

December 2005

Child's Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution

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CHILD'S PLAY: AVOIDING THE PITFALLS OF CRAWFORD v. WASHINGTON IN CHILD ABUSE PROSECUTION

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I. INTRODUCTION

On March 8, 2004, in *Crawford v. Washington*, the United States Supreme Court made a fundamental change in its interpretation of the United States Constitution's Sixth Amendment Confrontation Clause as it applies to

certain out-of-court statements.¹ Prior to *Crawford*, the Supreme Court had consistently held that a defendant's Sixth Amendment right to confrontation did not prevent the admissibility of a witness's out-of-court statement, despite the witness being unavailable at trial, so long as the pertinent statement bore "an adequate indicia of reliability."² The Court previously determined that an out-of-court statement had "an adequate indicia of reliability" when the statement fell within a firmly rooted hearsay exception or had "particularized guarantees of trustworthiness."³ In *Crawford*, by a 7-2 decision, the Court rejected this analysis. Justice Scalia, the author of the *Crawford* majority, in rejecting the former jurisprudence quipped that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."⁴ Instead, *Crawford* adopted a new framework in determining whether a defendant's right to confrontation bars certain out-of-court statements from being introduced at trial. *Crawford* holds that any out-of-court testimonial statement made by a witness not present at trial is barred under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.⁵

According to numerous experts in the legal community, one area of the law where *Crawford* will likely have a significant impact is child abuse prosecution⁶ because the allegedly abused child is often times unavailable to testify at

¹ *Crawford v. Washington*, 541 U.S. 36 (2004). The Sixth Amendment Confrontation Clause provides that "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

² *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980). In *Roberts*, the Court found that despite a witness being unavailable at trial, the introduction of the witness's out-of-court statement did not violate the defendant's right to confrontation because the defendant was able to cross-examine the witness at a preliminary hearing. *Id.* at 73. The Court determined that the out-of-court statement possessed an adequate indicia of reliability because the defendant sufficiently cross-examined the witness at the pre-trial hearing. *Id.* It should be noted, however, that while *Roberts* allowed the out-of-court statement in because of the prior cross-examination deemed it reliable, nowhere did *Roberts* require that cross-examination was necessary to ensure reliability. Thus, *Roberts* specifically held that reliability of a statement "could be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception" or where there is "a showing of particularized guarantees of trustworthiness" in the statement. *Id.* at 66. For more discussion of *Roberts*, *See infra* Part II, A.

³ *Id.*

⁴ *Crawford*, 541 U.S. at 62.

⁵ *See id.* at 59.

⁶ *See, e.g.,* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 10 (2004) [hereinafter *Adjusting to Crawford*](stating that "Another type of case that will frequently test the limits of the term testimonial [from *Crawford*] involves statements by children, typically alleging some kind of abuse."); JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE § 802.05 (2004) (raising questions about how child hearsay in child abuse cases will be affected by the *Crawford* decision); Victor Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of Crawford v. Washington*, 16 UPDATE EXPRESS 12 (2004) (claiming that "[t]he United States Supreme Court has interpreted the 6th Amendment Confrontation Clause in such a manner as to undermine the ability of prosecutors

trial. Specifically, an allegedly abused child will either refuse to testify because the child fears testifying in the presence of the defendant, or a court can declare the child incompetent to testify at trial based on the child's young age or intellect.⁷ Prior to *Crawford*, despite a child being unavailable to testify, prosecutors were usually successful in getting the child's out-of-court statements admitted at trial either through a state statutory scheme or through various exceptions to the hearsay rule. Both of these methods allowed a court to admit such statements under the Supreme Court's previous analysis of reliability.⁸ However, recent post-*Crawford* child abuse cases demonstrate that a successful prosecution of a child abuse case will be more difficult because *Crawford* bars the admission of any out-of-court testimonial statement made by a person that the defendant will not have the opportunity to confront at trial.⁹ In a country that seeks to protect the most vulnerable and defenseless, *Crawford's* potential result of allowing child abusers to likely go free simply because the child was unable to testify at trial does not square with any sense of societal justice.

to admit child hearsay statements when the child is unavailable for testimony"). See also Richard P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 518 (2004) (stating that "*Crawford's* impact on the types of hearsay often admitted in child abuse prosecutions is particularly uncertain").

