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CHILD SEX ABUSE VICTIMS: HOW WILL THEIR STORIES BE HEARD AFTER *CRAWFORD v. WASHINGTON*?

INTRODUCTION

Christa Nester, a state prosecutor and child advocate, is working with seventeen-year-old Alice, who has been sexually abused by her father for approximately ten years. Alice is very fearful of testifying face-to-face against her father. Ms. Nester has videotaped interviews with Alice, the social worker, and other prosecutors where Alice explicitly describes the abuse. Since Alice's allegation, five other identified victims have refused to testify, including Alice's older sister Bonnie. Pursuant to a recent United States Supreme Court decision, *Crawford v. Washington*, Ms. Nester is unable to admit these videotapes or the testimony of the social worker, regardless of a judicial determination of reliability. This case, decided in March 2004, purported to protect the defendant's Sixth Amendment right of confrontation and declared that testimonial hearsay is inadmissible unless the victim is unavailable and there was prior opportunity for the defendant to cross-examine the witness.¹ Ms. Nester and other prosecutors now face the difficult task of advocating for child victims after this decision.

This comment focuses on the Confrontation Clause's interpretation throughout history and demonstrates the adverse effects the current state of the law has on child sex abuse victims like Alice and Bonnie. As such, the United States Supreme Court should declare that current statutory protections for child sex abuse victims are valid exceptions to the Confrontation Clause. Additionally, states should be encouraged to establish these statutes where they do not exist.

BACKGROUND

Historical Underpinnings of the Confrontation Clause

The Confrontation Clause of the Sixth Amendment guarantees the defendant the right to confront his accuser face-to-face at trial.² The origin of the Sixth Amendment dates back to the age of the Roman

1. See *Crawford v. Washington*, 541 U.S. 36 (2004).

2. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process

Empire.³ In *Coy v. Iowa*, the Court quoted Acts 25:16, “It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.”⁴ Similarly, in Sir Walter Raleigh’s trial for high treason, he attempted to call his accuser Lord Cobnam, to the trial with hopes of recantation.⁵ When the prosecutor Sir Edward Coke denied these repeated requests, Raleigh proclaimed:

But it is strange to see how you press me still with my Lord Cobnam, and yet will not produce him . . . [H]e is in the house hard by, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof.⁶

This was one of the most well-known trials of its time and is given the credit for the early English statutory reforms involving confrontation.⁷ This unjust system of government faced by Sir Walter Raleigh caused great fear in the minds of the Framers and influenced the Sixth Amendment’s right of confrontation.⁸

Adoption of the Sixth Amendment

While the historical underpinnings are important when discerning the intent of the Framers, it is imperative to explore the adoption of the Sixth Amendment and its interpretation throughout case law in order to establish its purpose and intricacies. The Sixth Amendment reads in part, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.”⁹

According to one commentator, the Confrontation Clause received little attention during the constitutional debates, which resulted in the adoption of the Bill of Rights.¹⁰ The Supreme Court first passed down

for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”) (emphasis added).

3. *Crawford*, 541 U.S. at 43.

4. *Coy v. Iowa*, 487 U.S. 1012, 1015-016 (1988).

5. Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 542 (2003).

6. *Id.* at 542-43.

7. *Crawford*, 541 U.S. at 44.

8. White, *supra* note 5, at 542.

9. U.S. CONST. amend. VI.

10. Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1004-05 (2003) (stating “[these] eighteen words, . . . collectively referred to as the Confrontation Clause, found their way into the Sixth Amendment with almost no notice”).

a decision interpreting the clause over a century later in 1895.¹¹ Furthermore, it was not held applicable to the states until 1965 when Justice Black stated in *Pointer v. Texas*, “the Sixth Amendment’s right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.”¹²

United States Supreme Court Decisions: Over 100 years of Precedent

The United States Supreme Court has consistently held that the Confrontation Clause is a fundamental right which ensures the reliability of admissible evidence¹³ and has repeatedly emphasized that this fundamental right is not absolute.¹⁴ For 100 years, the Court allowed deviations from the strict text of the Sixth Amendment in order to promote public policy and to accommodate the necessities of the cases.¹⁵

Previous Precedent: Ohio v. Roberts

The Court’s decision in *Ohio v. Roberts* gave future judges and justices an analytical template to use when deciphering whether certain hearsay should be admitted into evidence.¹⁶ The Court held that when a declarant was found to be “unavailable,” his statement was only admissible when it bore adequate “indicia of reliability,” meaning the statement either fell into a firmly-rooted hearsay exception or showed particularized guarantees of trustworthiness.¹⁷ State legislatures relied on this framework when drafting legislation for protection

11. See *Mattox v. United States*, 156 U.S. 237 (1895).

12. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

13. See *Mattox*, 156 U.S. 237; *Pointer*, 380 U.S. 400; *Maryland v. Craig*, 497 U.S. 836 (1990).

14. See *Mattox*, 156 U.S. at 243 (“General rules of this kind, however beneficent in their operation and valuable to the accused must occasionally give way to considerations of public policy and the necessities of the case The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.”); *Dowdell v. United States*, 221 U.S. 325, 330-31 (1911) (affirming that the Confrontation Clause has always have “certain well-recognized exceptions”); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (“Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.”)

15. *Mattox*, 156 U.S. at 243.

16. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004).

17. *Id.*

of child sex abuse victims, adult victims and mentally infirm adult crime victims.¹⁸

The Court affirmed its decision in *Roberts* when it was confronted with a child sex abuse situation in the 1988 decision, *Coy v. Iowa*.¹⁹ This decision, written by Justice Scalia, found that by placing a screen between a defendant and a child in a child sex abuse case violated the defendant's Sixth Amendment Confrontation right.²⁰ In the discussion of the case, Scalia conceded that:

We have in the past indicated that rights conferred by the Confrontation Clause are *not* absolute . . . We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only *when necessary to further public policy*.²¹

The court held that denying this particular defendant a face-to-face cross examination opportunity violated his Sixth Amendment rights and created a high threshold for future cases in determining whether a child can legally testify through a medium that substituted the face-to-face cross-examination.²²

In a concurring opinion, Justice O'Connor emphasized the importance in recognizing that the Confrontation Clause is not absolute.²³ "[T]hose rights are *not* absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."²⁴ Justice O'Connor wrote about the increase of child abuse in today's society and emphasized "nothing in [the *Coy*] decision necessarily dooms such efforts by state legislatures to protect child witnesses."²⁵

Justice O'Connor's concurring opinion in *Coy* took shape as a majority opinion in *Maryland v. Craig*.²⁶ This case involved a 6-year-old victim of sex abuse who was likely to suffer severe emotional distress by seeing her perpetrator in the courtroom.²⁷ O'Connor wrote

18. Chase, *supra* note 10, at 1020.

19. *Coy*, 487 U.S. 1012.

20. *Id.* at 1020.

21. *Id.* at 1020-021 (emphasis added).

22. *Id.* at 1022.

23. *Id.*

24. *Id.* (emphasis added).

25. *Id.* at 1023.

26. See *Craig*, 497 U.S. at 849-50 (stating "though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers").

27. *Id.* at 836.

that the Confrontation Clause does not guarantee an absolute right to a face-to-face confrontation.²⁸ She reemphasized that the central purpose of the clause is “to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact.”²⁹ Furthermore, the opinion stated that public policy and the necessities of the case provide for exceptions and that a state’s interest in the child abuse victim’s welfare can outweigh a defendant’s right to face his or her accusers in court.³⁰

Crawford v. Washington, 2004: The Current State of the Law

Crawford’s complexity requires a detailed examination in order to understand the current state of the law and the necessity of the creation of an exception for child sex abuse victims. This decision overruled prior precedent and created an absolute bar to testimonial hearsay unless it is proven that the declarant is 1) unavailable and 2) there was prior opportunity for cross-examination.³¹ The Court’s rationale was to absolutely protect the defendant’s Sixth Amendment right of confrontation.³²

In 1999, Michael D. Crawford was charged with assault and attempted murder for the alleged stabbing of Kenneth Lee.³³ Sylvia Crawford, defendant’s wife and witness to the incident, indicated that the incident was not in self-defense in her tape-recorded interview with a police officer.³⁴ Pursuant to the state of Washington’s marital privilege, Sylvia could not testify.³⁵ The State introduced her tape-recorded statement and Crawford objected on the grounds that its admission would violate his Sixth Amendment Confrontation Clause rights.³⁶

After two appeals, the Supreme Court of Washington admitted the statement concluding that the statement bore particularized guarantees of trustworthiness and should be admitted under *Roberts*.³⁷ The United States Supreme Court granted certiorari to review the Confrontation Clause issue.³⁸

28. *Id.* at 836-37.

29. *Id.* at 837.

30. *Id.*

31. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

32. *Id.* at 60.

33. *Id.* at 38.

34. *Id.*

35. *Id.* at 39.

36. *Id.*

37. *Id.* at 40.

38. *Id.* at 42.

Justice Scalia wrote a landmark decision overruling *Ohio v. Roberts* and creating vast confusion over the admission of out-of-court statements throughout the criminal law field. Justice Scalia found *Ohio v. Roberts* too subjective and held the rule of law announced in the decision allowed evidence to be admitted “untested by the adversary process” and “based on a mere judicial determination of reliability.”³⁹

Justice Scalia’s analysis implied that there first must be a determination of whether the statement seeking to be admitted is testimonial or non-testimonial.⁴⁰ He failed to define “testimonial”, however stated at a minimum, the term covers “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”⁴¹ The opinion referred to an appellate brief written by the National Association of Criminal Defense Lawyers as *Amici Curiae*, which suggested that testimonial statements are statements that a reasonable witness would make in contemplation of trial.⁴² In general, states have consistently considered co-defendants’ statements to police, prosecutors’ interviews with defendants, and videotaped interviews and formal statements made by victims to the police to be testimonial and therefore invoking the defendant’s Sixth Amendment rights.⁴³ In contrast, non-testimonial statements have generally only included excited utterances, statements to undercover officers not in contemplation of trial, statements to third parties, and co-conspirator statements.⁴⁴

39. *Id.* at 61.

40. *Id.* at 59, 68 (“Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law.”).

41. *Id.* at 68.

42. *Id.* at 52.

