive interview questions, and confusion about what is and is not pleasing to adult investigators.[19] To prevent the admission of false or misleading testimony, CSA cases therefore require reliability testing that extends beyond mere judicial instinct concerning the "trustworthiness" of a child's ex parte statement.[20]

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[16] Ohio v. Roberts, 448 U.S. 56, 66 (1980); *see, e.g.*, *Contreras*, 910 So. 2d at 904 (finding that the trial court relied on the test of reliability that was established in *Roberts*, and later overruled by *Crawford*). The trial judge determined that the prosecutors had done a sufficient job showing the trustworthy nature of the child's ex parte statements such that cross-examination was not necessary. *Id.* In particular, the judge predicted that "cross-examination of the child, had it been possible without traumatizing her, would not have yielded any concessions by her that would have lessened or significantly altered her statement." *Id.*

[17] *See* Maryland v. Craig, 497 U.S. 836, 853 (1990) ("[A] State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."); *see also* New York v. Ferber, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

[18] John E.B. Myers, *Adjudication of Child Sexual Abuse Cases*, FUTURE CHILD., Summer/Autumn 1994, at 84, 85 (noting that children are unlikely to lie deliberately about sexual abuse claims but that they may be "coached or led" into believing untrue stories about how they have been abused); WALKER PERRY & WRIGHTSMAN, *supra* note 6, at 139.

[19] Goodman & Clarke-Stewart, *supra* note 7, at 103; *see* Charles Brainerd & Peter A. Ornstein, *Children's Memory for Witnessed Events: The Developmental Backdrop*, *in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS, *supra* note 7, at 10, 15 (explaining that tainting a child's recollection of events can happen quite accidentally, merely through exposure to other accounts in which a child's original recollection can be influenced by leading questions, and a desire to please adults, especially adults in authority); *see also* Annabelle Hall, *Cross-Examining the Child Witness: Preparation, Style, and Execution*, CRIM. PRAC. GUIDE, Apr. 2000, at 3, 3 (advising criminal defense attorneys on how to cross-examine children in sexual assault cases by providing the following mantra, "The child is not lying; the child is not telling the truth."). As Hall explains, it is extraordinarily difficult to prove that a child is lying, but it is much more likely that a defense attorney can use the procedure of cross-examination to show that a child may have made a mistake, pretended, been mixed up, not understood the events in question, or been "doing someone else's bidding." *Id.*; *see also* Myers, *supra* note 18, at 86 (explaining that young children, especially those of preschool age, can be more suggestible than older children and adults).

[20] *See* Crawford v. Washington, 541 U.S. 36, 62 (2004) (pointing to the circularity of the "trustworthiness" test by explaining that dispensing with confrontation because testimony

B. CONFRONTATION: THE SOURCE OF THE SOLUTION

Confrontation provides the paramount reliability test, which is why it was included in the Sixth Amendment.[21] Substitutes for confrontation, such as cross-examining government witnesses about a victim's testimony or reliance on judicial discretion concerning a statement's general trustworthiness, cannot satisfy the Constitution's explicit protections for criminal defendants.[22] In 2004, the Supreme Court revitalized this argument when it provided the new *Crawford* rule of confrontation, which bars all testimonial out-of-court statements when a witness is unavailable to testify at trial unless the defendant had a prior opportunity to cross-examine that witness.[23] Then, in 2006, the Supreme Court made it clear that this rule extends to all criminal prosecutions, including those that often involve unavailable witnesses.[24] By requiring that all criminal defendants have an opportunity to confront the testimony offered against them, the *Crawford* rule of confrontation has thus addressed one key problem in CSA cases: the need to let defendants test the reliability of children's allegations.

While the other issues surrounding CSA cases—the need to protect children from the trauma of testifying at trial and the need to admit children's statements into evidence—have not disappeared, the *Crawford* rule has made it much more difficult to admit children's ex parte statements in CSA trials.[25] As a result, over the past three years the *Crawford* rule of

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presents "particularized guarantees of trustworthiness" was "akin to dispensing with jury trial because a defendant is obviously guilty"); *see also Craig*, 497 U.S. at 868 (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) ("The 'special' reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by 'special' reasons for being particularly insistent upon it in the case of children's testimony.").

[21] *See* State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (1794) ("[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.").

[22] Moreover, allowing Confrontation Clause violations, even for an interest as compelling as prosecuting child sex abusers, is equivalent to prosecuting a defendant without the due process of law. *See* U.S. CONST. amend. XIV, § 1 (providing that no State shall "deprive any person of life, liberty, or property, without due process of law").

[23] *Crawford*, 541 U.S. at 68 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

[24] Davis v. Washington, 126 S. Ct. 2266 (2006). Both of the cases at issue in *Davis* concerned domestic violence, which the Court recognized as a type of crime that often involves victims who are so susceptible to intimidation and coercion that they do not testify at trial, thus "giv[ing] the criminal a windfall." *Id.* at 2280. Nevertheless, the Court was equally clear in explaining that this unfair advantage fails to justify the vitiation of a defendant's constitutional rights to confront all testimony offered against him. *Id.*

[25] *See* discussion *infra* Section IV.B.

confrontation has often functioned not to test the reliability of children's statements but rather to exclude children's voices from sexual abuse trials.[26] The purpose of the Confrontation Clause is to ensure the reliability of evidence offered against criminal defendants; it is not intended to eliminate the use of that evidence altogether.[27] Consequently, as it currently operates, the *Crawford* rule of confrontation advantages CSA defendants well beyond its intended purpose.

C. CENTERING THE SEESAW

Weighing the unfair advantages possessed by CSA prosecutors before *Crawford* with those that have emerged for defendants as a consequence of the new rule, an inevitable question arises: Should we sacrifice the prosecution's case, excluding the most critical evidence—the victim's voice—or should we sacrifice the alleged abuser's defense, displacing constitutional confrontation rights by admitting children's out-of-court allegations without testing the reliability of those statements?

Because sexual abuse is such an abhorrent crime and one that tends to rile the public, a knee-jerk public policy reaction might lead us to take the latter route and sacrifice the defendant.[28] However, even the best-intentioned public policy concerns do not justify a suspension of constitutional rights.[29] The goal then is to balance the seesaw of advantages by developing rules of CSA confrontation that harmonize society's interests in protecting children and prosecuting sex abusers with the preservation of the criminal defendant's right to test the reliability of all testimony offered against him.[30]

This Comment proposes a method for meeting that goal by looking both at the recent *Crawford* case and at the cases leading up to it with regard to child victim testimony in CSA trials. Section II.A begins by examining the admission of child victim testimony in CSA cases prior to *Crawford*.[31] This section focuses on two particular issues: the trustworthiness of ex parte testimony and definitions of sufficient

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[26] *See* discussion *infra* Section IV.

[27] Maryland v. Craig, 497 U.S. 836, 845 (1990).

[28] For an example of other evidentiary standards that have recognized exceptions for sex abuse cases in particular, see FED. R. EVID. 413-415 (concerning the admission of prior crimes evidence in child sexual abuse—an exception to criminal law in general).

[29] *See Davis*, 126 S. Ct. at 2279-80 (standing for the principle that the constitutional guarantee of confrontation may not be suspended simply because it has the effect of giving the criminal defendant "a windfall").

[30] *See Craig*, 497 U.S. at 849.

[31] *See* discussion *infra* Section II.A.

confrontation in CSA cases. Section II.B then analyzes the Supreme Court's recent opinions in *Crawford* and *Davis v. Washington*.[32] Section III looks at the effects that *Crawford* and *Davis* have had on CSA cases and explains why previous suggestions for mitigating these effects provide inadequate solutions to the problems at issue.[33]

Finally, Section IV proposes a way that unavailable child victims' voices can be heard in the courtroom while still upholding the defendant's right to test the reliability of a child's allegations under the *Crawford* rule of confrontation.[34] Specifically, this section focuses on the importance of looking beyond the *Crawford* decision to define what it means to provide criminal defendants with a "prior opportunity for cross-examination."[35] Only by defining and addressing this component of the *Crawford* rule can the Confrontation Clause's goal of reliability testing be successfully attained without jeopardizing the public's interest in protecting child victims while prosecuting CSA crimes.

II. BACKGROUND

A. SETTING THE PRE-*CRAWFORD* STAGE

Prior to *Crawford v. Washington*, the Supreme Court heard a range of cases concerning the nexus between confrontation requirements and the admissibility of children's statements in CSA trials. These cases fell into two categories:[36] those that assess the "trustworthiness" of ex parte statements when a child is unavailable to testify at trial,[37] and those that define sufficient confrontation when a child testifies at trial in an alternative format.[38]

1. The Admissibility of Ex Parte Statements

Prior to *Crawford*, the admissibility of ex parte testimony from unavailable witnesses was evaluated using a reliability test established in

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[32] *See* discussion *infra* Section II.B.

[33] *See* discussion *infra* Section III.

[34] *See* discussion *infra* Section IV.

[35] *See* Crawford v. Washington, 541 U.S. 36, 68 (2004); discussion *infra* Section IV.

[36] *See* White v. Illinois, 502 U.S. 346, 358 (1992) (clarifying this distinction by explaining that "the question of what *in-court* procedures are constitutionally required to guarantee a defendant's confrontation right" is distinct from the question of "what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations").