⁷ See Wendy N. Davis, *Hearsay, Gone Tomorrow?*, A.B.A. J. 23 (2004) (quoting Victor Vieth, director of the Alexandria, Virginia-based American Prosecutors Research Institute's National Child Protection Training Center) who believes that "[t]he child abuse cases that will be impacted by *Crawford* are those involving preschool-aged children or severely mentally retarded victims who are declared incompetent to testify."); Sherrie Bourg Carter & Bruce M. Lyons, *The Potential Impact of Crawford v. Washington on Child Abuse, Elderly Abuse and Domestic Violence Litigation*, CHAMPION 21, 22 (Oct. 2004) (explaining that "[i]n child abuse cases, the issue of unavailability [of the child] typically arises either because the child is deemed incompetent to testify (usually as a result of lack of knowledge or understanding due to age or intellect) or because the child is "emotionally unavailable" to testify due to the presence of the defendant in the courtroom."); see also, American Academy of Pediatrics, *The Child in Court: A Subject Review*, 104 PEDIATRICS 1145, 1146 (1999) (stating that some researchers believe that "child witnesses will experience distress sufficient to affect the reliability of their testimony and exacerbate their feelings of victimization and stigmatization" if forced to testify in front of their alleged abuser.)

⁸ See, e.g., *White v. Illinois*, 502 U.S. 346, 350 (1992) (The United States Supreme Court did not find any Confrontation Clause violation because the child's out-of-court statements fell within two recognized hearsay exceptions: spontaneous declaration and statements made in the course of securing medical treatment.).

⁹ See, e.g., *Snowden v. State*, 846 A.2d 36 (Md. Ct. Spec. App. 2004). In *Snowden*, the Court of Special Appeals of Maryland excluded out-of-court statements made by an alleged abused child to a social worker because the court found the statement to be testimonial, and the defendant did not have an opportunity to cross-examine the child. *Id.* at 47. *People ex rel. R.A.S.*, 111 P.3d 487, 491 (Colo. Ct. App. 2004) (excluding a child's out-of-court statement to a police investigator because the statement was deemed testimonial, and the defendant did not have the opportunity to cross-examine the child). See also, *United States v. Bordeaux*, 400 F.3d 548, 555-57 (8th Cir. 2005) (holding that an allegedly abused child's out-of-court statements to a forensic interviewer were inadmissible in violation of the defendant's Sixth Amendment right to confrontation because the statements were testimonial and the defendant did not have the opportunity to cross-examine the child at trial).

Accordingly, the overall purpose of this Note is to address some of the problems that *Crawford* presents for child abuse prosecution and to offer practical solutions to mitigate some of these effects.¹⁰ In order to fully understand how *Crawford* fundamentally altered the Supreme Court's Confrontation Clause jurisprudence and assess *Crawford's* likely significant impact on future child abuse prosecutions, this Note will first briefly discuss the Supreme Court's pre-*Crawford* analysis of the Sixth Amendment right to confrontation. Part III will provide a short synopsis of the facts, history, and holding of *Crawford*. Next, Part IV will seek to analyze the central question left outstanding in *Crawford's* holding: what types of utterances actually constitute out-of-court testimonial statements? As the Supreme Court explained, if the out-of-court statement is found by a court to be non-testimonial then *Crawford* is not implicated.¹¹ *Crawford* provided three potential definitions of a testimonial statement. However, the Court ultimately declared, "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or a former trial, and to police interrogations."¹² In an attempt to provide concrete, practical solutions on how to successfully prosecute a post-*Crawford* child abuser, this Note will argue for a specific, confined definition of an out-of-court testimonial statement that courts should apply in the future.