43. See *Brooks v. State*, 132 S.W.3d 702, 707 (Tex. Ct. App. 2004); *United States v. Saner*, 313 F. Supp. 2d 896, 902 (S.D. Ind. 2004); *People v. Zarazua*, No. H025472, 2004 WL 837914, at *4 (Cal. App. 6th April 20, 2004); *Moody v. State*, 594 S.E.2d 350, 354 (Ga. 2004).

44. See *People v. Moscat*, 777 N.Y.S.2d 875, 878 (2004); *People v. Becerra*, No. G030893, 2004 WL 576246, at *7 (Cal. App. 4th March 24, 2004); *People v. Coker*, No. 238738, 2004 WL 626855 (Mich. App. March 30, 2004); *State v. Forrest*, 596 S.E.2d 22, 27 (N.C. App. 2004); *Cassidy v. State*, 149 S.W.3d 712 (Tex. App. 2004); *United States v. Manfre*, 368 F.3d 832 (8th Cir. 2004); *But see People v. Cortes*, 2004 N.Y. Slip Op. 24185 (N.Y. 2004) (holding 911 calls were testimonial in nature).

However a marked gray area exists between testimonial and non-testimonial statements in cases involving children and sex abuse.⁴⁵ In *People v. Geno*, the Michigan appellate court held that a child's statement to the executive director of a Child Assessment Center was non-testimonial and therefore admissible in court.⁴⁶ Conversely, in *Snowden v. State*, a Maryland appellate court found statements made by children to social workers about sexual abuse to be testimonial and therefore not admissible without the requisite showing of unavailability and a prior opportunity for cross examination.⁴⁷ The court found that the interview was in contemplation for trial because "the children were interviewed for the expressed purpose of developing their testimony by [the social worker]."⁴⁸

Chief Justice Rehnquist stated in his concurrence in *Crawford* that overruling *Ohio v. Roberts* "will cast a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide this present case."⁴⁹ Commentators believed that *Ohio v. Roberts* sought to accommodate two competing interests: "confrontation as a means of testing the reliability and accuracy of evidence against the accused versus the need on occasion to admit hearsay evidence to further effective law enforcement."⁵⁰ One hundred years of precedent proves that the Confrontation Clause is not absolute and that exceptions *are* allowed for the purpose of promoting public policy.⁵¹ Past Courts have determined that when drafting the Sixth Amendment the Framers intended to ensure the reliability and truthfulness of evidence,⁵² consequently protecting both the defendant and the victim's rights.

Pursuant to the *Ohio v. Roberts*⁵³ decision, over 40 states passed legislation that protected child abuse victims from seeing their offenders in court by creating ways for their out-of-court statements to come into evidence.⁵⁴ The legislation proved necessary when statistics sur-

45. See *People v. Geno*, 683 N.W.2d 687 (Mich. App. 2004); *But see Snowden v. State*, 846 A.2d 36 (Md. App. 2004).

46. *Geno*, 683 N.W.2d at 690.

47. *Snowden*, 846 A.2d at 47.

48. *Id.*

49. *Crawford*, 541 U.S. at 68 (Rehnquist, C.J., concurring).

50. Chase, *supra* note 10, at 1044.

51. See *Mattox v. United States*, 156 U.S. 237 (1895).

52. See *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mattox*, 156 U.S. 237.

53. *Roberts*, 448 U.S. 56, *overruled by Crawford*, 541 U.S. 36.

54. See ALASKA STAT. § 12.40.110 (1998); CAL. EVID. CODE § 1228 (1995); COLO. REV. STAT. § 13-25-129 (1997); OKLA. STAT. ANN. tit. 12, § 2803.1 (1993) (other states with these statutes include Delaware, Florida, Georgia, Illinois, Kansas, Louisiana,

faced showing widespread child sex abuse and an inability to prosecute the offenders.⁵⁵ In 1983, about ten years after child abuse awareness began, the Department of Health and Human Services estimated 72,000 children were being sexually abused by their parents, guardians, and persons in their household, while only ten percent of those were able to be prosecuted successfully due to a of lack of evidence and child trauma.⁵⁶ In 1998, the American Academy of Child & Adolescent Psychiatry reported that there were 80,000 reported and many more suspected incidents that remained unknown “because the children are afraid to tell anyone what has happened, and the legal procedure for validating an episode is difficult.”⁵⁷ Previous precedent allowed for statutes that protected child victim’s rights allowing for substitutions to face-to-face confrontation or allowing out of court testimony when the court determines it to be reliable.⁵⁸ However, these statutes may now be determined to be unconstitutional under current law.⁵⁹

Overtured Convictions Under the Current State of the Law

Many child sex abuse convictions have been reversed since the *Crawford v. Washington* decision. These cases demonstrate the difficulty in prosecuting perpetrators under the current state of the law. The facts of these cases demonstrate the importance of having exceptions for child victims who cannot competently testify due to their young age and abject fear.

People v. Espinoza

A jury convicted Espinoza of sexually abusing a child based on evidence from a medical examination at Valley Children’s Hospital in

Montana, Nevada, New Jersey, Oregon, Pennsylvania, South Dakota, Wisconsin, and Wyoming).

55. Lynn H. Frank, *Pennsylvania v. Ritchie: The Supreme Court Examines Confrontation and Due Process in Child Abuse Cases*, 34 LOY. L. REV 181, 186 (1988).