[37] *See, e.g.*, *White*, 502 U.S. 346; Idaho v. Wright, 497 U.S. 805 (1990).

[38] *See, e.g.*, Maryland v. Craig, 497 U.S. 836 (1990); Coy v. Iowa, 487 U.S. 1012 (1988).

Ohio v. Roberts.[39] *Roberts* allowed an unavailable witness's out-of-court statement to be admitted at trial as long as it exhibited certain "indicia of reliability." Specifically, the ex parte statement needed either to fall within a "firmly rooted" hearsay exception *or* to bear "particularized guarantees of trustworthiness."[40] Both of these determinations were left to judicial discretion.[41] Once a judge determined that an unavailable witness's ex parte statement bore the necessary indicia of reliability, that statement could then be offered at trial through the testimony of another witness or through a previously recorded video- or audiotape.[42] Neither of these methods allowed the criminal defendant an opportunity to cross-examine the witness directly. Instead, under the *Roberts* rule, a defendant's right to confront the witness at trial was nullified by a judge's determination that the unavailable witness's ex parte testimony was reliable.[43]

Several years after establishing the *Roberts* rule of admissibility, the Court applied it to two different CSA cases. In *Illinois v. White*, the Court identified what constitutes a "firmly rooted" hearsay exception in a CSA case.[44] In particular, the Court determined that a four-year-old child's allegations of sexual abuse as shared with her babysitter, her mother, an investigating police officer, and the emergency room personnel who interviewed the child were all admissible under established exceptions to the hearsay rule.[45] The Court reasoned in part that these declarations were admissible because of their substantial probative value and because the child's spontaneity in making these statements could not be duplicated by future testimony in court even if the child were available to testify.[46] Thus, in *White*, the Supreme Court affirmed that the *Roberts* rule hearsay exception applies in CSA cases.

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[39] 448 U.S. 56 (1980). Though *Roberts* did not specifically concern CSA issues, it provided a general rule of ex parte admissibility under the Confrontation Clause.

[40] *Id.* at 66.

[41] *Id.*

[42] *Id.* at 73. Notably, *Roberts* involved a situation in which the ex parte statement at issue came from pretrial testimony during which the defendant actually had the opportunity to cross-examine the witness. *Id.* at 58. Consequently, even though it limited defendants' confrontation rights, the Court retained an emphasis on the value of providing some opportunity to cross-examine witnesses, even if that opportunity did not occur at trial.

[43] *Id.*

[44] 502 U.S. 346 (1992).

[45] *Id.* at 356-57. The Court identified the child's statements as hearsay under the excited utterance and medical diagnosis exceptions.

[46] *Id.* Foreshadowing the *Crawford* opinion, Justices Thomas and Scalia wrote a concurring opinion in *White*, in which they explained that while they agreed with the case's result, the Confrontation Clause doctrine nevertheless required revisiting. *Id.* at 358, 365 (Thomas, J., concurring).

In *Idaho v. Wright*, another CSA case to reach the Supreme Court, the Court examined the "guarantees of trustworthiness" component of the *Roberts* rule as it applied to ex parte testimony.[47] *Wright* concerned statements that a young girl made in response to her examining pediatrician during a CSA investigation.[48] The child, who was three years old at the time, was unavailable to testify at trial because she could not communicate with the jury.[49] Consequently, the prosecutor attempted to admit her ex parte statements through the pediatrician's trial testimony.[50] As the statements came after rather than during a physical examination and were elicited in response to leading questions from the pediatrician, they did not fall under either the excited utterance or medical diagnosis hearsay exceptions.[51] After examining the totality of the circumstances, the Court found that the child's statements also lacked the necessary "guarantees of trustworthiness" to fall under the *Roberts* exception because the child had been questioned in a suggestive manner.[52] Thus, admitting them would violate the defendant's confrontation rights. The *Wright* Court did not provide much direction about what circumstances would lead to a finding of "trustworthiness" in CSA situations. It did, however, consider the lower court's suggestion that the statements would have been sufficiently trustworthy had the doctor videotaped her interview with the child so that jurors could determine the statement's reliability on their own.[53] Ultimately, the Court neither approved of nor rejected the lower court's proposed requirement that doctors use a videotape to establish trustworthiness when relaying statements from a child interview.[54]

2. Sufficient Confrontation

At about the same time that it addressed questions concerning the admissibility of ex parte statements in CSA cases, the Supreme Court also addressed a second question concerning the Confrontation Clause and CSA

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[47] 497 U.S. 805 (1990).

[48] *Id.* at 810-11.

[49] *Id.* at 809.

[50] *Id.* at 810-11.

[51] *Id.* at 827.

[52] *Id.* at 826.

[53] *Id.* at 818-19.

[54] *Id.* (explaining that though the procedural guidelines identified by the lower court may enhance the reliability of children's ex parte out-of-court statements regarding sexual abuse, the Supreme Court declined to detail the specific procedural requirements of the Confrontation Clause with regards to child interviews).

cases. Specifically, the Court examined what constitutes sufficient confrontation by looking at two different CSA cases.[55]

Coy v. Iowa concerned the constitutionality of a state law under which CSA victims could testify in court with a screen placed between themselves and the defendant, even without a showing that the child would be traumatized by face-to-face cross-examination.[56] Justice Scalia wrote for a plurality, explaining that any law that weakens a defendant's right to "face to face" confrontation must depend on more than a mere "generalized finding."[57] Justice O'Connor filed a concurring opinion in *Coy*, finding that, while preferable, "face to face" cross-examination is not an "absolute" component of the confrontation right.[58]

Two years later, Justice O'Connor had the opportunity to expand upon her concurrence in *Coy* when she wrote the majority opinion in *Maryland v. Craig*.[59] *Craig* presented a similar issue because it questioned the constitutionality of a statute under which CSA victims could give testimony at trial outside the defendant's physical presence, using a one-way closed circuit television.[60] In contrast with *Coy*, however, the statute at issue in *Craig* allowed this method of confrontation only upon a finding that the particular child would be traumatized by facing the defendant in court.[61]

The Court upheld the Maryland statute by emphasizing three main points. First, the Court focused on the central purpose of the Confrontation Clause—to ensure the reliability of all evidence offered against a criminal defendant.[62] The Court explained that in certain situations, such as in CSA cases, forcing procedural requirements such as face-to-face cross-examination can hinder rather than help the attainment of this goal. For example, the experience of facing the defendant in court could "so overwhelm the child" that it hinders her ability to provide effective

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[55] Maryland v. Craig, 497 U.S. 836 (1990) (involving a CSA situation where the child witness was permitted to testify in court without directly facing the defendant); Coy v. Iowa, 487 U.S. 1012 (1988) (same).

[56] *Coy*, 487 U.S. at 1014.

[57] *Id.* at 1021.

[58] *Id.* at 1022 (O'Connor, J., concurring). Justice Blackmun took this reasoning a step further and dissented, arguing that a significant state interest, such as the interest in protecting child victims from trauma, can justify a "limited departure" from the face-to-face component of confrontation. *Id.* at 1025 (Blackmun, J., dissenting).

[59] *Craig*, 497 U.S. 836.

[60] *Id.* at 840.

[61] *Id.* at 844-45.

[62] *Id.* at 845.

testimony and would thus undermine the "truth-finding function of the trial itself."[63]

Second, the Court reasoned that while certain methods of confrontation, such as "face to face" cross-examination, are preferable, they must sometimes cede to public policy concerns, such as the protection of children from trauma.[64] Third, the Court explained that cross-examination alone is not synonymous with confrontation. Instead, the *Craig* Court highlighted the importance of several other aspects of sufficient confrontation—including oath taking and the opportunity for a trier of fact to observe the witness's demeanor while testifying.[65] In fact, the *Craig* Court found that before any alternative modes of cross-examination can be permitted, these other aspects must be present to protect a criminal defendant's Sixth Amendment confrontation right.[66]

3. Take-Away Rules Preceding Crawford

Thus, before *Crawford*, the Supreme Court had established several key rules concerning the admission of child victim testimony in sexual abuse trials. First, pursuant to *Illinois v. White* and *Idaho v. Wright*, when children were unavailable to testify at trial their ex parte testimony could still be admitted at trial. However, to be admissible, those statements had to either fall within a "firmly rooted" hearsay exception or bear other

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[63] *Id.* at 857; *see also* Rhona Flin, *Commentary, A Grand Memory for Forgetting*, *in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS, *supra* note 7, at 21, 23 (explaining that a highly stressful situation such as testifying in a courtroom can lead to a child witness's impaired performance). *But see Craig*, 497 U.S. at 866 (Scalia, J., dissenting) (arguing that exceptions for fear of the defendant undermine the very object of the Confrontation Clause).

[64] *Craig*, 497 U.S. at 853-54 (recognizing that a state's interest in the "physical and psychological well-being of child abuse victims" is an interest of such magnitude that it may outweigh a defendant's right to face his accusers directly at trial).