Part V will outline some of the most common types of hearsay exceptions utilized by prosecutors in a child abuse case and will analyze the effects that *Crawford* will have on a prosecutor's ability to use these exceptions in the future. Next, Part VI will discuss the principle that a defendant can forfeit his right to confrontation and will argue for an expansion of this concept, which could potentially render *Crawford's* implications on child abuse prosecution moot in some circumstances. Finally, Part VII will argue that prosecutors, in a post-*Crawford* world, should increasingly utilize and rely upon alternative methods of testimony when *Crawford* necessitates that the allegedly abused child testify at trial.

¹⁰ Many states statutorily define child abuse in a variety of different ways. Therefore, for the purpose of this Note, child abuse will loosely be defined as the physical, emotional, or sexual misconduct of children under the age of eighteen by an individual or individuals, where the mistreatment of the child rises to the level of a criminal offense. For a medical definition of child abuse or maltreatment, see RICHARD E. BEHRMAN ET AL., NELSON'S TEXTBOOK OF PEDIATRICS 121 (17th ed. 2004) (stating that child abuse or maltreatment "encompasses a spectrum of abusive actions, or acts of commission, and lack of action, or acts of omission, that result in morbidity or death" of the child).

¹¹ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¹² *Id.*

II. THE OLD CONFRONTATION CLAUSE REGIME: *OHIO V. ROBERTS* AND ITS PROGENY

A. Ohio v. Roberts

Prior to *Crawford*, the United States Supreme Court took a very different approach to determine whether an out-of-court statement used at trial violated a defendant's Sixth Amendment right to confrontation. The seminal case that previously governed the United States Supreme Court's analysis of the Confrontation Clause was the 1980 decision of *Ohio v. Roberts*.¹³ *Roberts* specifically dealt with a defendant, who had been charged with forgery of checks and possession of stolen credit cards.¹⁴ At a preliminary hearing, the defendant's counsel cross-examined the daughter of the individual whose checks and credit cards were allegedly forged and stolen by the defendant.¹⁵ During the testimony, the daughter repeatedly denied the defendant's accusation that the items were given to the defendant to use.¹⁶ A year later, after repeated efforts to contact the daughter to testify at the defendant's trial, the prosecution successfully introduced the transcript from the daughter's preliminary hearing testimony implicating the defendant in the crimes.¹⁷ The defendant objected to the introduction of the daughter's prior statements as a violation of his Sixth Amendment right to confrontation because the defendant was unable to cross-examine the daughter at trial.¹⁸

The United States Supreme Court rejected this contention. Instead, the Court put forth a Confrontation Clause analysis that would essentially govern the admissibility of all out-of-court statements for the next twenty-four years. *Roberts* held:

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 statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.¹⁹

¹³ 448 U.S. 56 (1980).

¹⁴ *Id.* at 58.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 59.

¹⁹ *Id.* at 66.

Applying this analysis, the Court concluded that the transcript in question bore sufficient indicia of reliability and was thus admissible at trial.²⁰

B. The Narrowing of Roberts: United States v. Inadi and White v. Illinois

After *Roberts*, the next twelve years saw the Supreme Court greatly restrict its holding twice, especially in regards to the *Roberts* language that the Confrontation Clause required a showing of unavailability. First, in 1986, in *United States v. Inadi*, the Supreme Court clarified and narrowed the *Roberts* analysis by concluding that a witness's unavailability was a necessary part of the inquiry *only* when the challenged out-of-court statement was made in the course of a prior judicial proceeding.²¹ Six years later, in *White v. Illinois*,²² the United States Supreme Court all but extinguished the requirement that a witness must be unavailable in order for his or her out-of-court statements to be admitted at trial.

