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# Child Sexual Abuse Victims and the Confrontation Clause

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# CHILD SEXUAL ABUSE VICTIMS AND THE CONFRONTATION CLAUSE

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## I. Introduction

Generally speaking, we do not want to put child sexual abuse victims on the witness stand to testify in open court. From a prosecutor's point of view, it is preferable to admit previous statements of the abuse for a variety of reasons. Placing a child on the witness stand may cause the child additional trauma; it is not unreasonable to believe that the child will fear being in the presence of his or her abuser; additional questioning about the abuse, especially by a prosecutor who may not be trained in the art of interviewing children, can result in recantation or inconsistencies in the child's testimony. Additionally, the prosecutor runs the risk of placing the child on the stand only to have him or her testify to not remembering anything about the abuse, or simply "clamming up". The issue then is whether, and to what extent, children's statements of sexual abuse can come into evidence at trial.

This paper will explore the new developments in relation to admitting out of court statements by child sexual abuse victims. Out of court statements offered for the truth of the matter asserted are generally barred from admission in both civil and criminal cases, unless they fall within a hearsay exception. However, many states have enacted statutes granting hearsay exceptions specifically for child sexual abuse victims. These statutes recognize the burden played on the child required to testify in open court.

In criminal cases, however, children's statements must also face a second barrier: confrontation challenge. Until 2004, the standard applied to out of court statements in criminal cases closely paralleled the standard for admitting hearsay. In *Crawford v. Washington*, however, the Supreme Court made a distinction between testimonial and non-testimonial statements, testimonial statements being barred from entry unless the witness is unavailable and the defendant had a previous opportunity to cross-examine the declarant. Offering additional guidance, the Supreme Court narrowed its definition in a line of cases following

*Crawford*. In *Davis v. Washington*, the Court explained that statements made during a 911 call constituted information given during an ongoing emergency and was, therefore, not testimonial.[1] Then, in *Michigan v. Bryant*, the Court clarified that statements given to law enforcement when an objective witness would find that a state of emergency existed at the time were not testimonial.[2]

Most recently, in *Ohio v. Clark*, the Court examined the application of testimonial statements in cases of child abuse. In *Clark*, the

[1] *See Davis v. Washington*, 547 U.S. 813, 827-28 (2006).
[2] *See Michigan v. Bryant*, 562 U.S. 344, 378 (2011).

Court discussed mandatory reporters of child abuse as well as the emergency situation that suspected abuse creates. The Court determined that being a mandatory reporter does not automatically make the reporter an agent of law enforcement, and a teacher asking a child questions regarding suspected abuse was in response to an emergency situation, focusing on the teacher's need to find out in whose care the child could be entrusted after school.[3]

*Clark* was an important decision because in the United States "[e]very 8 minutes, Child Protective Service responds to a report of sexual abuse".[4] However, depending on the circumstances of the child's disclosure, *Crawford* could prevent the child's statement of abuse from coming into evidence at trial. The child may be forced to testify in court or the prosecution may be forced to make a deal, if they are even able to bring charges.[5] Child sexual abuse is a crime that is highly under-reported and under-prosecuted. Consequently, only a small percentage of acts of abuse result in convictions.[6] In a crime with little to no physical evidence, a child's disclosure of sexual abuse is essential for prosecution of the case. Preserving the genuineness of the disclosure is an important aspect in prosecuting child sexual abuse cases because in preserving a child's statement regarding sexual abuse, we have, at the very least, a possibility of allowing evidence of the abuse into trial without forcing the child victim to testify in open court.

In the following discussion section, I explore hearsay and the development of a separate standard for confrontation, followed by subsections that provide a more in-depth analysis of the Court's treatment of those statements that are barred by the Confrontation Clause. Section C addresses those situations when a testimonial statement cannot come into evidence and a child must testify on the witness stand at trial. Part III discusses the implications of these issues as they apply to the state of Hawaii specifically, as well as recommendations that could be implemented in child sexual abuse cases.

## II. Discussion

### A. Hearsay

Hearsay is the first barrier to admitting a child's previous statement of abuse. States have attempted to fix this problem by enacting statutory exceptions for child sexual abuse victims. The standard for this exception is generally based on whether there are sufficient indicia of reliability. For civil cases brought in family courts, sufficient indicia of reliability is generally all that is necessary for a child's statement to come into evidence. When cases are brought in the civil system, a child's statement of sexual abuse need only overcome the barrier of hearsay, and is, therefore,, easier to admit a child's statement and avoid placing the child on the witness stand to testify.

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[3] *See Ohio v. Clark*, 135 S. Ct. 2173, 2183 (2015).

[4] RAINN, *Victims of Sexual Violence: Statistics*, https://rainn.org/get-information/statistics/sexual-assault-victims (citing UNITED STATES DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, CHILD MALTREATMENT SURVEY (2013)) (last visited July 26, 2016).

[5] DOUGLAS E. ABRAMS, SARAH H. RAMSEY & SUSAN VIVIAN MANGOLD, CHILDREN AND THE LAW IN A NUTSHELL 224 (5th ed. 2015) ("Where obstacles appear particularly imposing, the prosecutor may drop charges altogether or may accept a plea bargain that sharply reduces the sentence imposed on a dangerous perpetrator.")

[6] Theodore P. Cross, Children and Family Research Center, University of Illinois at Urbana-Champaign, *How Can We Be Effective in Pursuing Justice in Child Abuse Cases? Lessons from Twenty Years of Research* http://cfrc.illinois.edu/pubs/ pt_20120601_HowCanWeBeEffectiveInPursuingJusticeInChildAbuseCases.pdf (last visited July 27, 2016).

A basic principle in the rules of evidence is that hearsay is inadmissible in court. The inadmissibility of hearsay is based on the fact that the statement is not made under oath, the declarant is not subject to contemporaneous cross-examination, and the trier of fact is unable to determine the credibility of the declarant. Exceptions have been made to the general rule against hearsay for statements with enhanced reliability. For example, in the case of an excited utterance, the declarant is still under the stress of the incident and has not had time to contrive a false statement. Therefore, the statement has a greater likelihood of reliability and falls within an exception to the general rule excluding hearsay statements.

Hearsay exceptions have also been granted to child witnesses of sexual abuse. Hawaii has such a statutory hearsay exception. The rule provides:

> A statement made by a child when under the age of sixteen, describing any act of sexual contact, sexual penetration, or physical violence performed with or against the child by another, if the court determines that the time, content, and circumstances of the statement provide strong assurances of trustworthiness with regard to appropriate factors that include but are not limited to: (A) age and mental condition of the declarant; (B) spontaneity and absence of suggestion; (C) appropriateness of the language and terminology of the statement, given the child's age; (D) lack of motive to fabricate; (E) time interval between the event and the statement, and the reasons therefor; and (F) whether or not the statement was recorded, and the time, circumstances, and method of the recording. If admitted, the statement may be read or, in the event of a recorded statement, broadcast into evidence[.][7]

The rule against hearsay prevents unreliable statements from coming into evidence. However, when factors such as those enumerated in Hawaii's statutory hearsay exception indicate that the statement is reliable, child sexual abuse victims are able to have their statements admitted into evidence without being required to take the witness stand.

This standard of reliability is still applicable when child abuse cases are brought in civil courts as child maltreatment cases.[8] In fact, "[m]any states have . . . enacted 'general child hearsay' exceptions, which permit admission of a child sexual abuse victim's out-of-court statements that the court deems trustworthy".[9] The policy reason behind such an exception is the interest of the child and prevention of causing further trauma by requiring that the child testify on the witness stand.

Possible hearsay exceptions when the declarant is unavailable include the exceptions of former testimony and the residual exception. Under the hearsay exception for former testimony, "[t]estimony that: (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had . . . an opportunity and

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[7] HAW. REV. STAT. ANN. § Rule-804 (LexisNexis, Lexis Advance through Act 263 of the 2016 Reg. Legis. Sess.); *See also* Theodore P. Cross, Children and Family Research Center, University of Illinois at Urbana-Champaign, *How Can We Be Effective in Pursuing Justice in Child Abuse Cases? Lessons from Twenty Years of Research* http://cfrc.illinois.edu/pubs/ pt_20120601_HowCanWeBeEffectiveInPursuingJusticeInChildAbuseCases.pdf (last visited July 27, 2016) (stating that the recorded statement "may not itself be received as an exhibit unless offered by an adverse party.").

[8] ABRAMS ET AL., *supra* note 5, at 225.