Initially this holding stirred some contradictory case law among the lower courts because, though the U.S. Constitution does not explicitly state that confrontation must be face-to-face, several state constitutions do include face-to-face provisions. *See, e.g.*, People v. Fitzpatrick, 633 N.E.2d 685, 688-89 (Ill. 1994) (holding that the Child Shield Act provision allowing children to testify by closed circuit television violated the defendant's state constitutional right to "face to face" confrontation); Commonwealth v. Ludwig, 594 A.2d 281, 282 (Pa. 1991) (holding that the use of a closed circuit television to transmit a child witness's testimony in a sexual abuse case violated the Pennsylvania Constitution, which requires that all criminal defendants have a right to meet witnesses "face to face"). Two such states, Illinois and Pennsylvania, have subsequently amended their constitutions to meet the more general terms of the federal confrontation requirements following *Craig*. ILL. CONST. art. I, § 8 (amended in 1994 to eliminate the "face to face" requirement of confrontation); PA. CONST. art. I, § 9 (amended in 1995 to eliminate the "face to face" requirement).

[65] *Craig*, 497 U.S. at 845-46.

[66] *Id.* at 858.

guarantees of trustworthiness. Excited utterance and medical diagnosis were two common justifications for hearsay admission in CSA cases. Trustworthiness determinations required a totality of the circumstances review, but courts could consider such things as the use of a videotape to record the statements when making that determination.

Second, pursuant to *Coy v. Iowa* and *Maryland v. Craig*, sufficient confrontation could be satisfied even when traditional procedures such as face-to-face cross-examination were suspended. However, these procedures could only be suspended upon a finding of necessity for the individual case. Moreover, under *Craig*, sufficient confrontation required more than just cross-examination; it also required oath-taking and the opportunity for the trier of fact to perceive the witness. Finally, *Craig* provided the guiding principle that when suspending traditionally applied confrontation procedures courts should focus on the ultimate goal of the Confrontation Clause—the attainment of reliable testimony.

B. THE CONFRONTATION SEA CHANGE: *CRAWFORD V. WASHINGTON* AND *DAVIS V. WASHINGTON*

In March 2004, the Supreme Court decided *Crawford*.[67] In so doing, the Court overruled the *Roberts* rule's "guarantees of trustworthiness" standard for admitting ex parte statements, and provided instead that: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[68]

1. Crawford*: A Lesson in History and Linguistics*

Crawford offered Justice Scalia a long-awaited opportunity to redefine the scope of the Confrontation Clause.[69] He approached this task by revisiting British common law, in which he focused on Sir Walter Raleigh's 1603 trial for treason as an example of a "paradigmatic confrontation violation."[70] Prior to Raleigh's trial, Lord Cobham, his alleged accomplice, provided testimony against Raleigh both "in an examination before the

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[67] 541 U.S. 36 (2004).

[68] *Id.* at 68.

[69] *Cf.* Illinois v. White, 502 U.S. 346, 358 (1992) (Thomas, J., joined by Scalia, J., concurring) (noting that Confrontation Clause interpretation has "evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself"); *Craig*, 497 U.S. at 866 (Scalia, J., dissenting) (arguing that allowing exceptional circumstances such as fear of the defendant to serve as a basis for suspending a defendant's confrontation rights undermined the very purpose of the Confrontation Clause).

[70] *Crawford*, 541 U.S. at 52.

Privy Council and in a letter."[71] Though Cobham did not testify at trial, the government used his ex parte statements against Raleigh at trial.[72] The jury subsequently convicted Raleigh of treason, and he was sentenced to death.[73] Scalia asserted that nearly two hundred years later, the injustice of admitting ex parte evidence that had not been cross-examined resounded in the minds of those who drafted the Sixth Amendment to the U.S. Constitution.[74] Consequently, as a check on governmental abuses of prosecutorial power, they provided a procedural safeguard for testing the reliability of witness testimony when they wrote that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[75]

Scalia determined that the *Roberts* test of reliability strayed too greatly from the historical principles on which the Confrontation Clause was written. He thus purported to replace it with a more predictable framework.[76] To devise his own interpretation of the clause, Scalia examined the words "witnesses against," as they appear in the Sixth Amendment.[77] He parlayed this phrase into the idea that a "witness[] against" a defendant is a witness who offers "testimony" against the defendant.[78] Turning to *Webster's American Dictionary* for assistance, Scalia interpreted "testimony" to mean a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[79]

Finally, to apply that definition to the question of when an unavailable witness's ex parte statements should be admissible at trial, Scalia drew a distinction between ex parte statements that are "testimonial" and those that are not.[80] He did not provide a detailed description of what constitutes a "testimonial" statement, recognizing instead that there would be at least

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[71] *Id.* at 44.

[72] *Id.* (Despite Raleigh's assertions that the witness against him had lied to save himself, and that surely his accuser would recant if forced to appear before the accused, the judges refused. Raleigh's plea to "let Cobham be here, let him speak it. Call my accuser before my face" went unanswered.).

[73] *Id.*

[74] *Id.* at 45-46.

[75] U.S. CONST. amend. VI; *Crawford*, 541 U.S. at 49 (quoting *State v. Webb*, 2 N.C. (1 Hayw.) 103, 104 (1794), as evidence that the drafters' intention was elucidated by the holding that "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine").

[76] *Crawford*, 541 U.S. at 63.

[77] *Id.* at 51.

[78] *Id.*

[79] *Id.* (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY (1828)).

[80] *Id.*

some "interim uncertainty" interpreting and applying this new rule.[81] He did explain, however, that a "testimonial" statement is a statement that provides "testimony," as a witness would in court.[82] Thus, "testimonial" statements trigger the defendant's confrontation rights as though she were confronting a witness against her at trial.[83] Moreover, Scalia also recognized that despite this shift in confrontation jurisprudence, statements falling under firmly rooted hearsay exceptions could still be admissible at trial even without confrontation.[84]

2. Davis v. Washington: *A Clarification?*

Two years after the *Crawford* decision, the Supreme Court elaborated on its definition of the term "testimonial" when it decided *Davis v. Washington*.[85] The *Davis* Court held that statements are testimonial when made during an interrogation whose primary purpose is to establish or prove past events potentially relevant to later criminal prosecution.[86] By contrast, statements are non-testimonial when made during an interrogation whose primary purpose is to "enable police assistance to meet an ongoing emergency."[87]

Davis combined two separate cases that involved domestic violence victims and the statements they made to police officers or government personnel. In the first case, the victim made statements during a 911 call.[88] In the second case, the victim made statements in an affidavit that she completed during a police investigation.[89] The Court distinguished between

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[81] *Id.* at 68.

[82] *Id.* at 51-52. In this sense, while a casual remark to a friend falls outside the realm of "testimony," a formal statement to a government officer or a statement "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" bears the mark of being "testimonial" in nature. *Id.* at 52.

[83] *Id.* at 68-69 (explaining that when "testimonial statements" are at issue, the act of confrontation is the only "indicum of reliability" that can satisfy the Constitutional requirements of the Sixth Amendment).

[84] *Id.* at 51.

[85] 126 S. Ct. 2266 (2006).

[86] *Id.* at 2273-74. The Court went on to find that statements made in a signed affidavit were testimonial because they constituted a deliberate recounting of past events in response to police questioning and thus provided an "obvious substitute for live testimony." *Id.* at 2278.

[87] *Id.* at 2273. The Court held that incriminating statements in response to the interrogator's questions on a 911 call are *not* testimonial because they were made for the purposes of attaining police assistance during an emergency. *Id.* at 2277.

[88] *Id.* at 2270.

[89] *Id.* at 2272.

these two types of statements and their contrasting non-testimonial and testimonial natures by examining the surrounding circumstances in which each statement was made. In particular, the Court considered the fact that the first victim made her statements when she was unprotected by the police, and apparently in immediate danger. Thus, it decided that her statements were non-testimonial.[90] Conversely, the second victim made her statements to the police when she was removed from the time of the events and the danger she described.[91] Thus, her statements were testimonial.[92]

3. *Take-Away Rules from* Crawford *and* Davis

Under the *Crawford* rule of confrontation, when a witness is unavailable to testify at trial, his ex parte statements are inadmissible if they are testimonial in nature. After *Davis*, a statement is considered testimonial if it was taken during a non-emergency interrogation for the purpose of proving past events that are potentially significant for a criminal prosecution. Consequently, anything an unavailable witness says to a police officer or any other investigatory official under non-emergency conditions is testimonial and therefore excludable as evidence at trial. There are, however, two exceptions to this exclusion. One exception occurs when the ex parte statements fall within a firmly rooted hearsay exception because *Crawford* and *Davis* only overruled the "guarantees of trustworthiness" component of the *Roberts* rule. The other exception occurs when the defendant had a pretrial opportunity to cross-examine the unavailable witness.[93]

III. BEYOND "INTERIM UNCERTAINTY"—APPLYING *CRAWFORD* TO CHILD SEXUAL ABUSE CASES

Over the last three years, the *Crawford* rule of confrontation has provoked more than mere "interim uncertainty" for all types of criminal adjudications.[94] However, due to the heightened importance and unpredictability of admitting child victim testimony, the *Crawford* decision has had especially dramatic effects on the prosecution of CSA cases.[95] One

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[90] *Id.* at 2279.

[91] *Id.*

[92] *Id.*

[93] Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

[94] As of April 17, 2007, *Crawford* has accumulated 260 negative citing references among subsequent case law on Westlaw.