56. *Id.*

57. American Academy of Child & Adolescent Psychiatry, No. 9, at <http://www.aacap.org/publications/factsfam/sexabuse.html>, Last modified 11/98. (On file with Campbell Law Review)

58. See COLO. REV. STAT. § 13-25-129 (2003) (stating that an out-of-court statement made by a child sex abuse victim is admissible in evidence when the child either 1) testifies, or 2) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement).

59. Michael S. Walsh, Joseph K. Scott III, *Recent Development Criminal Law to Trust, Estate*, 52 LA. B. J. 38, (2004).

Fresno.⁶⁰ The emergency room doctor found tears, scars, thinness and lesions in the child victim's rectum consistent with sexual abuse.⁶¹ There was so much swelling, scarring and healing that the doctor concluded that there had been multiple incidents of abuse.⁶² The child's rectum was larger than "it should have been" and it was possible that the abuse could have occurred as recently as that day.⁶³

During the exam, Espinoza's victim would not disclose any information to the doctor.⁶⁴ However, later that day in a videotaped interview with a Police Sergeant, the child victim gave specific details about the abuse and identified the defendant as the perpetrator.⁶⁵ On the day of trial, the child victim was determined to be "unavailable" to testify pursuant to California statute, and the State admitted the videotape into evidence in lieu of the child's testimony.⁶⁶

The jury found the defendant guilty of four counts of aggravated sexual assault for the forcible sodomy of the child victim who was less than fourteen years of age and over ten years younger than defendant. The defendant was also found guilty of committing a lewd or lascivious act upon another child victim, the defendant's daughter, and sentenced to 75 years to life in state prison.⁶⁷ The defendant appealed his convictions to the appellate court in California.⁶⁸ Based on *Crawford*, the court vacated the four counts of aggravated sexual assault against the child victim, upholding only the defendant's conviction for "committing lewd or lascivious acts" upon his daughter.⁶⁹

People v. Vigil

In this case, a father went to his son's bedroom to check on his 7-year-old son when he saw the defendant leaning over the child.⁷⁰ Both the defendant and the son were partially undressed and the son told his father that the defendant had "stuck his winkie in his butt and his butt hurt."⁷¹ He also told another visitor in the home that his bottom

60. *People v. Espinoza*, No. H026266, 2004 WL 1560376, at *1 (Cal. App. 6th July 13, 2004).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1-2.

66. *Id.* at 5.

67. *Id.* at 1.

68. *Id.*

69. *Id.*

70. *People v. Vigil*, 104 P.3d 258, 261 (Colo. Ct. App. 2004).

71. *Id.*

was sore.⁷² The trial court found that the son was incompetent to testify at trial and permitted the State to enter a videotaped interview between policeman and the victim into evidence.⁷³

Under *Roberts*, the court allowed the videotaped interview because the corroborating evidence ensured “particularized guarantees of trustworthiness.” There were two witnesses *and* there was a statement of the victim in an environment without the presence of the perpetrator that was consistent with that of the witnesses. In addition, after the incident the defendant told the police and that he had “done bad” and stabbed himself.⁷⁴ The defendant then repeated this confession to the emergency room personnel.⁷⁵

A jury convicted Vigil of sexual assault on a child and found him to be a habitual sex offender.⁷⁶ On appeal, the court reversed the conviction because the admission of the victim’s videotaped interview violated his Sixth Amendment confrontation rights.⁷⁷ The court determined that this interview was taken in anticipation of trial and that it was testimonial in nature.⁷⁸ Because the defendant had no prior opportunity to cross-examine the child, the appellate court followed *Crawford* and held the videotape was inadmissible.⁷⁹

In the Interest of R.A.S.

The juvenile respondent in this case was convicted for touching the genitals of a four-year-old victim and forcing the victim to perform oral sex on him.⁸⁰ The mother of the victim walked into their living room, heard the juvenile pull up his pants and then heard the victim say “he made me suck his pee pee.”⁸¹ The victim subsequently told his grandmother that the juvenile made him “lick” and “suck” his genitalia.⁸² An investigator conducted a videotaped interview with the victim, and the tape was subsequently admitted into evidence.⁸³ On appeal, the court found that the interview was “testimonial” and

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 262.

79. *Id.* at 264-65.

80. *In the Interest of R.A.S.*, No. 03CA1209, 2004 WL 1351383, at *1 (Colo. App. June 17, 2004).

81. *Id.*

82. *Id.*

83. *Id.*

reversed and remanded the case because there had been no prior opportunity for cross-examination.⁸⁴

Snowden v. State

Based on the ground that his confrontation rights were violated, the defendant appealed convictions for seven counts of child abuse and related offenses.⁸⁵ In the first trial, before the *Crawford* decision, testimony of a licensed social worker was admitted pursuant to a Maryland statute.⁸⁶ Each of three female victims alleged that the defendant touched them improperly in their genitalia and breast areas.⁸⁷ The appellate court reversed and remanded the case, declaring statements to the social worker testimonial because the interview was for “the expressed purpose of developing their testimony” by the social worker.⁸⁸ Under the current law, the State will have to prove on remand that each of the children are unavailable to testify *and* that the defendant had prior opportunity to cross-examine each child in order for the interview to be admitted into evidence without the children testifying at trial.⁸⁹

People v. Sisavath

Defendant was convicted of 10 counts of child sexual abuse including forcible lewd acts, aggravated child sexual assault, forcible rape and forcible sexual penetration.⁹⁰ On appeal the California court of appeals reversed and remanded in part, finding that admitting the victims’ testimony to the police was unconstitutional under *Crawford v. Washington*.⁹¹ Two children each told their mother that defendant, their mother’s acquaintance, had “touched [their] private parts”.⁹² Their mother called the police and after an investigation, there was evidence of numerous incidents of child abuse.⁹³

In order to convict the alleged perpetrator on remand, the State will have to give the defendant prior opportunity to cross examine the victims *and* prove that the victims are unavailable.⁹⁴

84. *Id.* at 5.