[9] *Id.*

similar motive to develop it by direct, cross-, or redirect examination" will "not [be] excluded by the rule against hearsay".[10] The second hearsay exception available when the declarant is unavailable to testify is the residual exception.[11]

Under this exception, "a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception".[12] The conditions for this exception to apply are that:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.[13]

An additional requirement under this exception requires that the prosecution give notice before the trial that the prosecution "inten[ds] to offer the statement . . . so that the [defendant] has a fair opportunity to meet it".[14] The residual exception may be another appropriate vehicle to allow sexual abuse disclosures into evidence because with little to no physical evidence, the child's statement may be the only evidence of the crime.[15]

The hearsay exceptions available when the declarant is unavailable are in addition to the hearsay exceptions that are available regardless of the availability of the declarant. This includes the exceptions for medical diagnosis, then existing state of mind, present sense impression, and excited utterance. A statement made for medical diagnosis or treatment does not have to have been made to a physician. The statement could be made to other medical personnel such as nurses.[16] The statement also does not have to have been made by the injured person. However, fault statements or statements that go to the identity of the defendant must be redacted. A statement for medical diagnosis is one that "(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause".[17] Also, statements for medical diagnosis can be obtained specifically for trial preparation.[18]

A statement of then-existing mental, emotional, or physical condition is also a relevant hearsay exception. The statement can be made to anyone and will concern "the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)"; however, the statement may not include "memory or belief to prove the fact remembered or believed".[19] A hear-

[10] FED. R. EVID. 804(b)(1).
[11] FED. R. EVID. 807.
[12] *Id.* ("not specifically covered by a hearsay exception in Rule 803 or 804").
[13] FED. R. EVID. 807(a).
[14] FED. R. EVID. 807(b).
[15] *See* Robert P. Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 Brook. L. Rev. 411, 426 (2005) [hereinafter Crawford's Impact ("Cases involving child sexual abuse and domestic violence are particularly susceptible to negative consequences [of *Crawford's* holding] because they often critically depend on hearsay to prove the case.").
[16] *See Griner v. State*, 899 A.2d 189 (Md. Ct. Spec. App. 2006).
[17] FED. R. EVID. 803(4).
[18] However, if the purpose in obtaining the statement is trial preparation, this goes to the heart of *Crawford* and would most likely be deemed testimonial and therefore barred from entry into evidence unless the child testifies.
[19] FED. R. EVID. 803(3). (Providing examples for acceptable statements such as "I am going to Crooked Creek." This statement goes to the intent of the declarant. Not acceptable: "Dr. Shephard poisoned me." This

say exception for present sense impression allows "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it" into evidence.[20] The policy behind allowing this type of hearsay in is similar to that of excited utterance in that the declarant has not had time to create a fabrication, and, therefore, the statement maintains a greater degree of reliability. The exception for an excited utterance, like the exception for present sense impression, allows "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused" into evidence.[21] Responses to non-leading questions are acceptable under this exception, and, while the court allows a longer delay for excited utterances than for present sense impression, those made by children are granted an even longer delay.[22]

While present sense impressions and excited utterances would be the most obvious exceptions to allow disclosure statements into evidence, in child sexual abuse cases the report and disclosure of the abuse is delayed and very well may fall outside the allowable window of time for these statements to be characterized as those of a present sense impression or an excited utterance. Statements made for medical diagnosis are another obvious hearsay exception in child abuse cases; however, statements identifying the assailant may be redacted if the statement were to come into evidence—another blow to the prosecution's case.

In civil cases, hearsay is the only hurdle to overcome in admitting out of court statements. If the statement falls into one of the above exceptions, the child need not testify at the trial in order for the statement to be admitted. In criminal cases, however, the prosecution must also get the out of court statement past a confrontation challenge.

### B. Confrontation

In criminal cases, Sixth Amendment concerns may exclude otherwise admissible out of court statements. Even if an out-of-court statement falls within a hearsay exception, it may still be inadmissible on Constitutional grounds, violating the defendant's right to confrontation. Unlike hearsay, this barrier cannot be fixed statutorily. The right to confrontation is a procedural protection guaranteed for the defendant. The standard, which began much like hearsay by only allowing in those statements that had a certain level of reliability, has evolved into its own separate standard.

Before, under *Roberts*, the Supreme Court declared that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his [or her] statement is admissible only if it bears adequate 'indicia of reliability.'"[23] Under the *Roberts* standard, both hearsay and confrontation were satisfied if the statement was sufficiently reliable.

However, now the standard for confrontation is separate from the hearsay standard. While a statement may show sufficient reliability to satisfy the hearsay standard, it must now pass a separate standard for confrontation. Under *Crawford*, certain hearsay statements that are considered testimonial in nature are barred unless two requirements are met: (1) the declar-

is a statement of memory or belief to prove the fact remembered or believed.).

[20] FED. R. EVID. 803(1).

[21] FED. R. EVID. 803(2).

[22] *See, e.g.*, *United States v. Donaldson*, 58 M.J. 477, 484 (C.A.A.F. 2003) (collecting cases) ("courts have been more flexible in cases in which the declarant is young").

[23] *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

ant is unavailable, and (2) the defendant had a prior opportunity for cross examination.[24]

The Court has defined testimonial statements as those given under circumstances that would lead an objective witness to believe that the statement was intended to be used in trial, considering such factors as the existence of an ongoing emergency and the nature of the questioning.

*Crawford* concerned a situation in which a wife did not testify against her husband per a state spousal privilege; however, the state tried to admit her prior statements contradicting Crawford's self-defense argument.[25] Crawford claimed that admitting these statements violated his right to confrontation. The Supreme Court agreed and held that the Confrontation clause required not only that the declarant be unavailable, but also that the defendant had had a prior opportunity for cross-examination, before certain statements (those that are testimonial in nature) could come into evidence.[26] When applied in a criminal case, general hearsay exceptions, such as those discussed in the previous section, may fail to meet the requirements laid out in *Crawford*, violating the defendant's Sixth Amendment, constitutionally protected, right to be confronted with his or her accuser.

Missouri has a hearsay exception explicitly applied to criminal proceedings.[27] Under the statute, the first part of the Crawford test is satisfied because the child either testifies or is "unavailable". However, the second requirement under *Crawford* (that the defendant have an opportunity to cross-examine the declarant) is not. In its first case applying *Crawford*, the Missouri Supreme Court, en banc, held that if the out-of-court statement was testimonial, the defendant was guaranteed the right to cross-examination granted by the Sixth Amendment.[28] The court's decision implies that the Missouri rule leans too far in the way of protecting the child declarant at the cost of the defendant's constitutional right to confrontation.

Hawaii's general hearsay exception maintains this balance of public policy and constitutional rights. Though added prior to *Crawford*, Hawaii's general hearsay exception "was … recommended by the Hawaii Supreme Court in its Final Report of the Committee on Hawaii Rules of Evidence 37-38 (1991)[.][29] . . [T]he bottom-line reliability criterion: '[T]hat the time, content, and circumstances of the statement provide strong assurances of trustworthiness[]' . . .is intended to countenance only those hearsay statements that are 'so

[24] *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.").

[25] *See id.* at 40.

[26] *See id.* at 68

[27] ABRAMS ET AL., *supra* note 5, at 226 (quoting Mo. Rev. Stat. §491.075). ("[A]n otherwise inadmissible statement concerning a sex crime made by a victim under [fourteen] is admissible in a criminal proceeding as substantive evidence to prove the truth of the matter asserted if: "(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and (2)(a) The child testifies at the proceedings; or (b) The child is unavailable as a witness; or (c) The child is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding.") (increased from the age of twelve).

[28] *State v. Justus*, 205 S.W.3d 872, 874 (Mo. 2006).

[29] HAW. REV. STAT. ANN. § Rule-804 (LexisNexis, Lexis Advance through Act 263 of the 2016 Reg. Legis. Sess.) 1993 supplemental commentary to Rule 804. ("What is needed is a hearsay exception that will provide sufficient safeguards to allow for receipt of reliable hearsay statements in cases where child declarants become 'unavailable' through inability to remember or to communicate[.]").

reliable that cross-examination does not appear necessary[.]'"[30] However, Hawaii's rule "does not affect the opponent's right . . . to call and to cross-examine the declarant concerning the subject matter of any statement received . . . ."[31] Therefore, the Hawaii Rules of Evidence balance the policy behind a general hearsay exception with the defendant's right to confrontation.[32]

Not all general hearsay statutes have been tested against the Confrontation Clause. Presumably, states tailored their child sexual abuse hearsay exceptions to the *Roberts* standard of sufficient indicia of reliability. However, criminal defendants have a Constitutional right to be confronted with their accuser, as the Supreme Court explained in *Crawford*. Generally, if the child testifies, testimonial statements are no longer prohibited. This is so because "*Crawford* allows admission of [testimonial] statements if the child testifies at trial and is subject to cross-examination."[33] The New Jersey Supreme Court explained that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements[,]" because "[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."[34]

The Confrontation Clause is also satisfied if there was an opportunity for earlier confrontation should the witness currently be unavailable. This is what Mosteller calls "*past confrontation plus present unavailability* principle."[35] In other words, if the child declarant is, 9071993 currently unavailable, the defendant must have had a prior opportunity to cross-examine the child.[36]

[30] *Id.*

[31] HAW. REV. STAT. ANN. § Rule-804 (LexisNexis, Lexis Advance through Act 263 of the 2016 Reg. Legis. Sess.).