[95] *See* Myrna Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions*

consequence is that CSA cases that were up for appeal when the *Crawford* decision came down have been reviewed using a different rule of confrontation than that applied at trial. This shift in standards has led numerous state appellate and supreme courts to reverse and remand CSA cases over the past three years.[96] Most of these cases involved ex parte testimony from unavailable child defendants who are no more available to testify at trial now than they were when the cases were first heard because the causes of their unavailability are not easily remedied.[97] Consequently, prosecutors are faced with the difficult task of retrying already challenging cases with even less evidence than they had at first.[98]

Beyond the immediate disruption these cases have provoked in criminal appeals, they also sound a clear alarm for the future of CSA trials. Specifically, prosecutors must figure out how to adapt to, rather than

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after Crawford, CRIM. JUST., July/Aug. 2005, at 24 [hereinafter Raeder, *Domestic Violence*]. (observing that the consequences of *Crawford*, while felt throughout the criminal justice system, have had a "unique impact" on domestic violence, child abuse, and elder abuse cases because it is quite common for victims in those cases to be unavailable as witnesses in the trial context).

[96] *See, e.g.*, People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 (Cal. Ct. App. 2004) (affirming in part, reversing in part, and remanding a CSA conviction); People v. Sharp, No. 04CA0619, 2006 WL 3635393, at *2 (Colo. Ct. App. Dec. 14, 2006) (reversing and remanding a CSA conviction because admission of an unavailable five-year-old child's videotaped interview with a forensic interviewer violated the defendant's constitutional confrontation rights); Contreras v. State, 910 So. 2d 901, 905, 910 (Fla. Dist. Ct. App. 2005) (reversing for error a CSA case in which a father was convicted of sexually abusing his eight-year-old daughter, on the ground that her videotaped statement to a child protection worker was "testimonial"); State v. Henderson, 129 P.3d 646, 654 (Kan. Ct. App. 2006) (review granted Sept. 19, 2006) (reversing for error upon finding that an unavailable child's videotaped statement was "testimonial"); State v. Blue, 717 N.W.2d 558, 560 (N.D. 2006) (reversing and remanding a CSA conviction after the court found that playing a videotape of the unavailable child's testimony without providing the defendant an opportunity to cross-examine the witness violated the defendant's constitutional rights to confront his accuser). *But see* People v. Vigil, 127 P.3d 916, 934 (Colo. 2006) (affirming a CSA conviction upon finding that in conjunction with the admission of non-testimonial hearsay, admission of a child's videotaped police interview did not constitute plain error).

[97] *See, e.g.*, *Sharp*, 2006 WL 3635393, at *1 (concluding that the five-year-old victim's unavailability to testify against her father was determined when the prosecution attempted to have her testify and it became apparent that she was too traumatized to do so); *Blue*, 717 N.W.2d at 561 (concluding that a five-year-old child witness's unavailability resulted from her lack of memory of the abusive events that allegedly took place when she was only four).

[98] *See, e.g.*, *Contreras*, 910 So. 2d at 909-10 (reversing and remanding with the direction to exclude a child's videotaped statement as a confrontation violation). The State's original case consisted of the child's ex parte videotaped testimony, her father's confession that he "molest[ed]" but never penetrated his child, and the mother's testimony that she had seen them in "stages of undress." *Id.* at 903-04. No additional evidence was available because the child was too traumatized to testify in court and the examining physician had found no physical evidence of sexual abuse. *Id.*

circumvent, *Crawford*, so that they can continue to successfully try CSA crimes in the post-*Crawford* era of confrontation. To achieve this end, three key questions demand attention. First, when are children's ex parte statements testimonial? Second, can children be made more available to testify at trial? Third, what is required for a "prior opportunity for cross-examination" to constitute sufficient confrontation? The majority of academic attention examining *Crawford*'s effects on CSA trials has thus far focused on answering the first two questions.[99] While these questions will both will be addressed below, it is the third question—the defendant's prior opportunity to cross-examine a witness—that will prove most useful in explaining how children's voices can continue to be heard within the bounds of the *Crawford* rule.[100]

A. WHEN ARE CHILDREN'S EX PARTE STATEMENTS "TESTIMONIAL"?

In the last three years, courts across the country have interpreted the above question in a wide variety of ways. Some courts have found children's statements to be testimonial by looking at the contextual factors that surround "objective" witnesses—when and where that statement was shared, to whom the child spoke, and the types of questions asked.[101] For

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[99] *See, e.g.*, Carol A. Chase, *Is* Crawford *a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial,"* 84 OR. L. REV. 1093 (2005); Heather L. McKimmie, *Repercussions of* Crawford v. Washington*: A Child's Statement to a Washington State Child Protective Services Worker May Be Inadmissible*, 80 WASH. L. REV. 219, 237 (2005); Lynn McLain, *Post-*Crawford*: Time to Liberalize the Substantive Admissibility of a Testifying Witness's Prior Consistent Statements*, 74 UMKC L. REV. 1 (2005); Daphne A. Oberg, *Working Within and Around Utah's Section 76-5-411 After* Crawford v. Washington*: Assessing the Admissibility of Out-of-Court Statements of Child Victims of Sexual Abuse*, 2005 UTAH L. REV. 1101 (2005); Allie Phillips, *Child Forensic Interviews After* Crawford v. Washington*: Testimonial or Not?*, PROSECUTOR, Aug. 2005, at 17, 21; Raeder, *Domestic Violence, supra* note 95; Myra Raeder, *Remember the Ladies and the Children Too*, 71 BROOK. L. REV. 311 (2005); Jennifer E. Rutherford, *Unspeakable!* Crawford v. Washington *and Its Effects on Child Victims of Sexual Assault*, 35 SW. U. L. REV. 137 (2005); Erin Thompson, *Child Sex Abuse Victims: How Will Their Stories Be Heard After* Crawford v. Washington*?*, 27 CAMPBELL L. REV. 279 (2005); Daniel E. Monnat & Paige Nichols, *The Kid Gloves Are Off: Child Hearsay After* Crawford v. Washington, CHAMPION, Jan./Feb. 2006, at 18.

[100] *See* discussion *infra* Section IV; *see also* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 783-800 (2005) (addressing potential ways of satisfying a defendant's prior opportunity for cross-examination in CSA cases); Mosteller, Crawford*'s Impact, supra* note 11 (identifying how domestic violence cases can incorporate the prior opportunity to cross-examine unavailable witnesses in an effort to meet the *Crawford* rule); Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 591-97 (2005).

[101] *See, e.g.*, State v. Snowden, 867 A.2d 314, 329 (Md. 2005) (finding that "an objective test, using an objective person, rather than an objective child of that age" is the appropriate

example, if it is clear that the person with whom a child spoke is affiliated with a governmental agency or with the investigatory process, these courts are likely to find a child's out-of-court statements testimonial.[102] These courts reason that even if children do not understand the specific legal implications of their words, their statements nevertheless serve to prove facts against their abusers at a later criminal trial.[103]

Other courts have found children's ex parte statements to be non-testimonial by distinguishing child witnesses from "objective" witnesses. These courts focus less on the contextual aspects of the child's statements and more on the individual child's subjective perception.[104] Following the recent *Davis* decision, however, this line of argument has become rather attenuated when children's statements to any investigatory official are at issue because children often make allegations of abuse once that abuse has become a "past event."[105] Consequently, even in the short period since the *Davis* decision came down, several state courts have changed their approaches to assessing the testimonial nature of children's ex parte statements, erring more on the side of exclusion than admission.[106]

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test for determining a statement's testimonial nature).

[102] *See In re* R.A.S., 111 P.3d 487, 490 (Colo. Ct. App. 2004) (finding that a child's out-of-court videotaped statement to a police officer was testimonial within "even the narrowest formulation of the Court's definition of that term"); State v. Mack, 101 P.3d 349, 352-53 (Or. 2004) (ruling that a three-year-old's statements to a Department of Human Services caseworker in the course of a police-directed interview were "testimonial" because under *Crawford*, statements made to police officers and by extension government officials for the purposes of a criminal investigation are inherently testimonial).

[103] *See, e.g.*, Mencos v. State, 909 So. 2d 349, 351 (Fla. Dist. Ct. App. 2005) (holding that statements made in response to an officer's questions were testimonial while statements overheard by an officer while they were being made to the child's mother were not testimonial in nature); People v. R.F., 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) (distinguishing statements made to non-governmental personnel such as family members from statements made to government agents such as police officers, which are testimonial statements and thus inadmissible under the Confrontation Clause).

[104] *See, e.g.*, State v. Bobadilla, 709 N.W.2d 243, 255-56 (Minn. 2006) (finding a child's statements were not testimonial because neither the child protection worker nor the three-year-old child victim acted to a substantial degree for the purpose of producing a trial statement).

[105] *See, e.g.*, State v. Hooper, No. 31025 2006 WL 2328233, at *4 (Idaho Ct. App. Aug. 11, 2006) (ruling after *Davis* that a child victim's statement to a nurse was not admissible because the nurse was "acting in tandem" with the police investigators to gain evidence of past events for the potential purpose of a future criminal prosecution).