White specifically examined a trial court's decision to admit an abused child's out-of-court statements to various people, including the child's babysitter, the child's mother, a police officer, and a doctor.²³ The defendant objected to the trial court's decision, claiming that his confrontation right had been violated because the prosecution made no showing that the child victim was unavailable to testify at trial.²⁴ The trial court rejected the defendant's contention and found that the out-of-court statements were admissible because they fell under the recognized hearsay exceptions of spontaneous declaration and statements made for the purpose of a medical diagnosis. The United States Supreme Court affirmed the trial court. Specifically, the Court held:

We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant later testifying in court. To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness (sic) Given the evidentiary value of such statements, their reliability, and that *establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs*, we see no reason to

²⁰ *Id.* at 73.

²¹ 475 U.S. 387, 394 (1986) (emphasis added).

²² 502 U.S. 346 (1992).

²³ *Id.* at 349-51.

²⁴ *Id.* at 350.

treat the out-of-court statements in this case differently from those we found admissible in *Inadi*.²⁵

The combination of *Roberts*, *Inadi*, and *White* allowed prosecutors all over the country to offer an abused child's out-of-court statements at trial regardless of whether the child was unavailable. In short, the prosecution would simply have to show that the child's out-of-court statements bore some indicia of reliability because the statement fell within either a firmly rooted hearsay exception or the statement had particularized guarantees of trustworthiness.²⁶ The *Roberts-Inadi-White* regime²⁷ proved to be extremely successful for prosecutors. Prosecutors were no longer concerned about the child either refusing to testify at trial, or a trial court deciding that the allegedly abused child was incompetent to testify. Instead, a prosecutor's only task was to demonstrate that the child's out-of-court statements met one of the numerous recognized hearsay exceptions, or to otherwise prove that the statement possessed particularized guarantees of trustworthiness. According to the United States Supreme Court, a defendant's Sixth Amendment right to confrontation required nothing more.²⁸ Many legal experts and commentators felt very uneasy about this relaxed approach taken by the Supreme Court regarding a defendant's Sixth Amendment right.²⁹ When the Court granted certiorari in *Crawford v. Washington*, these

²⁵ *Id.* at 356-57 (emphasis added).

²⁶ Many jurisdictions followed *White*'s reasoning and concluded that the prosecution did not have to necessarily prove that the abused child witness was unavailable. *See, e.g.*, *Ring v. Erikson*, 983 F.2d 818, 820 (8th Cir. 1993) (holding that a defendant's contention that the Sixth Amendment right to confrontation required a finding by the trial court that the abused child was unavailable is not required. "[W]e now know that whether C.R. (abused child) was unavailable is irrelevant for the purposes of the Clause." *Id.*); *State v. Anderson*, 608 N.W. 2d 644, 657 (S.D. 2000) (holding that in determining whether to admit an abused child's out-of-court statement, a court is not required by the Constitution's Confrontation Clause to find the child unavailable). However, it should be noted that a minority of states disregarded *White*'s holding on separate state constitutional grounds and thus required prosecutors to continue to show that the witness was unavailable at trial. *See, e.g.*, *Kansas v. Willey*, 860 P.2d 67, 68 (Kan. Ct. App. 1993) (holding that as a matter of state constitutional law, the unavailability of the declarant must be shown before admitting the out-of-court statement).

²⁷ When this Note refers to the *Roberts-Inadi-White* regime, it is referring to the pre-*Crawford* analysis of allowing out-of-court statements in at trial so long as the statements possessed an indicia of reliability and not requiring the witness to be found unavailable.

²⁸ *See, e.g.*, *White*, 502 U.S. at 356 (indicating "[w]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied").

²⁹ *See, e.g.*, Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1260 (2003) (arguing that "[t]his approach (referring to the *Roberts-Inadi-White* regime) has produced a doctrine, which is to say the least, unsatisfactory, and under which the Confrontation Clause has become lost in the arcane of the rule against hearsay."); Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1172 (2002) [hereinafter *Dial-In Testimony*] (contending that "the current confrontation doctrine (referring to the *Roberts-Inadi-White* regime), geared to improving the reliability of evidence, is fundamentally misconceived and fails to reflect the basic values of underlying the Confrontation Clause."); Rich-

same legal experts fervently argued for a jurisprudential change away from the *Roberts-Inadi-White* regime.³⁰