[32] *Id.* (clarifying that The right of cross-examination of an "unavailable" declarant, according to the Hawaii Supreme Court's Final Report of the Committee on Hawaii Rules of Evidence 36 (1991), is inserted to assure opponent's cross-examination of a hearsay declarant who "testifies to a lack of memory" concerning the subject matter of the hearsay statement and thus becomes unavailable under subsection (a)(3) of this rule. HAW. REV. STAT. ANN. § Rule-804 (LexisNexis, Lexis Advance through Act 263 of the 2016 Reg. Legis. Sess.) 1993 supplemental commentary to Rule 804.

[33] Mosteller, Crawford's Impact, *supra* note 15, 412 (2005); see also *People v. Sundling*, 965 N.E.2d 563, 580 (Ill. App. Ct. 2012) ("For purposes of the confrontation clause, because M.D.B. 'appeared' for cross-examination at trial within the meaning of Crawford, any of his prior statements offered at trial was a constitutional nonevent."); *State v. Williams*, 400 S.W.3d 904, 907 (Mo. Ct. App. 2013) (holding that when a victim testified at trial and was available for cross-examination regarding both her in court testimony and questions about her testimony contained in Exhibit 1, the previously videotaped statement of Victim at the Child Advocacy Center. Consequently, the admission of State's Exhibit 1 did not violate Defendant's rights under the Confrontation Clause).

[34] *State v. Buda*, 949 A.2d 761, 775 (N.J. 2008) (quoting *Crawford*, 541 U.S. at 59 n.9).

[35] Mosteller, Crawford's Impact, *supra* note 15, at 415 (arguing that "when a prior statement produced ex parte by government agents is offered from an available declarant under the principle that subsequent cross-examination justifies admissibility, the definition of what constitutes an adequate opportunity to cross-examine should be rigorously enforced."); Robert P. Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 762 (1993) [hereinafter Remaking Confrontation].

[36] Though beyond the scope of this paper, it should be noted here that some rebuttals to a Confrontation violation come in the form of a forfeiture by wrongdoing argument. In other words, "'one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.' [However, c]ourts have not determined whether a maltreatment perpetrator similarly forfeits the right to confrontation where he [or she] selected a victim who is likely too young to testify at trial". ABRAMS ET AL., *supra* note 5, at 235 (quoting *Davis v. Washington*, 547 U.S. 813, 833 (2006)); *see also* Jennifer Long, John Wilkinson & Julie Kays, *10 Strategies for Prosecuting Child Sexual Abuse at the Hands of a Family Member*, STRATEGIES, Sept. 2011, http://www.aequitas-resource.org/ 10_Strategies_for_Prosecuting_Child_Sexual_Abuse_at_the_Hands_of_a_Family_Member.pdf

As the U.S. Supreme Court held, if a statement is testimonial, the defendant has a right to be confronted with the declarant. Therefore, there will only be a confrontation issue in a criminal proceeding if the statement that the prosecution tries to admit is testimonial. If the statement is deemed to be testimonial in nature, even though the declarant is unavailable and the statement was admissible under a hearsay exception, the second *Crawford* requirement (that the defendant have a prior opportunity for cross examination) will need to be cleared. If the child has previously testified at a deposition in which the defendant's counsel had an opportunity to cross examine the child, then *Crawford* is satisfied and the statement can come in without the declarant even if the statement is deemed to be testimonial.

*1. "Unavailable" on the stand*

The circumstances in which the defendant's confrontation right has been satisfied are not always clear.[37] *Crawford* only requires an opportunity for cross-examination.[38] For instance, the defendant's right has been satisfied if he or she has the opportunity to cross examine the child declarant at a video recorded deposition or similar procedure.[39] Even if during this prior opportunity the child "witness is unresponsive or answers most questions with 'I don't know' or 'I don't recall', the right to confrontation has been satisfied."[40] However, some courts have added a requirement that the defendant have an opportunity for *effective* cross-examination.[41]

For example, in Pennsylvania, a trial court determined that the child, three-years-old at the time and four-years-old at trial, did testify and, therefore, allowed a testimonial video taped interview into evidence. However, the Supreme Court of Pennsylvania, taking a more narrow view of *Crawford*, held that the defendant did not have an opportunity for effective cross-examination and that due to "A.D.'s inability to speak and physical recoiling . . . the juvenile, 672-80, 1209-1216 court improperly deemed A.D. to have been available for cross-examination".[42] Thus, in Pennsylvania, mere presence on the witness stand is not enough to satisfy *Crawford*. Under Pennsylvania's theory, a child who is physically available may be unavailable for the purpose of confrontation.[43] The Federal Rules of Evidence lay out criteria

[37] *See In re Brandon P.*, 992 N.E.2d 651, 664-67 (Ill. App. 2013) ("Despite M.J.'s apparent unwillingness or inability to testify on direct examination about these events, M.J. 'appeared' for cross-examination at trial within the meaning of the confrontation clause . . . because defense counsel could have cross-examined her but chose not to do so."); *see also* State v. Painter, No. COA04-896, 2005 N.C. App. LEXIS 2000, at *1 (Ct. App. Sep. 20, 2005) (holding "that the child satisfied *Crawford* and the Sixth Amendment by testifying and being subject to cross-examination" despite the child's memory loss.).

[38] *See* Mosteller, Crawford's Impact, *supra* note 15, at 413. ("[T]he Confrontation Clause is still satisfied by an uninhibited *opportunity* to cross-examine".) (emphasis added) ("The Clause is not satisfied by the prosecution simply making the witness available at a prior hearing or calling the witness to testify at a pretrial hearing that has no consequences other than to render the testimony admissible if the witness later becomes unavailable.").

[39] *See State v. Griffin*, 202 S.W.3d 670, 672-80 (Mo. Ct. App. 2006).

[40] ABRAMS ET AL., *supra* note 5, at 232 (citing *Pantano v. State*, 138 P.3d 477 (Nev. 2006)); Mosteller, Crawford's Impact, *supra* note 15, at 419. (reading in an additional requirement of "public accusation" in order for these prior statements to satisfy *Crawford*. "To be sufficient, what occurred at that prior proceeding must itself meet this model of both public accusation and cross-examination.").

[41] *See In re N.C.*, 105 A.3d 1199, 1209-1216 (Pa. 2014).

[42] *In re N.C.*, 105 A.3d 1199, 1216— 17 (Pa. 2014).

[43] *See* Mosteller, Crawford's Impact, *supra* note 15; *see also People v. Kennebrew*, 13 N.E.3d 808, 819 (Ill. App. 2014) ("Generally, if a witness physically appears, takes the stand under oath, and willingly answers counsel's questions, that witness is 'available' for cross-examination for purposes of the confrontation clause.").

that the judge must use to decide whether the child declarant is unavailable as a witness:

> A declarant is considered to be unavailable as a witness if the declarant: (1) is exempted from testifying about the subject matter of the declarant statement because the court rules that a privilege applies; (2) refuses to testify about the subject matter despite a court order to do so; (3) testifies to not remembering the subject matter; (4) cannot be present to testify at the trial or hearing because of death or then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6)[44]; or (B) the declarant attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).[45]

The pertinent part of these criteria is the portion in which the declarant testifies to not remembering the subject matter. The Federal Rules provide that if the child declarant testifies to— not remembering the subject matter, the child "is considered to be unavailable as a witness".[46] If the defendant did not have a prior opportunity to cross-examine the child declarant, and the child is deemed to be an unavailable witness because the child testifies that he or she does not remember the abuse, any testimonial statements that the prosecution could have admitted at trial will be barred.

Whether intentional or not, FRE 804(a) may be used as a sword or a shield. The prosecution may want to utilize the hearsay exception for former testimony,[47] in which case the child must be unavailable as a witness in order for the hearsay exception for former testimony to apply. However, if in establishing that the child declarant is unavailable because he or she testifies to not remembering the subject matter, the defense can object to the competency[48] of the child witness and, if the court agrees, essentially prohibit the prosecution from admitting any testimonial statements that the defense has not had an opportunity to cross-examine.

The general rule is that "[e]very person is competent to be a witness"[49] including child sexual abuse victims.[50] However, "[t]he court should exercise reasonable control over the mode and order of examining witnesses . . . so as to[ ] protect witnesses from harassment or undue embarrassment."[51] In Ohio, "children younger than 10 years old are incompetent to testify if (a)they are incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relat-

[44] FED. R. EVID. 804(b)(1) is the exception for former testimony and 804(b)(6) is the exception for a statement offered against a party that wrongfully caused the declarant's unavailability.

[45] FED. R. EVID. 804(a); 804(b)(2) is the exception for a statement under the belief of imminent death, otherwise known as a dying declaration, 804(b)(3) is the exception for a statement against interest, and 804(b)(4) is the exception for a statement of personal or family history.