[106] *See, e.g.*, People v. Sharp, 143 P.3d 1047, 1053 (Colo. Ct. App. 2005) (finding that a child victim's videotaped statement recounting sexual abuse was not "testimonial" because the child did not show an indication that she understood the consequences of her statements or how they might be used to put defendant in jail), *vacated*, No. 04CA0619, 2006 WL 3635393, at *5 (Colo. Ct. App. Dec. 14, 2006) (finding that a child victim's videotaped statement was "testimonial" because the purpose of the interview was to elicit statements

Finally, no matter how they determine the testimonial nature of a child's ex parte statements, courts across the country continue to admit statements that fall within a firmly rooted hearsay exception.[107] The two types of hearsay exceptions that most regularly apply in CSA cases are the excited utterance[108] and medical diagnosis[109] exceptions. Though these two firmly rooted hearsay exceptions can help prosecutors admit children's ex parte statements in CSA cases after *Crawford*, both exceptions depend largely on the unpredictable circumstances in which children disclose information.[110] The most basic differences in revelation scenarios—whom they tell, when they tell, and where they tell—all conspire either to help or hinder the possibility that a child's statements, the linchpin in sexual abuse prosecutions, will be heard if the child is unavailable to testify at trial.[111]

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that would be used at a later criminal trial to convict defendant); State v. Krasky, 696 N.W.2d. 816, 819-20 (Minn. Ct. App. 2005) (finding that a child's statements to her examining nurse were "not testimonial" because they were made in the absence of police presence and the child could not have known that the police were involved), *vacated*, 721 N.W.2d 916, 919-20 (Minn. Ct. App. 2006) (ruling that a child's statements to her examining nurse were testimonial for the following reasons: the police arranged for the interview to further a criminal investigation of the child's accusation; there was no identified medical reason for the interview; there was no imminent threat to the safety or welfare of the child; there was no suspicion that the reported sexual abuse was committed in the recent past; and the events under investigation were at least two years old). *But see* State v. Bobadilla, 709 N.W.2d 243, 254-56 (Minn. 2006) (reversing in part a post-*Crawford* but pre-*Davis* decision to exclude a child's statement upon finding instead that statements made by a three-year-old child victim to a child protection worker during a risk-assessment interview were not testimonial since neither the child nor the interviewer acted to produce a statement for trial).

[107] Ohio v. Roberts, 448 U.S. 56, 57 (1980); *see, e.g.*, People v. Vigil, 127 P.3d 916, 924 (Colo. 2006) (holding that a child victim's statements to an examining physician and to his father were not "testimonial" because both fell under a firmly rooted hearsay exception).

[108] FED. R. EVID. 803(2). The rationale behind the admission of excited utterances is that when a declarant makes a spontaneous statement in response to an exciting, unpredicted occurrence, the declarant has not had any opportunity to fabricate the statement and thus it must be trustworthy. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL 16-6 (2005 ed.).

[109] FED. R. EVID. 803(4). The rationale behind the medical diagnosis hearsay exception is that an individual's interests in her own health establishes an incentive to be honest with doctors. WEINSTEIN & BERGER, *supra* note 108, at 16-18.

[110] *See, e.g.*, State v. Kalar, No. 05-0298, 2006 WL 1279149, at *3 (Iowa Ct. App. May 10, 2006) (finding that a child victim's motive for participating in a videotaped interview during a medical examination was within the purpose of obtaining treatment for sexual abuse and thus admissible under the medical hearsay exception). *But see* State v. Krasky, 721 N.W.2d 916, 924 (Minn. Ct. App. 2006) (finding that a child's statement to a nurse practitioner was excludable as "testimonial" evidence because the interview was arranged through the police and was therefore given for the purpose of proving facts against the defendant at a future trial under the new *Davis* standard).

[111] In theory, this problem could be avoided if Congress and state legislatures enacted

Moreover, due to the unpredictable nature of these contextual factors, prosecutors have little to no control over whether or not children's statements are testimonial when originally made.[112] The question thus remains: How can prosecutors ensure that children's voices continue to be heard in CSA cases while also working within the boundaries of the *Crawford* rule?

B. CAN CHILDREN BE MADE MORE AVAILABLE TO TESTIFY AT TRIAL?

Under the *Crawford* rule of confrontation, obstacles to admitting ex parte statements only arise when a child is deemed unavailable to appear at trial.[113] By contrast, when a child testifies and is available for cross-examination at trial, her ex parte statements can be admitted without a *Crawford* problem.[114] Accordingly, some commentators have suggested that placing higher restrictions on children's unavailability, or requiring children's availability, will help avert the problems that the *Crawford* rule of confrontation currently poses for CSA cases.[115] On its face, requiring children's availability appears to present a reasonable solution for prosecutors looking to meet *Crawford's* confrontation requirements while admitting out-of-court testimonial statements. However, requiring children to be available to testify at trial is not an appropriate solution for several reasons.

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general CSA hearsay exceptions based on the idea that children's out-of-court statements are generally more spontaneous than those of adults and by extension must also be more reliable. This proposal would merely circumvent the Confrontation Clause, however, and would thus fail to address the inherent rationale behind it—the attainment of reliable testimony. Maryland v. Craig, 497 U.S. 836, 848 (1990); *see, e.g.*, State v. Snowden, 867 A.2d 314, 329-30 (Md. 2005) (rejecting the idea of a "tender years" hearsay exception for young children's "testimonial" statements on the ground that "concern for the testimonial capacity of young children overlooks the fundamental principles underlying the Confrontation Clause"). *But see* People v. Geno, 683 N.W.2d 687, 693 (Mich. Ct. App. 2004), *appeal denied*, 688 N.W.2d 829 (Mich. 2004) (concluding in a post-*Crawford* decision that though a child's statement to a children's assessment center director did not specifically fall under any firmly rooted hearsay exceptions, it showed "equivalent circumstantial guarantees of trustworthiness" and was thus admissible under a general exception to the hearsay rule).

[112] WALKER PERRY & WRIGHTSMAN, *supra* note 6, at 163; McKimmie, *supra* note 99, at 237.

[113] Crawford v. Washington, 541 U.S. 36, 68 (2004).

[114] *See, e.g.*, State v. Price, 146 P.3d 1183, 1192 (Wash. 2006) (holding that admission of testimonial ex parte evidence did not violate the defendant's right to confront all witnesses against him because the child testified at trial for Confrontation Clause purposes even though she could not remember the relevant events or her prior disclosures about them).

[115] Mosteller, Crawford's *Impact*, *supra* note 11, at 414-15 (recommending that prosecutors work diligently to produce child victims for testimony at trial).

First, because the problems affecting children's availability are not easily remedied, requiring child witness availability would most likely have little effect in making children any more available to testify and would instead serve only to cause unnecessary trauma. Children's unavailability usually stems from an inability to express themselves or from extreme fear—fear of the defendant, the courtroom, or the process of testifying.[116] If a child were forced to testify despite extreme fear or an inability to express himself, the experience could be extraordinarily damaging to his psychological stability.[117] Additionally, there is no reason to believe that a child's forced availability in the trial setting will make his testimony any more reliable.[118] In fact, as recognized in *Maryland v. Craig*, minimizing children's fear by allowing them to testify in less formal settings, earlier on in the investigation when their memories of the events are fresher, can result in greater truth-telling in CSA cases.[119]

Second, requiring a child to testify would not necessarily serve the criminal defendant's best interests. The threshold for finding sufficient confrontation once a CSA victim testifies in court is typically quite low.[120]

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[116] *See, e.g.*, People v. Sisavath, 13 Cal. Rptr. 3d 753, 756 (Cal. Ct. App. 2004) (finding a four-year-old child unavailable in a preliminary hearing after she failed to respond to most of the questions that she was asked, and could not express herself so as to be understood); Contreras v. State, 910 So. 2d 901, 903 (Fla. Dist. Ct. App. 2005) (finding that having a child victim testify against her father in a CSA trial would likely have led to her suffering severe trauma); State v. Henderson, 129 P.3d 646, 649 (Kan. Ct. App. 2006) (concluding that the child was unavailable as a witness because she did not understand the proceedings, the questions, or her duty to testify truthfully); *see also* 18 U.S.C. § 3509(b)(1)(B) (2000) (listing grounds for finding unavailability).

[117] *See, e.g.*, People v. T.T. (*In re* T.T.), 815 N.E.2d 789, 795-96 (Ill. App. Ct. 2004) (child victim froze on the stand and could not answer any more questions from the prosecution after saying that the defendant had tried to unbutton her pants).

[118] *See* Kay Bussey et al., *Lies and Secrets: Implications for Children's Reporting of Sexual Abuse*, *in* CHILD VICTIMS, CHILD WITNESSES, *supra* note 5, at 147, 161-62; Flin, *supra* note 63, at 23 (explaining that a highly stressful situation such as testifying in a courtroom can lead to a child witness's impaired performance).

[119] Maryland v. Craig, 497 U.S. 836, 857 (1990).

[120] *See, e.g.*, State v. Painter, No. COA04-896, 2005 WL 2277051, at *4-5 (N.C. Ct. App. Sept. 20, 2005) (referenced as a decision without publication in 618 S.E.2d 874) (denying the defendant's motion to strike the child witness's in-court testimony due to his forgetfulness and hesitancy to respond, finding instead that the child's testimony and cross-examination were sufficient under the Confrontation Clause because the child appeared to understand the questions, though he was "in some genuine embarrassment and unwilling to discuss [the allegations] at that time . . . and was doing the best that he could"); State v. Price, 146 P.3d 1183, 1184-85 (Wash. 2006) (child took the stand and testified as an available witness at trial but in response to questions pertaining to the alleged abuse she said, "[m]e [sic] forgot," and "[m]e [sic] forgot again." The defendant subsequently declined his opportunity to cross-examine the child witness.); *see also* Mosteller, Crawford*'s Impact*, *supra* note 11, at 414 (explaining that under what he calls the "*Green-Owens* principle,"

For example, by the time a child testifies at trial, it is not unusual for her to have a poor memory of events or to be unable to answer questions fully on cross-examination. Nevertheless, courts often find that a defendant's constitutional rights have been upheld once a child appears at trial and provides an opportunity for cross-examination, even if that opportunity is virtually useless.[121]

Finally, requiring children to testify at trial could have negative effects for CSA reporting in general because parents or other guardians might try to reduce the trauma of being forced to testify at trial by preventing children from testifying at all. Consequently, just as prosecutors cannot control the testimonial nature of a child's ex parte statements, it is unwise for courts to attempt to force the availability of child witnesses in CSA trials.