III. CRAWFORD V. WASHINGTON

A. Facts and Procedural History

Crawford involved a dispute that arose when the defendant, Michael Crawford, stabbed a man who had allegedly attempted to rape his wife.³¹ The state of Washington charged the defendant with assault and attempted murder.³² At trial, the defendant claimed self-defense³³ and invoked Washington state's marital privilege to prevent his wife from testifying at his trial.³⁴ However, the prosecution did play a tape of a previously recorded statement that the defendant's wife made to the police describing the events leading up to the stabbing, which tended to contradict the defendant's claim of self-defense.³⁵ The defendant objected to the prosecution playing the tape, claiming that the admission of such evidence violated his Sixth Amendment right to confrontation.³⁶ The trial court rejected the defendant's argument, applied the *Robert's* analysis, and determined that the out-of-court statement made by the defendant's wife to the police was sufficiently trustworthy and was thus admissible.³⁷ The Washington Court of Appeals reversed the trial court and held that the wife's out-of-court statement was untrustworthy and inadmissible. The Washington Supreme Court subsequently overturned the Court of Appeals' decision and reinstated the de-

ard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 247 (2002) [hereinafter *The Conundrum of Children*] (arguing that "[m]ost fundamentally, the focus on reliability misses the point of the confrontation right. The Confrontation Clause is not a constitutionalization of the law of hearsay, with all its oddities. It does not speak of reliability or of exceptions." Instead, Friedman asserts that "the confrontation right reflects a belief, central to our system of criminal justice, that a witness against a criminal defendant should give testimony under prescribed conditions—under oath, in the presence of the accused, subject to cross-examination, and, if reasonably possible, in open court.").

³⁰ Brief of Amici Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park at 4, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410).

³¹ *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

³² *Id.*

³³ *Id.*

³⁴ *Id.* Washington's marital privilege prohibits a spouse from testifying without the other spouse's consent. See WASH. REV. CODE §5.60.060(1) (1994). However, the marital privilege does not include a spouse's out-of-court statements that can be introduced at trial under various hearsay exceptions. See *State v. Burden*, 841 P.2d 758, 760 (1992).

³⁵ *Id.* at 38.

³⁶ *Id.* at 40.

³⁷ *Id.*

defendant's conviction concluding that the wife's out-of-court statement was reliable because it bore sufficient guarantees of trustworthiness.³⁸

B. Crawford's *Holding and Reasoning*

By a vote of 9-0, the United States Supreme Court reversed the Washington Supreme Court's decision to uphold the defendant's conviction.³⁹ Most importantly, however, the Court, by a 7-2 majority, overturned the previous *Roberts-Inadi-White* regime governing Sixth Amendment Confrontation Clause analysis and replaced it with a new testimonial approach to govern the admissibility of out-of-court statements.⁴⁰ After a lengthy historical discussion by Justice Scalia, the Court concluded that the "Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."⁴¹

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of reliability. . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.⁴²

The Court then addressed what it considered to be an out-of-court testimonial statement. The court outlined three possible definitions of these kinds of statements:

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudi-

³⁸ *Id.*

³⁹ *Id.* at 69.

⁴⁰ *Id.* at 63.

⁴¹ *Id.* at 54. It should be noted that while *Crawford* suggests that unavailability and cross-examination are both necessary to admit a testimonial statement, the Court said nothing about what was actually required to find a witness unavailable. The pre-*Crawford* unavailability analysis, especially with allegedly abused child witnesses, was quite lenient. See *supra* note 26. Therefore, because *Crawford* does not mention any new law regarding unavailability or overruling this more lenient standard, it is logical to presume that the Court still believes this prior analysis is correct for Confrontation Clause purposes.