[46] FED. R. EVID. 804(a).

[47] Mosteller, Crawford's Impact, *supra* note 15, at 418-19 (suggesting "[i]n those cases where the witness repudiates her accusation, that denial . . . tends to damage the prosecution's case. Thus, . . . the prosecution suffers the harm of presenting a witness who exculpates the defendant and thereby damages the government's case".).

[48] Personal knowledge of the subject matter is necessary to be a competent witness according to the Federal Rules of Evidence. FED. R. EVID. 602. Need for Personal Knowledge

[49] FED. R. EVID. 601. Competency to Testify in General.

[50] ABRAMS ET AL., *supra* note 5, at 235-36 ("In many states . . . child sexual abuse victims of any age are competent as a matter of law to testify about the abuse. Victims as young as three have testified.").

[51] FED. R. EVID. 611(a)(3). Mode and Order of Examining Witnesses and Presenting Evidence.

ing them truly.'"[52] If the child is not competent to testify, then testimonial statements are inadmissible unless the defendant had a prior opportunity for cross-examination.[53]

Most cases that are taken to trial by the prosecution are cases in which the child will testify.[54] However, "[i]n their study of criminal trials, Goodman and colleagues found that children's greatest fear was of seeing the defendant in court."[55] The study, which included four-to eight-year-olds, found that even with "efforts to make the experiment as comfortable as possible for the children, 25% of the children 'refused to testify, either by outright refusal or by appearing distressed so that the [research assistant] judged that the child should not continue'Therefore".[56] Therefore, it is likely that even with preparation, the child declarant may not be deemed available for purposes of satisfying the Confrontation Clause, preventing the entry of statements considered testimonial. The result is greater emphasis on and scrutiny of the circumstances under which the child made his or her statement, including such factors as the existence of an ongoing emergency.

*2. Ongoing emergency*

at 1220 The Confrontation Clause is only triggered if the statement being admitted is testimonial. The most general definition of a testimonial statement is a statement made "at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[57] This initial definition of testimonial was vague. The Court offered greater guidance in a line of cases following *Crawford*. In *Davis v. Washington*, the Supreme Court further narrowed its definition of testimonial:

> [O]ut-of-court statements (1) are non-testimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," but (2) are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[58]

*Davis* provided one example of a statement made during the course of an ongoing emergency. The Court held that a statement made during a 911 call is a statement made during the course of an ongoing emergency.[59] The policy behind the non-testimonial nature of statements made during an emergency:

> is not unlike [the logic] justifying the excited utterance exception in hearsay law. Statements "relating to a startling event or condition made while the

[52] *Ohio v. Clark*, 135 S. Ct. 2173, 2178 (2015) (quoting OHIO R. EVID. 601(A) (Lexis 2010)) (Scalia concurrence) ("[t]he inconsistency of [the child's] answers . . . ma[d]e him incompetent to testify.").

[53] *Clark* , *supra* note 52 (providing an example of a child who was unavailable to testify per the Ohio governing statute).

[54] *See* Thomas D. Lyon and Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. OF CRIM. L. AND CRIMINOLOGY 1181, 1219 (2012) http://www.ncbi.nlm.nih.gov/pmc/articles/ PMC4212261/.

[55] *Id.* (citing Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC. RES. CHILD DEV. 1, v (1992));

[56] *Id.* at 1220 (quoting Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 L. & HUM. BEHAV. 165, 179 (1998)).

[57] *People v. Vigil*, 127 P.3d 916, 921 (Colo. 2006) (citing *Crawford*, 541 U.S. at 51).

[58] ABRAMS ET AL., *supra* note 5, at 232 (citing *Davis v. Washington*, 547 U.S. 813, 813 (2006) and its companion case *Hammon v. Indiana*, 547 U.S. 813 (2006)).

[59] *Davis*, 547 U.S. at 822.

> declarant was under the stress of excitement caused by the event or condition," are cannot form a falsehood.[60]

However, "whether an emergency exists and is ongoing is a highly context-dependent inquiry".[61] Based on *Davis* it would seem that to answer the question of whether an ongoing emergency exists, the Court must apply a totality of the circumstances test.

*3. Mandatory reporters*

The standard laid out since *Crawford* was put to the test in a child abuse case, *Ohio v. Clark*. The pertinent facts of that case are as follows: After noticing marks on the child's body, a preschool teacher asked the child what happened to him and who had done it. The child "said something like, Dee, Dee."[62] After bringing the marks to the attention of the teacher's supervisor, the supervisor "called a child abuse hotline to alert authorities about the suspected abuse."[63]

Because Ohio has a mandatory reporting statute under which the teacher was required to report the suspected abuse to law enforcement, the defendant, Clark, argued that the teacher was acting as an agent of law enforcement, and, therefore, the child's statements to her were testimonial. When the child was deemed incompetent to testify at trial as per Ohio's child competency statute, Clark argued that admission of the testimonial statement violated his right to confrontation.[64]

Ohio, like many states, has a child competency statute. Ohio's statute deems "children younger than 10 years old . . . incompetent to testify if they 'appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating 342 (2013). them truly."[65]. Similar to the Missouri general hearsay statute, discussed above, Ohio allowed the child's statement of abuse in because there were sufficient indicia of reliability. The Supreme Court of Ohio ruled that allowing the statement in violated the defendant's right to confrontation because "no ongoing emergency existed . . . . Rather, his teachers acted to fulfill their duties to report abuse. . . . At a minimum, when questioning a child about suspected abuse in furtherance of a duty pursuant to O.R.C. 2151.421,[66] a teacher acts in a dual capacity as both an instructor and as an agent of the state for law-enforcement purposes."[67]

In *Clark*, the Ohio Supreme Court reasoned that because of Ohio's mandatory reporting statute, the teacher who questioned the child was acting as an agent of law enforcement, making the child's statement testimonial.[68] Mandatory reporting statutes are motivated by the welfare of the child.[69] In Hawaii, mandatory reporters are identified by statute and include:

[60] *Michigan v. Bryant*, 562 U.S. 344, 361 (2011) (quoting FED. R. EVID. 803(2)); see also MICH. R. EVID. 803(2).
[61] *Id.* at 363.
[62] *State v. Clark*, 2013-Ohio-4731, 137 Ohio St. 3d 346, 342 (2013).
[63] *Ohio v. Clark*, 135 S. Ct. 2173, 2178 (2015).
[64] *Id.*
[65] *Id.* (quoting OHIO R. EVID. 601(A) (Lexis 2010)).
[66] Ohio's mandatory reporting statute
[67] *State v. Clark*, 2013-Ohio-4731, 137 Ohio St. 3d 346, 999 N.E.2d 592.
[68] *Clark*, 135 S.Ct. 2173, 2178 (2015).
[69] *See*, e.g., HAW. REV. STAT. ANN. § 350-1.1 (Thomson Reuters, West through Act 229 of the 2016 Reg. Sess.) (The purpose of this measure is to require staff members of public or private schools, agencies, or institutions who, in their professional capacity, have reason to believe that child abuse or neglect has occurred, or that there is a substantial risk that a child may be abused or neglected in the foreseeable future, to immediately report the abuse or neglect to the Department of Human Services. This measure will ensure timely reporting and investigation of suspicions of child abuse and neglect

> (1) Any licensed or registered professionals of the healing art and any health-related occupation who examines, attends, treats, or provides other professional or specialized services including, but not limited to, physicians, including physicians in training, psychologists, dentists, nurses, osteopathic physicians and surgeons, optometrists, chiropractors, podiatrists, pharmacists and other health-related professionals; (2) [e]mployees or officers of any public or private school; (3) [e]mployees or officers of any public or private agency or institution, or other individuals, providing social, medical hospital, or mental health services, including financial assistance; (4) [e]mployees or officers of any law enforcement agency, including, but not limited to, the courts, police departments, correctional institutions, and parole or probation offices; (5) [i]ndividual providers of child care, or employees or officers of any licensed or registered child care facility, foster home or similar institution; (6) [m]edical examiners or coroners; and (7) [e]mployees of any public or private agency providing recreational or sports activities.[70]

In Hawaii, the number of mandatory reporters have various capacities which supports the purpose of the mandatory reporting statute: to ensure a quick response to suspected child abuse. However, given the various roles of mandatory reporters, it may be ineffective to treat all reporters the same under the law.

In the state of Hawaii, the above listed mandatory reporters will be guilty of a petty misdemeanor if the person or entity "knowingly fails to report an incident involving child abuse. . . or who knowingly fails to provide additional information, or who prevent another person from reporting such an incident".[71] An additional requirement of mandated reporters is that he or she "allow the Child Welfare Services [CWS] investigator to interview the child victim *without the parents or caretakers present*".[72] The next step in the process will be for a social worker to investigate the claim of abuse. If the social worker feels that "legal intervention is necessary as a means of helping the child . . . , a petition will be prepared and filed in Family Court . . . .[73] However, "CWS forwards all reports to the police and the police determine whether they will conduct a criminal investigation".[74]

A timely response is a reasonable measure to secure the immediate safety of the child, and establishing mandatory reporters furthers this purpose. In *Clark*, the Supreme Court of the United States determined that "[the child's] statements occurred in the context of an ongoing emergency involving suspected child abuse."[75] The Court went on to explain:

> When L.P.'s teachers noticed his injuries, they rightly became worried that

by requiring mandatory reporters to report directly to the Department of Human Services rather than to a person in charge or a designated delegate.).