85. *Snowden v. State*, 846 A.2d 36, 42 (Md. Ct. App. 2004).

86. *Id.*

87. *Id.*

88. *Id.* at 47.

89. *See Crawford v. Washington*, 541 U.S. 36 (2004).

90. *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 755 (Cal. Ct. App. 2004).

91. *Id.* at 757.

92. *Id.* at 755.

93. *Id.*

94. *See Crawford*, 541 U.S. 36.

Statistics

The reversal of the above convictions and the difficulty of prosecuting future cases will affect society as a whole. An estimated 10% of all boys and 25% of all girls in the United States are sexually abused.⁹⁵ Long-term symptoms of sexual abuse include anxiety, depression, suicidal thoughts, sexual anxiety, low self-esteem, greater propensity for unhealthy habits such as alcohol abuse, drug abuse, self-mutilation, or bingeing and purging.⁹⁶ The prosecution of child sex crimes becomes increasingly difficult because young children lose memory, traumatized children block memory, and victims blame themselves.⁹⁷ The director of the American Prosecutors Research Institute's National Child Protection Training Center is concerned about the effect the *Crawford* decision will have on mentally retarded children and young children, like Alice and Bonnie, who are unable to testify under oath.⁹⁸ The director said, "without in-court, under-oath testimony *Crawford* will exclude many child hearsay statements."⁹⁹ He further stated that the recent United States Supreme Court decision is causing many prosecutors to 'throw in the towel'.¹⁰⁰

Proposal

In order to prevent the 'throw in the towel' mentality, the United States Supreme Court should distinguish their holding in *Crawford v. Washington* and declare that statutory exceptions to face-to-face confrontation as applied to child sex abuse victims are constitutional. Column I in table I below represents an example of a statute that seeks to protect the unavailable child victim while demanding other forms of evidence in order to ensure the reliability of evidence.¹⁰¹ The comments in column II of Table I describe the effects that the *Crawford* decision will have on these statutes.

95. Julia Whealin, Ph.D., Child Sexual Abuse, A National Center for PTSD, Fact Sheet at http://www.ncptsd.org/facts/specific/fs_child_sexual_abuse.html.

96. *Id.*

97. See Kibret Markos. *Young Victims' Short Memories Complicate Child-Abuse Cases*. N.J. RECORD. Aug. 2, 2004, at 1, available at 2004 WLNR 3228349.

98. Wendy N. Davis, *Hearsay, Gone Tomorrow?*, 22 A.B.A. J., Sept., 2004.

99. *Id.*

100. *Id.*

101. DEL. CODE ANN. TIT. 11 § 3513 (2003).

TABLE I

DELAWARE CODE ANNOTATED
TITLE 11, PART II, CHAPTER 35.EFFECT ON STATUTE AFTER
CRAWFORD V. WASHINGTON

<p>§ 3513 Hearsay exception for child victim's or witnesses out-of-court statement of abuse.</p>	<p>Exceptions will only be allowed when the statement is determined to be non-testimonial. If statement is non-testimonial, "it is consistent with the framers' design to afford the states flexibility in their development of hearsay law."¹⁰² If statement is determined to be testimonial, declarant must be 1) unavailable and 2) defendant must have had prior opportunity to cross-examine the witness.¹⁰³</p>
<p>(a) An out-of-court statement made by a child victim or witness who is under 11 years of age at the time of the proceeding concerning an act that is a material element of the offense relating to sexual abuse, physical injury, serious physical injury, death, abuse or neglect as described in any felony delineated in subpart A, B or D of subchapter II of Chapter 5 of this title, or in any of the felonies delineated in § 782, 783, 783A, 1102, 1108, 1109, 1111 or 1112A of this title or in any attempt to commit any felony delineated in this paragraph that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of subsections (b)-(f) of this section are met.</p>	
<p>(b) An out-of-court statement may be admitted as provided in subsection (a) of this section if:</p> <p>(1) The child is present and the child's testimony touches upon the event and is subject to cross-examination rendering such prior statement admissible under § 3507 of this title; or</p> <p>(2)a. The child is found by the court to be unavailable to testify on any of these grounds:</p> <ol style="list-style-type: none"> 1. The child's death; 2. The child's absence from the jurisdiction; 	<p>If child is testifying, Confrontation Clause violation is not at issue.</p> <p>These factors are used by the courts to determine whether the child declarant is unavailable.</p>

102. Crawford v. Washington, 541 U.S. 36, 68 (2004).

103. *Id.*

DELAWARE CODE ANNOTATED
 TITLE 11, PART II, CHAPTER 35.