C. CONCLUSION ON THE *CRAWFORD* RULE'S FIRST TWO PRONGS

Under the *Crawford* rule of confrontation, children's once admissible ex parte statements are now much more frequently excluded for their "testimonial nature."[122] Because the causes of children's unavailability have not changed, however, children are no less likely now than they were before *Crawford* to suffer severe trauma from the experience of testifying at trial.[123] Furthermore, without contradicting *Crawford* or displacing society's interest in protecting children, prosecutors and courts cannot realistically control either the testimonial nature of a child's ex parte statement or a child's availability to testify at trial. As a consequence, under the *Crawford* rule of confrontation children's voices are now regularly excluded from CSA trials across the country. Within its ruling, the *Crawford* Court did, however, include one key alternative means of admitting testimonial ex parte statements despite witness unavailability. Specifically, under the third prong of the *Crawford* rule, by providing defendants with a "prior opportunity for cross-examination" prosecutors can still admit an unavailable witness's ex parte testimonial statements.[124] It is this third prong of the *Crawford* rule that can most significantly bridge the need for children's voices to be heard in CSA cases with the need to test the reliability of their statements.

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confrontation can be satisfied when children merely take the stand and are subject to cross-examination, even if they have serious memory loss).

[121] *See, e.g.*, *Price*, 146 P.3d at 1185-86.

[122] *See* discussion *supra* Section III.A.

[123] *See* discussion *supra* Section III.B.

[124] Crawford v. Washington, 541 U.S. 36, 68 (2004); *see, e.g.*, Morales v. State, No. 13-05-188-CR, 2006 WL 3234073, at *4 (Tex. App. Nov. 9, 2006) (holding that a defendant's confrontation rights are not violated when the court admits videotaped pretrial testimony if the defendant had the opportunity to cross-examine the witness).

IV. DEFINING AND PROVIDING A PRIOR OPPORTUNITY FOR CROSS-EXAMINATION

A. DEFINING CONFRONTATION AFTER *CRAWFORD*

The best way to interpret and define how a "prior opportunity for cross-examination" could constitute sufficient confrontation is by looking at the language of the *Crawford* rule.[125] First, the word "prior" indicates that confrontation need not take place at trial, but can occur at an earlier proceeding. Also, the term "opportunity" recognizes that the defendant need not exercise his right to cross-examination at trial so long as he was previously provided with an opportunity to do so.[126] Furthermore, though the Court identified the process of cross-examination as the most critical component of sufficient confrontation,[127] this identification was somewhat clouded by Scalia's focus on the Sir Walter Raleigh trial as a source of information about the purpose behind the Confrontation Clause. Raleigh did not ask for an opportunity to cross-examine his accuser.[128] Rather, he focused on the value of requiring the witness to speak his accusations publicly in the defendant's presence.[129] Consequently, an inference could be drawn from the *Crawford* opinion that sufficient confrontation requires not only cross-examination, but also some opportunity to be confronted with the witness's direct testimony.

Despite these overarching guidelines, the *Crawford* Court did not identify any specific methods of cross-examination that are required to constitute sufficient confrontation.[130] Consequently, in addition to

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[125] *Crawford*, 541 U.S. 36, 68 (2004) ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

[126] *See* State v. Tobias, No. 89,642, 2004 WL 944019 (Kan. Ct. App. Apr. 30, 2004) (holding that a defendant's confrontation right was not violated when the defendant strategically chose not to cross-examine the child).

[127] *Crawford*, 541 U.S. at 61.

[128] *Id.* at 44 (citing Raleigh's pleas to "let Cobham be here, let him speak it. Call my accuser before my face.").

[129] This emphasis is further supported by the very language of the Sixth Amendment, which does not guarantee criminal defendants' a right to confront all witnesses, but rather a right to "be confronted *with*" the witnesses against them. U.S. CONST. amend. VI (emphasis added). For a more detailed analysis of the value of an accuser making his accusation in the defendant's presence, see Mosteller, Crawford*'s Impact*, *supra* note 11, at 419 (explaining that to be sufficient, cross-examination at a prior proceeding must meet the trial "model of both public accusation and cross-examination").

[130] Justice Scalia referenced the "face to face" element of confrontation in his discussion of the origins of the Confrontation Clause, but that language was not included in the final *Crawford* rule. *See Crawford*, 541 U.S. at 43.

reviewing the language of the *Crawford* decision, it is necessary to consider prior Supreme Court precedent. *Maryland v. Craig* remains the most relevant precedent on this issue as it pertains to CSA cases.[131] There are three main aspects of the *Craig* decision that provide guidance for determining what constitutes sufficient confrontation under the *Crawford* rule. First, the *Craig* decision highlighted the Confrontation Clause's overarching purpose—the attainment of reliable testimony—as the guiding principle under which sufficient confrontation is established.[132] Second, the *Craig* Court emphasized that oath taking, allowing the trier of fact to watch the witness answer questions, and cross-examination are all critical elements of sufficient confrontation.[133] Finally, the *Craig* Court made it clear that alternative forms of cross-examination are only acceptable upon a showing that the witness would likely suffer trauma from face-to-face cross-examination.[134]

B. PROVIDING CONFRONTATION AFTER *CRAWFORD*

When taken together, the following rule of sufficient confrontation emerges from the language provided in *Crawford* and the guidelines offered in *Craig*: an unavailable witness's ex parte statements are admissible if the witness is genuinely unable to testify in court, the defendant had a prior opportunity to cross-examine the witness, the witness testified under oath, and both the trier of fact and the defendant could perceive the witness as she testified.[135] Applied to CSA cases, this rule could be accommodated if, upon finding that a child will likely be unavailable to testify at trial, both the prosecutor and the defense attorney have a prior opportunity to videotape the child's sworn pretrial statement *and* cross-examination. A required opportunity to videotape would meet each of the *Crawford* and *Craig* procedural requirements for sufficient confrontation. Moreover, this

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[131] 497 U.S. 836 (1990).

[132] *Id.* at 857 (suspending the absolute requirement that confrontation be "face-to-face" because it frustrated the Confrontation Clause's greater purpose of obtaining reliable testimony by inhibiting children's abilities to testify).

[133] *Id.* at 845-46 (finding that confrontation requires a combination of several aspects of reliability testing, including oath taking, physical presence, and the opportunity for the trier of fact to observe the witness's demeanor); *see also* Bussey et al., *supra* note 118, at 149 (explaining that while children might not understand the concept of an oath, most children over the age of three understand the difference between telling the truth and telling a lie).

[134] *Craig*, 497 U.S. at 855.

[135] *See* Morales v. State, No. 13-05-188-CR, 2006 WL 3234073, at *3 (Tex. App., Nov. 9, 2006) (explaining that the required elements of confrontation include the physical presence of the witness, an oath, cross-examination, and observation of the witness's demeanor by the trier of fact).

rule would facilitate the overarching purpose of the Confrontation Clause—the attainment of reliable testimony—in three ways that are specific to CSA cases.

First, the proposed rule would reduce the danger that a child's testimony will become tainted over time. For example, if a statement is recorded early on in the investigation, the child is likely to have a fresher memory of the incidents in question.[136] Additionally, when recorded early, a child's statement is less likely to be distorted by leading questions and adult involvement.[137]

Second, recording a child witness's testimony before trial allows the jurors to observe not only the child's demeanor, but also the interviewer or attorney's questioning style.[138] Consequently, in contrast to situations where a child's ex parte testimony is offered only as hearsay from another witness, by videotaping the pretrial direct and cross-examination, juries can see whether the interviewer or attorney's questioning style interfered with the child's responses.[139]

Third, the proposed videotaping rule furthers the goal of reliability by equalizing the playing field between defendants and prosecutors.[140] This rule would benefit defendants because it would ensure that they have a chance to test the reliability of unavailable children's statements through

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[136] *See* LUCY MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 228 (1994).

[137] *See* Brainerd & Ornstein, *supra* note 19, at 15 (explaining that through exposure to other accounts of the event, even accounts offered unintentionally through leading questions, children's own memories of events can be altered considerably); Myers, *supra* note 18, at 92 (noting that in the course of a CSA investigation, it is not uncommon for children to be interviewed at different times by law enforcement personnel, social workers, physicians, nurses, mental health professionals, prosecutors, defense attorneys, probation officers, and family members).

[138] *Craig*, 497 U.S. at 846 (highlighting the importance of allowing the trier of fact to observe a witness as he answers questions on both direct and cross-examination).

[139] *See* Myers, *supra* note 18, at 86. Although CSA cases sometimes require that interviewers use a certain degree of leading questions, the use of a videotape provides the jurors with a full opportunity to hear both the form and the tone of the questions posed and to determine for themselves whether children's testimony was influenced by an interviewer.