[70] HAW. REV. STAT. ANN. § 350-1.1 (Thomson Reuters, West through Act 229 of the 2016 Reg. Sess.); *see also* DEP'T OF HUMAN SERVS., CHILD WELFARE SERVS., A Guide for Mandatory Reporters, 2-3 [hereinafter Mandatory Reporters Guide].

[71] Mandatory Reporters Guide, *supra* note 70, at 3.

[72] *Id.* at 4. *See also* STATE OF HAWAII, DEP'T OF HUMAN SERVS., A Guide to Child Welfare Services 5 (2015) [hereinafter Child Welfare Guide]; HAW. REV. STAT. ANN. § 587A-11(2) (LexisNexis, Lexis Advance through Act 263 of the 2016 Reg. Legis. Sess.) (emphasis added).

[73] Mandatory Reporters Guide, *supra* note 70, at 5. Family Court is a civil proceeding and, therefore, will not raise Confrontation Clause issues.

[74] Child Welfare Guide, *supra* note 72, at 6.

[75] *Ohio v. Clark*, 135 S.Ct. 2173, 2181 (2015).

> the 3– year–old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day, they needed to determine who might be abusing the child. Thus, the immediate concern was to protect a vulnerable child who needed help.[76]

Statements made in this context are not testimonial because statements made during ongoing emergencies are not testimonial in nature.

In *State v. Buda*, another child abuse case, a mother rushed her three-year-old son to the local emergency room because of physical injuries that she saw on the back of his neck after the child had been in the care of her boyfriend with whom she and her son lived. Because the medical professionals assessing N.M. concluded that N.M. exhibited signs of abuse, they contacted DYFS's [Division of Youth and Family Services] Office of Child Abuse Control, and a member of its Special Response Unit, Miriam Nurudeen, promptly responded. After speaking with an investigator from the County Prosecutor's Office who, also having responded to a call, was already at the hospital, as well as the examining physician, Nurudeen interviewed N.M.[77] The statements made by the child to the Special Response Unit representative were deemed non-testimonial because the DYFS worker was responding to an ongoing emergency.[78] The court then went on to assess the roll and purpose of the Division of Youth and Family Services.

The role of DYFS in New Jersey appears to be assessing the immediate safety of the child. By law, DYFS must report suspected child abuse to the county prosecutor.[79] In New Jersey:

> " . . . DYFS, the civil authority, must provide information about suspected abuse and neglect to the county prosecutor, the criminal authority[,]" and . . . "[b]y regulation, the prosecutor is required to consult with DYFS about whether a criminal investigation is necessary and to inform DYFS when a decision is made to initiate criminal proceedings."[80]

However, the DYFS representative, working in his or her normal capacity will "not [be] collecting information about past events for prosecutorial purposes, but gathering data in order to assure a child's future well-being."[81] New Jersey places emphasis on the role of the individual interviewer as well as the purpose of the interview in analyzing the testimonial nature of the child's statement. This reinforces that mandatory reporter status alone is not dispositive.

DYFS shares the same roll and purpose as Hawaii's Child Welfare Service (CWS) and the Children's Justice Center as they work in conjunction with the Hawaii's Child Welfare Service (CWS) and the Children's Justice Center as they work in conjunction with the Hawaii Police Department: assessing the immediate safety of the child.[82] Like the law that requires DYFS to report suspected child abuse to the county prosecutor, Hawaii has a

[76] *Id.*

[77] *State v. Buda*, 949 A.2d 761, 766 (N.J. 2008).

[78] *Buda*, 949 A.2d at 778. (stating that DYFS worker was responding to a life-threatening emergency no different in kind than the function being performed by the 911 operator in *Davis*; she was seeking information from a victim to determine how best to remove the very real threat of continued bodily harm and even death from this three-year-old child).

[79] N.J. STAT. § 9:6-8.36a (LexisNexis, Lexis Advance through New Jersey 217th First Annual Session, L. 2016, c. 14).

[80] *Buda*, 949 A.2d at 779 (quoting *State v. P.Z.*, 703 A.2d 901, 917 (N.J. 1997) (alterations in original)).

[81] *Buda*, 949 A.2d at 780.

[82] Interview with Jasmine M. Mau-Mukai, Director, Hawaii State Chapter of Children's Justice Centers, in Honolulu, Haw. (Apr. 5, 2016).

similar cross-reporting law.[83] At issue is at what point in the process, the purpose moves from the protection of the child to the prosecution of a crime. After all, mandatory reporters are required to report to the Department of Human Services, CWS or the police.[84] And, even if the report is made to CWS, all CWS reports are forwarded to the police department anyway.[85] Under New Jersey's interpretation, however, Child Welfare Services and the Children's Justice Center will not be deemed agents of law enforcement singly based on the fact that these agencies are required to report suspected abuse to the police department.

The Supreme Court of the United States in *Clark* indicated that "[m]andatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." [86]

*4. Nature of the questioning*

In applying the totality of the circumstances test, to determine the testimonial nature of the statement, the Court instructed that the analysis be objective. In *Crawford*, the Court adopted a standard, albeit a vague one, by which statements would be deemed testimonial: Would "an objective witness reasonably . . . believe that the statement would be available for use at a later trial"?[87] *Michigan v. Bryant* further defined this objective witness standard by evaluating the primary purpose of the interrogation, recognizing the ongoing emergency test in *Davis* as just one factor to consider.[88] In *Bryant*, the Court addressed the formality of the interrogation as being another factor indicating the presence of an ongoing emergency. The Court stated that "formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later criminal prosecution.'[However,] informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent."[89]

According to the line of cases following *Crawford*, the primary purpose test was analyzed from the perspective of an objective witness. However, in *Clark*, the Court stated that*Id.* "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause."[90] In his concurrence, Justice Scalia went so far as to say that young children are incapable of forming the requisite purpose of creating a substitute for in-court testimony.[91] Supporting this position, an Amicus brief submitted by the American Professional Society on the Abuse of Children stated that "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution."[92] If this dicta were incorporated into the analysis for child sexual abuse cases, no statement made by a child would be considered testimonial.

[83] *See* HAW. REV. STAT. ANN. § 350-2.
[84] Mandatory Reporters Guide, *supra* note 70, at 5.
[85] Child Welfare Guide, *supra* note 72, at 6.
[86] *Ohio v. Clark*, 135 S. Ct. 2173, 2183 (2015).
[87] *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (quoting Brief for Nat'l Ass'n of Criminal Def. Lawyers et al. as Amici Curiae 3 Supporting Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)).
[88] *Michigan v. Bryant*, 562 U.S. 344, 366 (2011) ("As *Davis* made clear, whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation.").
[89] *Id.* (quoting *Davis*, 547 U.S. at 822).
[90] *Clark*, 135 S. Ct. at 2182.
[91] *Id.* at 2184 (Scalia, J concurring) ("His age refutes the notion that he is capable of forming such a purpose.").
[92] *Clark*, 135 S. Ct. at 2182 (quoting Am. Prof'l Soc'y on the Abuse of Children as Amicus Curiae 7, and n. 5 (collecting sources), *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (No. 13-1352).

The dicta indicating that children do not understand the legal system and are incapable of forming the purpose of creating a substitute for in-court testimony leaves unanswered questions. Some of the subsequent issues include whether there is a cut-off age of the child, whether the standard of assessing the primary purpose of the child's conversation would be that of a reasonable child in similar circumstances, how differing developmental stages of children comes into play, and whether the objective witness is to presume that no child could possibly intend to create out-of-court testimony. In *State v. Snowden*, a pre-*Clark* case, the Maryland Court of Appeals "held that 'an objective test, using an objective person, rather than an objective child of that age, is the appropriate test for determining whether a statement is testimonial inn. nature.'"[93] But, in *Clark*, the Court went on to say that even if the primary purpose test is satisfied, this is not completely determinative. Statements that "would have been admissible in a criminal case at the time of the founding" are not prohibited by the Confrontation Clause.[94]

### *5. Interest of the child*

On the other end of the spectrum, courts have treated certain communications as non-testimonial based on the questioner's concern for the interest of the child.[95] For example, in *Herra-Vega v. State*, a Florida case, the court found that a "three-year-old's statements to her mother and father reporting a touching" were not testimonial.[96] This is most likely due to the "intimate nature of the parent-child relationship".[97] Similarly, *Pantano v. State*, a Nevada case, expanded further on this public policy stating that "[a] parent questioning his or her child regarding possible sexual abuse is inquiring into the health, safety, and well-being of the child."[98] In that case the court also addressed the negative consequences to the parent-child relationship that would result if "such parental questioning [were characterized] as the gatheringbrams 483. of evidence for purposes of litigation".[99] To leave the parent-child relationship unhindered, the courts refrain from classifying those communications as testimonial.