EFFECT ON STATUTE AFTER
 CRAWFORD V. WASHINGTON

<p>3. The child total failure of memory; 4. The child persistent refusal to testify despite judicial requests to do so; 5. The child physical or mental disability; 6. The existence of a privilege involving the child; 7. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or 8. Substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television; and 2(b) The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.</p>	<p>Overruled by Crawford v. Washington. If the statement is determined to be testimonial, the second criterion of the analysis is prior opportunity for the defendant to cross-examine the witness, no matter how reliable the statement.¹⁰⁴</p>
<p>(c) A finding of unavailability under subsection (b) (2)a.8. of this section must be supported by expert testimony.</p>	
<p>(d) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.</p>	
<p>(e) In determining whether a statement possesses particularized guarantees of trustworthiness under subsection (b)(2) of this section, the court may consider, but is not limited to, the following factors: (1) The child's personal knowledge of the event; (2) The age and maturity of the child; (3) Certainty that the statement was made, including the credibility of the person testifying about the statement; (4) Any apparent motive the child may have to falsify or distort the event, including bias, corruption or coercion; (5) The timing of the child statement; (6) Whether more than 1 person heard the statement; (7) Whether the child was suffering pain or distress when making the statement; (8) The nature and duration of any alleged abuse;</p>	<p>The "Particularized Guarantees of Trustworthiness" criterion has been overruled; <i>Crawford v. Washington</i> held these factors were too "amorphous" and "subjective".</p>

104. *Id.* at 63.

DELAWARE CODE ANNOTATED
TITLE 11, PART II, CHAPTER 35.

EFFECT ON STATUTE AFTER
CRAWFORD V. WASHINGTON

<p>(9) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience; (10) Whether the statement has a "ring of verity," has internal consistency or coherence and uses terminology appropriate to the child's age; (11) Whether the statement is spontaneous or directly responsive to questions; (12) Whether the statement is suggestive due to improperly leading questions;¹⁰⁵</p>	
<p>(f) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.¹⁰⁶</p>	<p>Unconstitutional</p>

At a minimum, a portion of state statutes such as Delaware's in Table I above, will now be unconstitutional. The analysis in the right column demonstrates which portions of the statute will be overruled pursuant to *Crawford*.¹⁰⁷

If there were a specific determination that this statutory exception for child sex abuse is constitutional, Ms. Nester would have a chance at convicting Alice's father. However without this determination, portions of state statutes such as Delaware's will be unconstitutional when statements are determined to be testimonial.¹⁰⁸ Furthermore, states that currently do not have such statutes in place will be unable to adopt them in order to protect their child victims.

ARGUMENT

Precedent and Public Policy Allow for these Exceptions

Throughout history the United States Supreme Court has tried to balance two very important sets of fundamental rights: those of victims and those of defendants.¹⁰⁹ Justice Scalia contends that the cases since *Mattox* have

remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where

105. *Id.* at 36.

106. DEL. CODE ANN. TIT. 11 § 3513 (2003) (emphasis added).

107. See *Crawford*, 541 U.S. 36.

108. *Id.*

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

the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.¹¹⁰

In general, this presumption is correct. However, history recognizes that the Sixth Amendment right of confrontation is a fundamental right and that face-to-face confrontation is the preferred method of cross-examination.¹¹¹ However, it is important to emphasize that the Confrontation Clause is not absolute and there are situations where exceptions should exist for “necessities of the case” and for the furtherance of public policy.¹¹² Before *Crawford*, a very low percentage of sex abuse cases were successfully prosecuted.¹¹³ After *Crawford*, and after the statutory exceptions are declared unconstitutional, that percentage will become even lower.

Alice and Bonnie

Alice and Bonnie’s story is based on a real life incident that occurred in Raleigh, North Carolina. An abuser had been terrorizing several young girls for over a decade before he was finally brought to justice in August of 2004.¹¹⁴ The district attorney interviewed a total of six victims, but only two testified at trial.¹¹⁵ The two victims were sisters and their father was the defendant.¹¹⁶ The youngest victim, now 17, gave birth to her father’s child.¹¹⁷ The district attorney reported that the other victims admitted that the defendant had sexually abused them. However, when the time came for trial, they were too emotional and vulnerable to actually take the witness stand and testify in the defendant’s presence.¹¹⁸

Under *Crawford*, if the victims had explained in great detail the abuse to the prosecutor on videotape or had poured their heart out to a social worker during a period of counseling, neither videotape would be admissible as a substitution for the children’s testimony. As a result, if all six victims had been emotionally incapable of testifying in front of the defendant, the decade-long molester would have walked free.

110. *Crawford*, 541 U.S. at 59.

111. See *Mattox v. United States*, 156 U.S. 237 (1895); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

112. *Mattox*, 156 U.S. 237.

113. Frank, *supra* note 56, at 186.

114. Andrea Weigl. *Few Incest Victims Report It or Testify*. THE NEWS & OBSERVER. Aug. 8, 2004, at 1.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

On the other hand, if *Crawford* had not drawn such a rigid line, statutory provisions would protect these six victims by offering them other options, such as closed circuit television testimony and admissibility of their interviews based on other reliability factors, such as corroborating evidence (i.e.: the DNA results of the daughter's child).