⁴² *Id.* at 61.

cial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [or] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁴³

Unfortunately, the Court refused to decide on one of these specific definitions.⁴⁴ Instead, the Court concluded:

We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations.⁴⁵ [However], [w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation scrutiny altogether.⁴⁶

IV. THE LINCHPIN OF *CRAWFORD V. WASHINGTON*: WHAT CONSTITUTES AN OUT-OF-COURT “TESTIMONIAL” STATEMENT?

A. *The “Testimonial” Approach*

While the *Crawford* majority provided a few illustrations of what actually constitutes an out-of-court testimonial statement, it is clear that the Court believes that this kind of statement should not be limited to these few, isolated

⁴³ *Id.* at 51-52 (internal citations omitted).

⁴⁴ The Chief Justice who, along with Justice O’Connor, did not want to overrule the *Robert’s* analysis objected to the majority’s refusal to clarify what actually constitutes a testimonial statement. As Chief Justice Rehnquist criticized,

But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied everyday in courts throughout the country, and parties should not be left in the dark in this manner.

Id. at 137. (Rehnquist, C.J. & O’Connor, J., concurring) (citations omitted).

Despite Chief Justice Rehnquist’s criticism, Justice Scalia retorted in a footnote that “[w]e acknowledge the Chief Justice’s objection that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo.” *Id.* at 1374 n.10 (citations omitted).

⁴⁵ *Id.* at 69.

⁴⁶ *Id.*

examples.⁴⁷ Therefore, in order to fully understand the impact that *Crawford* will have on the effective prosecution of child abuse cases, one must first establish a solid, concrete definition of an out-of-court testimonial declaration. First, it is important to note that the three definitions⁴⁸ proposed by the *Crawford* majority come from three different sources. The first suggested definition, “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” comes from the petitioner’s (defendant’s) brief in *Crawford*.⁴⁹ The next recommended testimonial formulation—“extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” is derived directly from Justice Thomas’s 1992 concurring opinion in *White v. Illinois*.⁵⁰ Finally, the last proposed definition of an out-of-court testimonial declaration, “state-

⁴⁷ Clearly, if the Court wanted an out-of-court testimonial statement to be restricted to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations then the Court would have outright concluded this proposition. The fact that the Majority called these specific examples the minimum of what constitutes a “testimonial” declaration obviously implies that there are other out-of-court statements that would also be considered testimonial by the Court.

⁴⁸ Perhaps some may suggest that there are not really three definitions articulated in *Crawford*, but, instead, the three formulations offered in *supra* note 43 are actually a single, cumulative definition of a “testimonial” statement. This Note disagrees with this interpretation of *Crawford*. Furthermore, most of the academic scholars who have analyzed the *Crawford* decision believe that the Court formulated three potential definitions or standards for a testimonial statement, without choosing one of them. See, e.g., Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 530 (2004) (stating that “[w]ithout adopting any specific formulation, the Court quoted three possible definitions of testimonial statements”). See also *Adjusting to Crawford*, *supra* note 6, at 9 (stating that “[t]he Court quoted three standards without choosing among them”).

⁴⁹ Petitioner’s Brief at 23, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410). The Petitioner’s definition of an out-of-court testimonial statement was based primarily on a historical review of the Confrontation Clause jurisprudence through the centuries not unlike the Majority’s historical review in *Crawford* itself. *Id.* at 16-22. After tracing the history of the Confrontation Clause jurisprudence, the Petitioner concluded that “[t]he landscape of these decisions, interpreted through the prism of the traditional understanding of the right to confrontation, evokes a straightforward rule.” *Id.* at 22. What is interesting to note is that the Petitioner’s definition refers to Justice Thomas’s concurring opinion, in *White v. Illinois*, joined by Justice Scalia, as the basis for his testimonial approach. However, nowhere in Justice Thomas’s concurring opinion in *White*, does Justice Thomas add the last clause of Petitioner’s testimonial definition: “similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.*

⁵⁰ See *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., & Scalia, J., concurring in part, and concurring in the judgment). Justice Thomas stated, “[t]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial statements that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process.” As alluded to in *supra* note 49, Justice Thomas does not mention anything about the Confrontation Clause being triggered by any out-of-court statement that a declarant reasonably believed would be later used prosecutorially.