Similarly, statements made to others such as friends have been held to be non-testimonial. For instance, the California Supreme Court held that a "12-year-old . . . victim's statement to a friend at school that the defendant stepfather had been fondling her for some time and she intended to confront him" was non-testimonial.[100] When statements are made to physicians or other medical personnel for

[93] Deborah Paruch, *Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children's Hearsay Statements Before and After Michigan v. Bryant*, TOURO L. R. 85, 122 (2012) http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi? article=1137&context=lawreview (quoting *State v Snowden*, 867 A.2d 314, 329 (Md. 2005); *see also* Joan S. Meier, Response, Ohio v. Clark, GEO. WASH. L. REV. DOCKET (June 22, 2015), http://www.gwlr.org/ohio-v-clark/ (suggesting that "many state courts have been more protective of the confrontation right in cases involving children than a majority of the high Court believes is constitutionally required").

[94] *Clark*, 135 S. Ct. at 2180.

[95] *See Clark*, 135 S. Ct. at 2181 ("statements to individuals who are not law enforcement officers. . .are much less likely to be testimonial than statements to law enforcement officers").

[96] Abrams BRAMS ET AL., *supra* note 5, at 233 (citing *Herrera-Vega v. State*, 888 So.2d 66, 69 (Fla. Dist. Ct. App. 2004).

[97] *Id.*

[98] *Id.* (quoting *Pantano v. State*, 138 P.3d 477, 483 (Nev. 2006); *Pantano*, 138 P.3d at 483 (noting that although the statements made to a detective may have been classified as testimonial, because the child testified, the defense had an opportunity to cross-examine, satisfying *Crawford's* requirement.).

[99] *Id.*

[100] ABRAMS ET AL., *supra* note 5, at 233 (citing *People v. Griffin*, 93 P.3d 344 (Cal. 2004)).

the purpose of providing medical treatment, courts generally characterize these statements as non-testimonial.[101] Again, the courts seem reluctant to interfere in the communications between doctors and patients.

In some cases, courts have determined that statements made to representatives of children assessment centers are also non-testimonial. Statements made by a two-year-old "to a non-government employee of Children's Assessment Center about sexual assault by the defendant" was determined by the Michigan Court of Appeals to be non-testimonial, presumably because the employee was not a representative of the government and there was no other police involvement at that time.[102]

However, in other cases statements made to child protective service employees were deemed testimonial. In *State v. Snowden*, the Maryland Supreme Court held that a "child sexual abuse victim's statement to [a] child protective services investigator" was testimonial in nature.[103] Based on the objective witness test that the Supreme Court of the United States laid out in *Davis* and *Bryant*, "'[i]nvolvement of government officers in the production of testimony with an eye toward trial' . . . would . . . 'lead an objective witness reasonably to believe that the statement would be available for use at a later trial'".[104] However, the courts have not addressed whether the government employee requires an eye toward trial for the objective witness to believe it would be used in a later trial. More than likely, the employee's purpose at a child abuse assessment center is ascertaining the immediate safety of the child. "[T]o protect a vulnerable child who need[s] help" would be the immediate purpose in the initial interviews and examinations conducted in a child abuse case.[105] *Clark* suggests that "statements to non-police, statements by young children and statements elicited based on safety concerns are not testimonial under *Crawford*".[106]

### C. Balancing Interests

If ultimately the prior testimony cannot be admitted, the interests of the child and the defendant should be balanced. The unique nature of child sexual abuse may account for the low prosecution rates. The victims of the abuse often feel ashamed[107] and will likely experience peculiar after-effects such as secrecy, helplessness, entrapment and accommodation, which can lead to delayed, conflicted, and unconvincing disclosures.[108] Child victims of sexual abuse commonly react by accepting the abuse.[109] Even when a child discloses the sexual abuse, theybrams very well may retract the statement.[110] The psychological state of the

[101] *See State v. Vaught*, 682 N.W.2d 284 (Neb. 2004) (statement made to a physician); *State v. Scacchetti*, 690 N.W.2d 393 (Minn. Ct. App. 2005) (statement made to a nurse practitioner). *See also* Paul W. Grimm, Jerome E. Deise, and John R. Grimm, *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions are Testimonial?*, 40 U. Balt. L.F. 155, 162-63 (2010) (citing *Griner v. State*, 22 So. 3d 79 (Fla. Dist. Ct. App. 2009)) (statement made to a nurse).

[102] ABRAMS ET AL., *supra* note 5, at 233 (citing *People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004)).

[103] *Id.* at 234 (citing *State v. Snowden*, 867 A.2d 314 (Md. 2005)).

[104] *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)).

[105] *Ohio v. Clark*, 135 S.Ct. 2173, 2181 (2015).

[106] Anne R. Traum, *Confrontation After Ohio v. Clark*, NEV. LAW., Oct. 2015, at 20, http:// nvbar.org/articles/sites/default/files/NevadaLawyer_Octt2015_ConfrontationAfterOhio.pdf.

[107] Abrams ET AL., *supra* note 5, at 224.

[108] *Id.* at 239-40 (identifying the symptoms of Child Sexual Abuse Accommodation Syndrome).

[109] *Id.* at 240.

[110] *Id.* (quoting *State v. J.Q.*, 617 A.2d 1196 (N.J. 1993) ("Whatever a child says about sexual abuse, she is likely to reverse it.")).

child when disclosing his or her abuse, leaves him or her vulnerable to misunderstanding and accusations of fabrication.[111] The peculiar, confusing, and possibly unconvincing nature of the child's disclosure can be explained; however, the nature of the crime makes prosecution difficult.[112]

The nature of child sexual abuse is such that the crime typically occurs when the offender is alone with his or her victim.[113] Therefore, the child victim may experience fear of retribution from his or her offender should he or she disclose the abuse.[114] This is especially true if the child's abuser is older or has authority over the child.[115] Generally, in child sexual abuse cases, there is little to no direct physical evidence of the crime.[116] Consequently, more weight is placed on the child's disclosure.[117] At the same time, little physical evidence leaves the child open to "claim[s] that the child fabricated the story or suffers memory lapse."[118] And, "more than a third of suspected victims do not report abuse when formally interviewed in forensic contexts, even when there is clear evidence that they were in fact abused." [119]

According to Mosteller:

> [T]he child's out-of-court statements are sometimes the only, and often the most important, evidence available to prove sexual abuse. Adults typically sexually molest children outside the presence of uninvolved witnesses; the perpetrators are usually relatives or others with access to the child in isolated settings; frequently physical evidence will be inconclusive or entirely unavailable; and many times the child will be unable or unwilling to testify at trial for a myriad of reasons related to age, capacity, guilt, and fear. . . . [I]n-court testimony by a child may produce emotional and psychological trauma that in some instances will be long-lasting.[120]

[111] See *Id.* at 224.

[112] Mosteller, Remaking Confrontation, *supra* note 35 at 692 (" . . . proof in child cases is often problematic. Children frequently have difficulty testifying effectively as a result of their different and somewhat limited abilities to remember, conceptualize, and communicate, and because of fear and the obstacles presented by the courtroom setting.").

[113] *See* ABRAMS ET AL., *supra* note 5, at 224.

[114] *Id.*

[115] *Id.*

[116] *Id.*; *see* Natalie Shure, *Why Young Sexual Assault Victims Tell Incoherent Stories*, THE ATLANTIC, (Feb. 5, 2014) http://www.theatlantic.com/national/archive/2014/02/why-young-sexual-assault-victims-tell-incoherent-stories/283613/ ("The very secrecy that makes the truth 'unknowable' is an instrument of the crime. With no witnesses or credible legal evidence, the 'he said/she said' conundrum prevails. The assailant knows this, and he can use it to his advantage."); *See also 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.").

[117] *See* THE ATLANTIC, *supra* note 116; *See also* Mosteller, Crawford's Impact, *supra* note 15, at 426 ("Cases involving child sexual abuse . . . often critically depend on hearsay to prove the case.").

[118] ABRAMS ET AL., *supra* note 5, at 239.

[119] Michael E. Lamb et al., *Structured Forensic Interview Protocols Improve the Quality and Informativeness of Investigative Interviews with Children: A review of research using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE & NEGLECT 1201 (2007)(quoting I. Hershkowitz, D. Horowitz, M.E. Lamb, *Trends in Children's Disclosure of Abuse in Israel: A National Study*, 29 CHILD ABUSE & NEGL. 1203 (2005); I. Hershkowitz, D. Horowitz, M.E. Lamb, *Individual and Family Variables Associated with Disclosure and Non-disclosure of Child Abuse in Israel*, CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 65-75 (Pipe at al. eds., 2007); I. Hershkowitz et al., *Dynamics of Forensic Interviews with Suspected Abuse Victims Who Do Not Disclose Abuse*, 30 CHILD ABUSE & NEGLECT. 753 (2006)).