Justice Scalia maintains that the "Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers."¹¹⁹ However, other members of the court recognize that "exceptions to confrontation have *always* been derived from the experience that some out-of-court statements are *just as reliable* as cross-examined in-court testimony due to the *circumstances* under which they were made."¹²⁰

Justice O'Connor's concurrence in *Coy v. Iowa* and in her majority opinions in *Maryland v. Craig* and *Idaho v. Wright* support the argument that exceptions to the Confrontation Clause must be allowed. Justice O'Connor has recognized the need for a *realistic* viewpoint on child sex abuse and the Confrontation Clause.¹²¹ Her opinions demonstrate the ability to sufficiently protect a defendant's Sixth Amendment right of confrontation while still being sensitive to the needs of the special victims of child sex abuse.¹²²

For example, in *Maryland v. Craig*, O'Connor led the majority in the pursuit of substitute means of cross-examination.¹²³ In this case, the 6-year-old victim was determined to be so emotionally distraught that "she could not communicate effectively."¹²⁴ The court found that she qualified for a Maryland statutory procedure, which allowed a judge to receive the testimony of the child by a one-way closed circuit television.¹²⁵ The procedure allows for the prosecutor, the victim and the defense counsel to be in one room while the jury, the judge and the defendant are in a different room hearing the direct and cross examinations.¹²⁶ The goal of this procedure is to allow the child to give her

119. *Crawford v. Washington*, 541 U.S. 36, 66 (2004).

120. *Id.* at 74 (Rehnquist, C.J., concurring) (emphasis added).

121. See *Maryland v. Craig*, 497 U.S. 836 (1990) ("[W]e have never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against the defendant despite the defendant's inability to confront the declarant at trial.")

122. See *Craig*, 497 U.S. at 853; *Coy v. Iowa*, 487 U.S. 1012 (1988) (O'Connor, J., concurring); *Idaho v. Wright*, 497 U.S. 805, 822 (1990).

123. See *Craig*, 497 U.S. 836.

124. *Id.*

125. *Id.*

126. *Id.*

testimony without having to look at his/her perpetrator.¹²⁷ However, the defendant's counsel gets to fully cross-examine the child and remain in contact via electronic communications with the defendant.¹²⁸ In this opinion, the majority reiterated that the Confrontation Clause is not absolute and "in certain narrow circumstances, competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial."¹²⁹ Likewise, the majority concluded that "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."¹³⁰ The majority continues by recognizing that there is a widespread belief in the importance of this public policy, consequently a significant majority of states have enacted statutes specifically aimed at protecting child sex abuse victims.¹³¹

Statutory Exceptions Would Adequately Protect a Defendant's Sixth Amendment Rights.

An analysis of the North Carolina case mentioned above demonstrates how statutes such as Delaware's protect the rights of both the victim and the defendant. Assume the two daughters from this case, Alice and Bonnie, are not emotionally capable of testifying against their father like the other four victims. Before the trial, the prosecutor interviewed each girl separately in preparation for her direct examination. In the videotaped interviews, the girls each tell consistent stories of the traumatic events over the past 10 years and continue to refuse to testify. The issue is whether the statement would have been admissible pursuant to statutes such as Delaware's pre-*Crawford*.

The first step would be to determine if they were unavailable. In this case, under Delaware Statute § 3213-(a)(2)(b)(8) the state would have to determine the victims to have a substantial likelihood of suffering severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.¹³² In addition, under section 2(c) the substantial likelihood of severe trauma must be supported with expert testimony.¹³³

127. *Id.*

128. *Id.*

129. *Id.* at 848.

130. *Id.* at 853.

131. *Id.*

132. DEL. CODE ANN. TIT. 11 § 3513 (2003).

133. *Id.*

The second step requires an examination to ensure that Alice and Bonnie's statements to the prosecutor withstand the particularized guarantees of trustworthiness. The court would look at the totality of the circumstances, including hearing evidence from the defense regarding possible motives for the man's daughters to lie, the defendant's arguments regarding leading questions, and the possibility of a lack of corroborating evidence. The court would also hear evidence from the prosecution regarding duration of the abuse, maturity of the girls, consistency of their stories, and whether there is any extrinsic evidence.¹³⁴ In this case, a paternity test showing that Alice's father was also the father of Alice's child would probably be sufficient corroborating evidence to ensure the reliability of Alice's testimonial statement to the police officer regarding the incest. If the court found that it was reliable, the child's statement would have been admitted into evidence. Conversely, if the evidence indicated that the stories were inconsistent, fabricated because of some ulterior motive, or simply not corroborated, the court would exclude the statement.

On the other hand, in Delaware after *Crawford*, the analysis of first step has the same conclusion as it did before *Crawford*, but the analysis of the second step would be extremely different. No matter what corroborating or extrinsic evidence the prosecution may show, any statements considered testimonial would not be admitted into evidence unless the declarant is unavailable *and* the defendant had prior opportunity to cross examine the witness.¹³⁵ In this case, if the girls were unable to testify, the only evidence available for the prosecution would have been the paternity test result and any statements the prosecutor could convince the court were non-testimonial. If the prosecution decided to proceed to trial with only a single piece of evidence, the paternity test, the defense would try to create a reasonable doubt in the minds of the jurors about the accuracy of the test. In the closing statement, the defendant may say, "there is *no testimony, there are no witnesses*. . . only results of a paternity test that may have been incorrectly understood because the daughter and the father have such similar DNA."