[140] *See* Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 J. CRIM. L. & CRIMINOLOGY 1353 (2006). Though he does not address the specific concerns of using video testimony to serve purposes of confrontation when children are unavailable at trial, Vandervort examines the advantages that videotaping CSA victim testimony can offer to both prosecutors and defendants. He focuses in particular on the overarching advantage that this use of technology poses for the broader community by helping to accurately identify cases of CSA and by allowing prosecutors and defense attorneys to resolve such cases in a "fair and balanced manner." *Id.* at 1364.

cross-examination. Moreover, the defendant is more likely to elicit information that may assist him in furthering his defense during an early examination, when the child may have a better memory of events.[141] Additionally, the proposed rule furthers the goal of efficiency in decision-making for the defendant because if the prosecutor's case appears weak based on the recorded pretrial testimony, the prosecutor might consider offering a plea or dropping the charges altogether.[142]

The proposed videotaping rule would also assist prosecutors. For example, in contrast to their current post-*Crawford* dilemma, prosecutors could ensure that their victims' voices are not excluded from trial due to unavailability or the testimonial nature of a given statement. The preserved memory and untainted testimony that videotaped recordings offer are also advantageous for prosecutors whose victims *are* able to appear at trial because when a child testifies in court, her testimony can appear untrustworthy or tainted by external influences.[143] By recording the child's testimony, the prosecutor can use the video either to refresh the child's recollection of events prior to trial or as a prior consistent statement to support the child's trial testimony.[144] Both techniques allow the prosecutor an opportunity to preserve the child's credibility as a witness.[145] Additionally, if a child's story comes across well in the videotaped statement and cross-examination, the recorded statements can provide an effective plea bargaining tool for prosecutors.[146] This tool is especially important because when pretrial testimony is not taken in CSA cases, a prosecutor's ability to work out a plea with the defendant often diminishes in direct relation to the likely diminishment of the child witness's memory

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[141] *See, e.g.*, United States v. Bordeaux, 400 F.3d 548, 557-58 (8th Cir. 2005) (the child victim revealed during her video interview that in addition to the defendant, her brother's friend had also "done bad things to her." This statement perhaps indicated that her knowledge of sexual activities, which was used against the defendant, did not stem from him but from the other potential offender.); State v. Price, 146 P.3d 1183, 1185 (Wash. 2006) (finding sufficient confrontation when the child took the stand and testified as an available witness at trial but answered "[m]e [sic] forgot" to questions).

[142] *See* Lucy McGough, *Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims*, 65 LAW & CONTEMP. PROBS. 179, 184-85 (2002).

[143] Yuille et al., *supra* note 5, at 98; *see also* Donna M. Pence & Charles A. Wilson, *Reporting and Investigating Child Sexual Abuse*, FUTURE CHILD., Summer/Fall 1994, at 75, 75 (limiting the succession of interviews a child undergoes also limits the potential challenges a defendant can make alleging that a child has been "programmed" by the interviewers).

[144] McGough, *supra* note 142, at 182-83.

[145] *Id.*

[146] *Id.* at 184-85.

and thus her potential unavailability to testify at trial.[147] Finally, showing a video of the child's statement to the defendant can sometimes help to elicit a confession from the defendant.[148]

C. CONCERNS

While a rule requiring that both prosecutors and defendants have a prior opportunity to videotape a child victim's testimony presents clear advantages for both sides, this proposal also raises certain concerns. To examine and address these concerns, it is useful to reflect again on the main interests that need to be safeguarded in any effort to ensure fairness in CSA trials—namely, the interest in protecting child witnesses while prosecuting CSA crimes and the interest in upholding criminal defendants' constitutional right to confront all witnesses against them.

1. Protecting Child Witnesses While Prosecuting CSA Crimes

One potential concern about videotaping children's pretrial direct and cross-examination testimony is that cross-examination in general, regardless of whether it occurs prior to or during a trial, could be extremely traumatic for children.[149] Consequently, merely pushing the process forward will not protect children's best interests. Another concern is that a child victim of sexual abuse could be particularly vulnerable during cross-examination early in an investigation. For example, if she has only just begun to feel safe confiding the details of the abuse to others, it may be overly traumatizing to undergo the adversarial experience of cross-examination.[150]

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[147] *See* Yuille et al., *supra* note 5, at 101; Lininger, *supra* note 100, at 786; *see also Young Victims' Short Memories Complicate Child-Abuse Cases*, N.J. REC., Aug. 2, 2004 (citing a case where two child victims had forgotten so much of their testimony after waiting two years to share it at trial that the prosecutor eventually had to offer their alleged abuser a plea offer that was about one quarter as severe as what would have been offered had the original statements been admitted. The article also noted that this is an especially important consideration given that plea-bargaining accounts for the resolution of approximately 85% of child sex-crime cases.).

[148] Vandervort, *supra* note 140, at 1361 (citing a study in which about sixty out of seventy-five child abuse defendants pled guilty after seeing their accusers' videotaped statements).

[149] *See* Paula E. Hill & Samuel M. Hill, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 822 (1987) (noting that "the child is no match for a defense attorney"). *But see* WALKER PERRY & WRIGHTSMAN, *supra* note 6, at 153-54 (noting that in most situations there is an intrinsic check on the adversarial nature of cross-examining children because juries are likely to sympathize with the witness if it appears that the defendant or his lawyer are bullying the child).

[150] *But see* Kamala London, *Disclosure of Child Sexual Abuse: What Does the Research*

To accommodate each of these concerns, and to facilitate the child's ability to answer both direct and cross-examination questions as completely as possible, the child's pretrial testimony should be taken in an environment that is comfortable and non-intimidating.[151] If necessary, the cross- and direct examinations could be conducted by a neutral interviewer who uses a list of questions submitted by the prosecutor and defense attorney in advance of the examinations.[152] Alternatively, a neutral interviewer could receive questions through an earpiece while the defense counsel and prosecutor remain in another room from which they can observe and hear the child.[153]

Another concern with the proposed rule is that even though videotaped testimony allows the jury to hear the victim's voice in a CSA trial, it is not a perfect substitute for live testimony.[154] As it pertains to unavailable witnesses, however, this is a disingenuous comparison. When a child is unavailable, a prosecutor does not have the option of using videotaped testimony or live testimony; she must instead decide between using videotaped testimony or no testimony at all.[155]

Finally, requiring pretrial videotaped testimony could disadvantage the prosecutor's case because she will be forced to reveal her key witness's testimony well before trial begins. Certain procedural rules can serve to minimize this problem. In particular, the decision to offer a pretrial opportunity for cross-examination should fall to the prosecutor. If the prosecutor chooses not to offer this opportunity, she runs the risk of having an unavailable key witness *and* inadmissible ex parte testimony—a far worse situation than revealing the key witness's testimony in the pretrial stages. Thus, it is up to the prosecutor to weigh the risk of revealing her

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Tell Us About the Ways Children Tell?, 11 PSYCHOL. PUB. POL'Y & L. 194, 197 (2005) (citing study findings that there is little evidence supporting the idea that abused children typically deny, recant, or re-disclose abuse when asked about it directly).

[151] *See* Flin, *supra* note 63, at 23; McGough, *supra* note 142, at 182.

[152] *See, e.g.*, Rangel v. State, 199 S.W.3d 523, 537 (Tex. App. 2006) (upholding Texas Code of Criminal Procedure article 38.071, which allows, upon a finding of unavailability, for both the state and defense attorneys to submit written interrogatories to a neutral interviewer who will then videotape an interview with the child). *But see id.* at 544-45 (Dauphinot, J., dissenting and concurring) (arguing that the existing statute fails to adequately protect defendants' constitutional confrontation rights in light of *Crawford* because written interrogatories presented by a neutral interviewer do not constitute confrontation or cross-examination as mandated in the Constitution).

[153] *See* David C. Raskin & Phillip W. Esplin, *Assessment of Children's Statements of Sexual Abuse*, *in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS, *supra* note 7, at 153, 154.

[154] *See* Lininger, *supra* note 100, at 796.

[155] *See id.*

key witness' testimony in the early stages of the trial with the risk of proceeding to trial without any testimony from that witness.

2. Protecting Criminal Defendants' Constitutional Rights

In addition to concerns about protecting children's best interests while prosecuting CSA crimes, the proposed rule also raises several concerns for defendants' rights. For example, juries might focus too much on the videotaped testimony and thus overlook other important evidence.[156] In fact, this is an ongoing problem facing courts today as the use of video equipment and other technology continue to grow. While minimizing the influence of technology on jurors is a difficult task, judges can issue jury instructions explaining the use of the videotape and advising the jurors of their responsibility not to give the testimony any greater weight merely because it is shown on a video. Even if jurors do give undue attention to videotaped testimony, this problem will likely be neutralized by the proposed rule which provides for an equal opportunity to admit a child's prior direct and cross-examination by videotape.

Additionally, while videotaped statements can help a defendant by revealing investigators' poor interviewing techniques, they can also fail to show the entire interview process and can therefore present biased perspectives. This problem could be addressed in part by requiring specific procedures for a pretrial child witness interview to ensure that the videotape would offer as fair a presentation of the evidence as possible.[157] Furthermore, both parties should be prohibited from editing the pretrial video recordings.