[120] Mosteller, Remaking Confrontation, *supra* note 35 at 692 (citing *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (there is a "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court")).

Therefore, the child may experience trauma from the abuse in addition to trauma from testifying about the abuse.

If the child is available and competent, the court, depending on the requisite evidentiary rules, may use its discretion to determine if testifying will cause undue trauma to the child.[121] If it has been previously determined that the child is available and competent to testify, and there is no finding that testifying will cause undue trauma to the child, the prosecution must find a hearsay exception that is applicable. However, there are some optional measures that courts may use in the interest of providing additional protections for the child. The Arizona Victim's Rights Implementation Act constitutionally allows a parent to be present with a child testifying at trial,[122] "even if the parent would otherwise be subject to exclusion from the courtroom as a potential future witness."[123] Even without this state constitutional protection, other "[c]ourts ordinarily permit young sex abuse victims to be accompanied while testifying by parents, relatives, friends, guardians *ad litem*, clergy or other adults."[124] Trial courts may also "determine on a case-by-case basis whether [closing the courtroom] is necessary to protect the victim. . ..weigh[ing] . . . the victim's age, psychological maturity and understanding; the nature of the crime; the victim's desires; and the interests of parents and relatives."[125]

If the judge determined that the child will experience undue trauma by testifying, the court has the discretion to alter the mode of testimony, using such techniques as testifying via telecommunications. Some states have statutes in place that allow for alternative modes of testifying that fulfill the defendant's right to confrontation without exposing the child to excessive trauma. In those cases the court may utilize the alternative mode of testifying if the requirements, proving undue trauma, are satisfied.[126] For example, the Child Victims'and Child Witness' Protection Act of 1990, 18 U.S.C.A §3509:

> [A]uthorizes the court to permit . . . children [who are victims of sexual abuse] to testify by two-way closed-circuit television where expert testimony provides basis for a case-specific determination that the prospective witness would suffer substantial fear or trauma and be unable to testify or communicate reasonably because of the defendant's physical presence, and not merely because of general fear of the courtroom.[127]

[121] *See* Mosteller, Remaking Confrontation, *supra* note 35 at 699 ("[T]he rules typically require that the child either testify or be found unavailable . . .The first alternative—that the child testify—may be satisfied by videotaped testimony of the child conducted with cross-examination by defense counsel but outside the physical presence of the defendant. The second alternative . . .recognizes unavailability based on trauma.").

[122] *See State v. Uriarte*, 981 P.2d 575, 579 (Ariz. Ct. App. 1998).

[123] ABRAMS ET AL., *supra* note 5, at 236.

[124] *Id.* at 236-37 (discussing *State v. Alidani*, 609 N.W.2d 152 (S.D. 2000) in which "the trial court permitted the victim-assistant to sit beside the eight-year-old victim and hold her hand during testimony"). However, the judge himself or herself cannot personally assist a testifying child witness. *See People v. Rogers*, 800 P.2d 1327 (Colo. Ct. App. 1990) (holding that the trial judge's conduct of personally accompanying the child to the witness stand violated the defendant's right to a fair trial.).

[125] *Id.* at 239.

[126] *See* MIL. R. EVID. 611(d). Remote live testimony of a child. ("(1) In a case involving domestic violence or the abuse of a child, the military judge *must*, subject to the requirements of subdivision (d)(3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. [Rules for Courts Martial] 914A") (emphasis added) http:// armypubs.army.mil/epubs/pdf/mre2012.pdf. ("(2) Definitions. As used in this rule: (A) 'Child' means a person who is under the age of 16 at the time of his or her testimony.").

[127] ABRAMS ET AL., *supra* note 5, at 230-31.

This statute has been included in the Military Rules of Evidence. Under the Military Rules of Evidence, remote live testimony should be utilized if the judge finds:

> (A) that it is necessary to protect the welfare of the particular child witness; (B) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (C) that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis.[128]

State child witness protection statutes also provide measures "[t]o protect child sex abuse victims from the trauma of testifying in the physical presence of the defendant".[129] State statutes permit the use of one- or sometimes two-way video monitor systems for testimony,[130] allowing the child to testify out of the courtroom and out of the presence of the defendant.

The constitutionality of child witness protection statutes has been upheld. The U.S. Supreme Court "rejected a Sixth Amendment Confrontation Clause challenge to child witness protection statutes" in 1990.[131] In this public policy decision, the Court "concluded that the Confrontation Clause's 'strong preference' for face-to-face confrontation may yield where denial of such confrontation is necessary to further an important public policy and where the testimony's reliability is otherwise assured".[132] This decision came before *Crawford* indicating the Court's interest in balancing the child's interests with the defendant's. The Court laid out certain requirements: "The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies."[133]

In addition to the above mentioned requirements, the Court emphasized that this alternative measure in conducting testimony is only applicable where the trial court finds "(1) that the particular child witness 'would be traumatized, not by the courtroom generally, but by the presence of the defendant,' and (2) that 'the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'"[134] The Court did not supply a standard of proof for trial courts to make this finding of undue trauma; however, many prosecutors use expert testimony to meet its burden.[135]

Hawaii also has a statute that allows children to testify by video teleconference (VTC). That statute provides:

> In any prosecution of an abuse offense or sexual offense alleged to have been committed against a child less than eighteen years of age at the time of the testimony, the court may order that the testimony of the child be tak-

[128] MIL. R. EVID. 611(d). Remote live testimony of a child ("In making a determination under subdivision (d)(3), the military judge may question the child in chambers, or at some comfortable place other than the courtroom, on the record for a reasonable period of time, in the presence of the child, a representative of the prosecution, a representative of the defense, and the child's attorney or guardian ad litem.").

[129] ABRAMS ET AL., *supra* note 5, at 228.

[130] *Id.*

[131] *Id.* (citing *Maryland v. Craig*, 497 U.S. 836 (1990)).

[132] *Id.*

[133] *Maryland v. Craig*, 497 U.S. 836, 851 (1990).

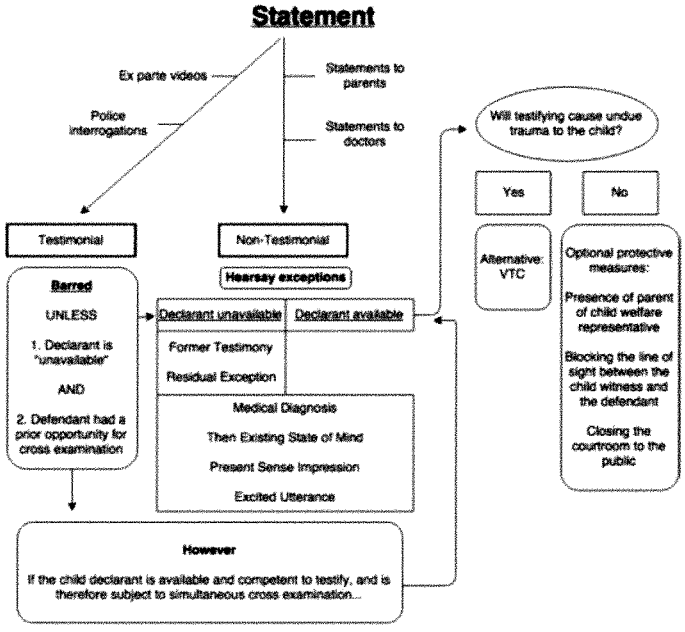
[134] ABRAMS ET AL., *supra* note 5, at 229 (quoting *Craig*, 497 U.S. at 856).

[135] *Id.* (highlighting the importance of the expert discussing the trauma that the particular child witness will experience by testifying in the presence of the defendant and not what child victims of sexual abuse in general may experience if forced to testify in front of the defendant).

> en in a room other than the courtroom and be televised by two-way closed circuit video equipment to be viewed by the court, the accused, and the trier of fact, if the court finds that requiring the child to testify in the physical presence of the accused would likely result in serious emotional distress to the child and substantial impairment of the child's ability to communicate. During the entire course of such a procedure, the attorneys for the defendant and for the State shall have the right to be present with the child, and full direct and cross-examination shall be available as a matter of right.[136]

This statute is fairly broad, defining child as anyone below eighteen-years-old. The commentary to this rule instructs that the determination is for the trial court to make but references similar requirements to those laid out in *Craig* as a necessary preliminary measure so as not to violate the Confrontation Clause.[137] In *Craig*, the Supreme Court held that "although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a 'case-specific finding of necessity.'[138]

Ex parte videos, on the other hand, violate the Confrontation Clause.[139] In the Court's historical analysis of the evolution of the Confrontation Clause in *Crawford*, the Court specifically identified ex parte videos as an example of a testimonial statement that would violate the Confrontation Clause if the declarant did not testify and the defendant did not have a right to cross-examine the declarant.[140]




## III. Recommendations

Hawaii Children's Justice Center is part of the state judiciary. It was established in 1986 and has some 35,000 child abuse cases reported in its system and 1,000 child sexual abuse cases reported per year statewide.[141] By housing the Justice Center within the judiciary, emphasis was placed on keeping the Center's

[136] HAW. REV. STAT. ANN. § Rule-616 (LexisNexis, Lexis Advance through Act 263 of the 2016 Reg. Legis. Sess.). Televised testimony of child.