In situations like Alice and Bonnie's, the state has a compelling interest to protect the psychological and physical well being of child victims who are unable to protect themselves.¹³⁶ This includes emotional protection by not putting them in severely traumatic situations and physical protection by prosecuting their perpetrators. Under cur-

134. *Id.*

135. See *Crawford v. Washington*, 541 U.S. 36 (2004).

136. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

rent law, the only solutions are to 1) plead to the court that the statement is non-testimonial¹³⁷ or 2) continue investigations in order to find other evidence.

Currently, protecting child victims is an impossible task. Statutory provisions, which allowed for a judicial determination of reliability, were the best way for the state to protect these interests. The United States Supreme Court should distinguish *Crawford v. Washington* and allow for statutes protecting child sex abuse victims from further trauma. These are precisely the "public policy" situations and "necessities of the case" for which the previous one hundred years of precedent would allow. In addition, states which do not have such statutes in place should adopt these statutes allowing for a child's out-of-court statement after a judicial determination of reliability.

One could argue that children's propensity for lying rebuts the argument for exceptions to the rule pronounced in *Crawford*. In *Coy*, for instance, Justice Scalia contends, "face-to-face presence . . . may confound and undo the false accuser, or reveal the child coached by a malevolent adult."¹³⁸ However, it is also well accepted that children "cannot sustain the lie through hundreds of hours of interviews with police officers, doctors, social workers, relatives, and prosecutors."¹³⁹ Ultimately, prevaricating children will never make it to the point of trial. In addition, statistics show that there is no nexus between honesty and age and that children's ability to remember real events is "quite accurate."¹⁴⁰ Furthermore, descriptions of sexual abuse have been proven to be as credible as recounts of any other crime.¹⁴¹ The statutory exceptions proposed provide additional safeguards to protect against deception by having a detailed consideration of the trustworthiness of the testimony.

Other Options for Victims

Other possibilities, like closed circuit television in *Maryland v. Craig*, were not directly overruled in *Crawford*.¹⁴² In fact, some scholars believe that the *Crawford* decision will encourage states to pass

137. See *People v. Geno*, 683 N.W.2d 687 (Mich. App. 2004) (concluding that a statement, made to the executive director of Children's Assessment Center, not to a government employee, was not ex parte in-court testimony nor its functional equivalent therefore it is non-testimonial).

138. *Coy*, 487 U.S. at 1020.

139. Frank, *supra* note 56, at 195-96.

140. Eleanor L. Owen, *The Confrontation Clause Applied to Minor Victims of Sexual Abuse*, 42 VAND. L. REV. 1511, 1528 (1989).

141. *Id.*

142. See *Craig*, 497 U.S. 836.

more laws allowing children to testify by closed circuit television.¹⁴³ Hopefully, this theory will be correct and the current statutes will be upheld and even more will be created. However, Justice Scalia's decision in *Crawford* mandated a technical adherence to the literal interpretation of the Sixth Amendment, which may indicate future requirements of a face-to-face confrontation with *no exceptions, not even for child sex abuse cases*.¹⁴⁴

CONCLUSION

It is human nature to become enraged when hearing about these heinous acts and imagining the child predators roaming free. However, it is not all about emotion and feeling; one hundred years of precedent demonstrates that the Confrontation Clause is not absolute and that exceptions were intended. Since hearing the first case to interpret it, the Court has recognized the exceptions and allowed them for "necessities of the case" and in promotion of public policy. There has been emphasis on 1) the right of Confrontation being fundamental, 2) the right not being absolute and 3) the core concern of the Clause being the admissibility of truthful, reliable testimony. In the 1970s, the recognition of child sex abuse began and by the eighties, the abuse was found to be pervasive. In 1980, Justice Blackmun, author of *Ohio v. Roberts*, realized that society was evolving and that the Framers would have intended the Clause to respond to changing conditions.¹⁴⁵ In the *Roberts* opinion, the majority created a strict framework that allowed states to have flexibility in determining exceptions as long as there was an "indicia of reliability". In 1982, *Globe Newspapers* recognized that the state has a compelling interest in the welfare of a child. Later that decade, *Coy* and *Craig* confronted the experiments that substituted face-to-face cross-examinations with closed circuit television. These cases, although they had different outcomes, each recognized that exceptions to the Confrontation Clause were allowed to in order to further public policy.

However, *Crawford v. Washington* has slowed the progress being made on behalf of the nation's child victims. In these cases, the "unavailability" prong of the analysis is usually met because child victims are vulnerable and will usually be emotionally incapable to testify against their perpetrators. However, the second prong will rarely be

143. David L. Hudson Jr., *New Clout for Confrontation Clause*, 17 A.B.A. J. E-Report, Apr. 30, 2004 at 1, available at <http://www.abanet.org/journal/ereport/>.

144. See *Crawford*, 541 U.S. 36.

145. See *Roberts*, 448 U.S. 56, *overruled by Crawford*, 541 U.S. 36.

met and the difficulty of prosecuting child predators will continue to increase.

In conclusion, the United States Supreme Court should declare that current statutes that allow statements made by child victims are constitutional. In addition, states that do not have statutory exceptions are encouraged to create those exceptions for the purpose of furthering public policy. Without these statutes, a child sex abuse victim's story may never be heard.

Erin Thompson