The proposed videotaping rule could also raise due process concerns if the defendant is not given a full and fair opportunity to confront the child witness.[158] For example, if a defendant's prior opportunity for cross-examination occurs before he has completed his discovery process, he could argue that the cross-examination proceeding failed to constitute sufficient confrontation.[159] This concern could be resolved in part, however, by incorporating a rule along the lines of Federal Rules of Evidence 804(b)(1), which allows the admission of prior testimony from a subsequently unavailable witness as long at the defendant's prior and present motive to

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[156] *See* Pence & Wilson, *supra* note 143, at 77.

[157] *See* Hill & Hill, *supra* note 149, at 832-33 (explaining that a fair presentation could include a prohibition against replaying the child's taped testimony multiple times for the jurors because that would otherwise be akin to allowing a witness to testify twice at trial).

[158] *See* Mosteller, Crawford*'s Impact*, *supra* note 11, at 423.

[159] *See id.* at 420.

examine the witness has not changed.[160] Applied to CSA cases, this would mean that if new evidence emerges through discovery that is substantial enough to change the defendant's motive for cross-examining the child witness after an initial, recorded cross-examination has occurred, the defendant could request a subsequent opportunity for cross-examination.

Another concern is that if a child's direct and cross-examinations are taken at two distinct times, it could infringe on the defendant's right to "be confronted with" all testimony against him.[161] However, this concern can be avoided by providing the defendant with an opportunity to view the child's pretrial direct testimony before he assumes his own opportunity to conduct a cross-examination. Alternatively, before cross-examination begins, a child witness could be asked to restate her basic accusations against the defendant before he can proceed with cross-examination.[162]

One final concern for criminal defendants is that if videotaping a child's prior testimony were to become a default rule in all CSA cases, prosecutors might never have an incentive to produce children as witnesses at trial. As a result, defendants would be forced to rely on prior cross-examination as their only means of confronting that witness against them.[163] To avoid this problem, judges should apply different standards for determining a child's likely unavailability and actual unavailability. First, during pretrial stages prosecutors should bear the burden of showing that a child will likely be unavailable at trial, thus necessitating the use of videotape to capture her testimony.[164] The judicial standard for finding likely unavailability should be broad to accommodate the varied and unpredictable reasons that children become unavailable to testify.[165] Then,

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[160] FED. R. EVID. 804(b)(1).

[161] U.S. CONST. amend. VI; *see* discussion *infra* Section V.A; *see also* Mosteller, Crawford*'s Impact*, *supra* note 11, at 417-19.

[162] Mosteller, Crawford*'s Impact*, *supra* note 11, at 418.

[163] *Id.* at 423 (explaining that prior examinations should only be permitted to fill the void of a witness's subsequent unavailability where there is "concrete justification for believing that the witness' testimony must be preserved at an early time").

[164] Crawford v. Washington, 541 U.S. 36, 57 (2004) (explaining that the government has an obligation to establish a witness's unavailability); *see also* Mosteller, Crawford*'s Impact*, *supra* note 11, at 426 ("[I]f we move in the direction of securing more prior confronted testimony, courts will need to be vigilant to ensure that the prosecution does indeed satisfy its constitutional obligation to show that the witness is unavailable.").

[165] *See* discussion *supra* Section III.B. For examples of the unpredictable nature of children's unavailability to testify at trial, see, e.g., Contreras v. State, 910 So. 2d 901, 903 (Fla. Dist. Ct. App. 2005) (despite initial expectations that she would be able to offer testimony, the child victim was ultimately found unavailable to testify at trial two and a half years after the child's original statement to the police, and approximately four years after the date when the child was allegedly sexually abused by her father because she would suffer severe trauma from the experience); People v. T.T. (*In re* T.T.), 815 N.E.2d 789, 795-96 (Ill.

at the time of trial the prosecutor should bear the burden of showing that the child is unavailable as a witness. However, at this stage, judges should apply a narrower standard for finding actual unavailability to avoid the prejudice that would ensue for defendants if child witness unavailability were to become the default rather than the exceptional standard.

D. IMPLEMENTING THE RULE OF CONFRONTATION AFTER *CRAWFORD*

To implement the proposed rule for recording a child witness's direct and cross-examinations, legislative steps must be taken on the state level. As an initial step, any states that currently have statutes prohibiting the act of videotaping ex parte testimony should repeal those statutes or remove the relevant language. Additionally, all states that have existing procedures in place for taking children's recorded testimony should amend those statutes to ensure that they comply with *Crawford*.[166] As a next step, all states need to implement the necessary procedures for obtaining a child witness's pretrial direct and cross-examination testimony. Some states have already begun to do this, and their practices and procedures can be used as models.[167]

1. Recommended Procedure

While the specific procedures for implementing the proposed videotaping rule should be determined by individual state legislatures, the following eight recommended steps are provided as suggestions to facilitate that process. First, the prosecutor should have the burden of showing a likelihood that the child will become unavailable to testify at trial.[168]

App. Ct. 2004) (child witness's unavailability was not apparent until trial when the child testified in court that "respondent unbuttoned her pajama suit in [her babysitter's] bedroom," but when she was asked what happened next she froze up and stopped responding. Finally, after it was clear that the child would not respond to any more questions, the prosecutor asked that the child witness be "deemed and declared unavailable.").

[166] For specific information about which states have existing legislation concerning pretrial procedures in CSA cases, see NAT'L DIST. ATTORNEYS ASS'N, LEGISLATION REGARDING THE ADMISSIBILITY OF VIDEOTAPED INTERVIEWS/STATEMENTS IN CRIMINAL CHILD ABUSE PROCEEDINGS (2004), *available at* http://www.ndaa-apri.org/pdf/statute_admissibility_videotaped_interviews_statements.pdf

[167] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon 2005). This statute was interpreted after *Crawford* and *Davis* in *Morales v. State*, No. 13-05-188-CR, 2006 WL 3234073 (Tex. App. Nov. 9, 2006), which held that the defendant was not denied his constitutional right to cross-examine the alleged victim when he was offered and accepted the opportunity to submit questions for a child interviewer to ask during a videotaped pretrial interview with the child.

[168] For examples of criteria on which to find unavailability, see 18 U.S.C. § 3509(b)(1)(B) (2000); *see also* G. Melton, *Children's Competence to Testify*, 44 LAW &

Second, the judge should apply a broad standard to determine a child's likely unavailability to accommodate the unpredictability of child witnesses. Third, if the judge determines that the child might become unavailable, the prosecutor should have the burden of providing the defendant with an opportunity to record the child's pretrial cross-examination. The defendant need not accept this opportunity, but if he declines it and the child is later deemed unavailable to testify, her ex parte statements will be admissible regardless of the fact that her testimony has not been cross-examined.

Fourth, if the defendant accepts the opportunity for cross-examination, the judge should oversee the process of taking pretrial testimony, either in person or by reviewing the prosecutor and defense counsel's questions in advance. Judicial oversight is necessary in this process to distinguish a prior opportunity for cross-examination from a mere deposition. Fifth, the defendant must be given not only an opportunity to cross-examine the witness, but also an opportunity to be confronted with that witness's testimony. If the judge oversees the pretrial process in person, this requirement can be satisfied by taking the pretrial direct and cross-examinations at the same time. If the judge reads the questions before the examinations take place, the defendant needs to be able to watch the direct examination before presenting questions to the judge. This method will allow the defendant a chance to respond to the testimony against him, and it will ensure that the scope of the defendant's cross-examination does not reach beyond that of the direct examination.[169]

Sixth, if discovery changes substantially after the time that the direct and cross-examinations have been recorded, the judge should determine whether a subsequent set of examinations is necessary. Seventh, before trial, the judge must reexamine the issue of the child's unavailability. At this stage, the judge should apply a narrower standard to prevent the unfair prejudice that could ensue if child witnesses are categorically considered unavailable to offer live testimony in CSA trials. Finally, if the child is still deemed unavailable to testify, the prosecutor and defendant should be permitted to admit their recordings of pretrial direct and cross-examination in lieu of the child witness's live testimony.

V. CONCLUSION

To balance all of the competing interests at stake, CSA trials must strike a balance between protecting criminal defendants' rights to a fair trial

HUM. BEHAV. 1225-33 (1981) (explaining the steps involved in finding a child unavailable to offer testimony at trial).

[169] *See* FED. R. EVID. 611(b).

and the public's interest in prosecuting sexual abuse while protecting child victims. Over the past several decades, CSA trials have been continually plagued by the distribution of advantages that alternate between favoring one of these interests over another. At first glance, it appears that the recent decision in *Crawford v. Washington* merely perpetuates this imbalance by emphasizing the importance of criminal defendants' constitutional rights to confront all witnesses against them. However, the *Crawford* Court provided a critical safeguard against this problem by allowing a prior opportunity for cross-examination to satisfy the confrontation requirement. As a result, instead of perpetuating the distribution of unfair advantages, the "prior opportunity for cross-examination" component of the new *Crawford* rule presents a starting point from which to re-balance the seesaw of advantages in CSA cases. Meeting this objective hinges, however, on merging the constitutional provisions set forth in the Confrontation Clause, and interpreted in *Crawford*, with the elements of sufficient confrontation set forth fourteen years earlier in *Maryland v. Craig*. By implementing a criminal procedure that allows both prosecutors and defendants a prior opportunity to videotape unavailable CSA victim testimony, state legislatures will succeed in integrating all the rules of these two pivotal cases.