[137] HAW. REV. STAT. ANN. § Rule-616 (LexisNexis, Lexis Advance through Act 263 of the 2016 Reg. Legis. Sess.) commentary.

[138] *Craig*, 497 U.S. 836 (quoting *Craig v. State*, 560 A.2d 1120, 1126 (Md. 1989) (internal citation omitted)).

[139] Mosteller, Remaking Confrontation, *supra* note 35 at 694 ("ex parte videotaped statements challenges the core concepts of the Confrontation Clause"); at 753-54 ("Proof of the state's case through ex parte accusations is antithetical to the adversary system in three regards. First, the manner in which the accusation is created is suspect—often secret and always one-sided. Second, the presentation of the state's case through such documents rather than by oral presentation of the witness is inconsistent with face-to-face accusation. The historical record indicates that the drafters were not inclined to permit trial by dossier. Third, the procedure denies the accused his right to cross-examine the witnesses—to test their conscience about the accusation.").

[140] *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004); *see also* KAN. STAT. ANN. § 22-3433(a) (which allowed the admission of ex parte video testimony but was repealed in 2010).

[141] Mau-Mukai interview, *supra* note 82.

work neutral.[142] In coordinating with the Department of Human Services Child Welfare Services, among other state agencies, the Justice Center's main objective is the safety and welfare of the child.[143] In acute cases, the Center's procedure is to send the child to a trained medical professional for a forensic medical examination.[144] But, in the case of very young children, the report of sexual abuse is usually delayed and generally only manifests itself through changes in behavior.[145]

In any case, at the Center the child will undergo a videotaped interview so as to reduce the need to re-interview the child.[146] This is important because the more often children are interviewed, the more likely the child's narrative of the incident will change making it more difficult to assess its accuracy as well as creating more opportunities for the adult interviewer to unintentionally influence the child's narrative.[147] However, in Hawaii cases are generally brought through civil rather than criminal court.[148] And, the cases that normally go forward with criminal charges tend to have some other physical evidence.[149] This is consistent with studies which have concluded that "[n]ot only did particular types of evidence uniquely predict whether charges were filed, but more types of supporting evidence and stronger levels of evidence increased the likelihood of charging."[150] In fact, "the majority of cases had child disclosures; about half had corroborating witnesses; and about one in five had an offender confession, behavioral evidence, or an eyewitness account."[151] The consequence is that "[o]f those charged, 80% of offenders were convicted, with the majority (82%) convicted via a guilty plea versus going to trial".[152] A study, which analyzed the types and amounts of evidence in child abuse cases, found that "[t]he most common reasons [that charges were not filed] included insufficient evidence (81%) or a vague or incomplete child disclosure (48%)".[153]

The study discussed above appears to have similar conclusions as other studies. One in particular, which reviewed 100 cases, found that over one third of child abuse cases that are referred to the prosecutor result in no charges being filed.[154] Of those that do result in charges, 14 are dismissed or diverted.[155] Of the remaining 52, 43 result in a guilty plea while nine go to trial.[156] The Bureau of Justice Statistics reported that "[a]ssaults against the youngest victims were the least likely of juvenile victimizations to result in arrest. An offender was arrested in just 19% of the sexual assaults of children

[142] *Id.*; *see also* Hawaii State Judiciary (2016), About the Children's Justice Center, http:// www.courts.state.hi.us/services/hawaii_childrens_justice_centers/about_the_justice_centers (last visited July 28, 2016) [hereinafter Justice Center website].
[143] Justice Center website, *supra* note 142.
[144] *Id.*
[145] Mau-Mukai interview, *supra* note 82.
[146] Justice Center website, *supra* note 142.
[147] ABRAMS ET AL., *supra* note 5, at 325 (suggesting that it is possible for an adult to influence a child's disclosure).
[148] Mau-Mukai interview, *supra* note 82.
[149] *Id.*
[150] Wendy A. Walsh et al., Prosecuting Child Sexual Abuse: The Importance of Evidence Type, CRIME & DELINQUENCY 14 (July 8, 2008), http://www.unh.edu/ccrc/pdf/CV175_Online %20version.pdf.
[151] *Id.*
[152] *Id.* at 12; *See* Mau-Mukai interview, *supra* note 82 (noting that Hawaii has a similarly high rate of conviction by guilty plea compared to cases that go to trial).
[153] *Id.* at 12.
[154] Cross, *supra* note 6 (34 out of 100 cases).
[155] *Id.*
[156] *Id.* (showing that from the nine that go to trial, six result in convictions and three result in acquittals. It should be noted that this study focused on child abuse cases generally, though the conclusions appear to parallel those studies that focused on child sexual abuse cases specifically, where corroborating evidence was also cited as being a substantial factor in whether charges were filed.).

under age [six]".[157] The conclusion is that in sexual abuse cases of young children, the rate of arrest is low as is the rate of charges being brought against the assailant. Cases are generally brought forward when the prosecution has corroborating evidence, resulting in more plea bargains than convictions by trial. The reasonable inference from all of these statistics is that a great number of perpetrators are on the streets rather than behind bars for the crime they have committed.

From 2009 to 2013, a study showed that for 80% of juvenile victims, the perpetrator was a parent.[158] Between 2008 and 2013 only 2% of children were returned to their family in Hawaii.[159] Based on the observations discussed in this paper, child sexual abuse is underreported because the youngest victims are unable to make sense of the crime they have fallen victim to and there is little physical evidence. The crime is such that the perpetrator is generally alone with the victim. When the child sexual abuse is reported, some corroborating evidence is needed for charges to be brought. Of those, only a portion result in trial. It may be that the obstacles that prosecutors face prosecuting child sexual abuse cases, including satisfying the Confrontation Clause, is the reason that child sexual abuse cases a brought in civil rather than criminal cases.

With good intention, the Children's Justice Center of Hawaii works to assess the immediate safety of the child, conducting a videotaped interview with trained interviewers immediately upon entry of the child into the facility. The Justice Center works with law enforcement and places the child in the state foster care system in order to keep the child away from his or her abuser. The fundamental flaw in the process is that by bringing the case in civil court, perpetrators remain free and the child is unable to come home. Given the 'ohana lifestyle in which there very well may be multiple extended family members living under the same roof, the child cannot stay with their extended family members alternatively.

To prevent a child victim of sexual abuse from suffering the trauma of abuse in addition to being separated from his or her family, state prosecutors should bring child sexual abuse cases to criminal court. To overcome prosecutorial obstacles, the Children's Justice Center should maintain a medical, healthcare, or welfare focus so that disclosures made to Justice Center counselors are less likely to be deemed testimonial. In this way, if the child is unavailable due to trauma from testifying in front of the accused, the child's disclosure can still come into evidence. Additionally, if the child does testify, prosecutors should utilize the Hawaii evidentiary rule that allows children to testify via two-way video. With these few adjustments, hopefully child sexual abuse perpetrators can be tried in criminal courts, children's initial disclosures can come into evidence resulting in a higher conviction rate, and children can return to their families as opposed to spending years in foster care.

[157] UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS (2000), http://bjs.gov/content/pub/pdf/saycrle.pdf.

[158] RAINN, *Children and Teen: Statistics*, https://www.rainn.org/statistics/children-and-teens (citing UNITED STATES DEPT' OF HEALTH AND HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, CHILD MALTREATMENT SURVEY, 2012 (2013)) (last visited July 29, 2016).

[159] DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, CHILD MALTREATMENT(2013), https://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf (Victims who were reunited with the families within the previous five years, 2013).

## About the Author

Nichole Timmreck is currently in her third year at the William S. Richardson School of Law, University of Hawaii at Manoa. She was inspired to write her law thesis on this topic after observing a court-martial during her 1L summer externship with the U.S. Army, Office of the Staff Judge Advocate. She has subsequently completed externships with the Honorable Richard Clifton of the U.S. Ninth Circuit Court of Appeals and the National Oceanic and Atmospheric Administration, Office of General Counsel, Pacific Islands Section. Nichole graduated magna cum laude from Texas A&M University in 2008 with a degree in Political Science; a history minor; and a Certificate in Law, Politics, and Society. She is also completing a Master's degree in International Relations and Conflict Resolution from American Military University. Nichole, her U.S. Army officer husband, and their four-year-old daughter are currently stationed in Hawaii.