ments that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," was authored by the National Association of Criminal Defense Lawyers in an amicus brief in *Crawford*.⁵¹ Given these three potential definitions, it is likely that the United States Supreme Court in the future will have to choose a single formulation. Currently, most state and federal courts that have applied the new *Crawford* analysis have decided not to adopt one of these definitions to be its guide in determining whether a particular out-of-court statement is admissible under the Confrontation Clause. As an alternative, these courts have applied all three definitions to the specific out-of-court statement at issue.⁵² This Note will not follow the trend of these courts and simply attempt to apply all three testimonial formulations to the most common hearsay statements that are at issue in the prosecution of child abuse.⁵³ Instead, this Note will suggest a

⁵¹ Brief of Amici Curiae National Association of Criminal Defense Lawyers at 3, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410). Amici explains why this definition is appropriate. "The Confrontation Clause should be read to prohibit the admission of any out-of-court statement unless the defendant has the opportunity to confront the witness. Not every statement uttered, and later used at trial, is testimonial." *Id.* at 22. Instead, Amici argues "[a]n out-of-court statement is testimonial only when the circumstances indicate that a reasonable declarant at the time would understand that the statement would later be available for use at a criminal trial. This understanding of the Clause flows from the paradigm of the *ex parte* affidavit that the Confrontation Clause was designed to prevent." *Id.* Amici concludes, "If the most fundamental point of the Confrontation Clause is to prevent the State from securing a conviction on the basis of witness testimony provided to it in private, then defining the category of excluded statements to encompass that evil serves the purpose of the Clause perfectly." *Id.* at 23 (internal citations omitted).

⁵² See, e.g., *People v. Vigil*, 104 P.3d 258, 259-60 (Colo. Ct. App. 2004) (applying all three of *Crawford's* testimonial definitions to a child's out-of-court statements to a police officer on videotape); *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 757-58 (Cal. Ct. App. 2004) (applying all three of the definitions to an alleged abused child's out-of-court statements to a police officer and social service employee); *Horton v. Allen*, 370 F.3d 75, 84-85 (5th Cir. 2004) (applying *Crawford's* three definitions to the admissibility of accomplice's statements to another individual in a private conversation).

⁵³ For a variety of reasons, this Note believes that merely applying all three definitions to the most common hearsay statements in the child abuse context is insufficient for the reader. First, by simply using all three definitions to determine whether a statement is testimonial, seems intuitively boundless and standardless. Nowhere in *Crawford* did the Court allude to the fact that all three definitions should govern whether a statement is testimonial. In fact, it is likely true that a particular statement in a given case could be admissible under one definition, but inadmissible under one of the other formulations. As a practical matter, it is hard to argue whether certain out-of-court statements are testimonial when there is no real working definition. Secondly, one purpose of this Note is to provide both prosecutors and defense attorneys with guidance on this issue. It is fairly obvious that this Note would provide little guidance to either if this Note fails to provide a tangible definition of what constitutes these kinds of statements. However, this being said, it is not the purpose of this Note to address in extensive and great detail why one testimonial formulation is better than the other. In fact, one could conceivably write an entire note specifically addressing the proper definition of an out-of-court testimonial statement. Instead, this Note, after reading and analyzing a significant amount of research among the various scholars who have specifically dealt with this important issue, will briefly explain which testimonial formulation is most appropriate and consistent with the Framers understanding of the purposes for a defendants' Sixth Amendment Right to Confrontation.

single, workable definition of an out-of-court testimonial statement that will provide definitive guidance to prosecutors when confronting a post-*Crawford* Confrontation Clause issue in the child abuse context.

For a variety of reasons, this Note believes that the proper definition of an out-of-court testimonial statement is articulated in both the first and third formulation cited above. First, it should be observed that, arguably, the first and third definitions essentially advocate the same formula for determining whether a declaration constitutes an out-of-court testimonial statement. The first definition, while laying out some specific examples of traditional testimonial statements, proposes that all testimonial declarations are ultimately those pretrial statements that “declarants would reasonably expect to be used prosecutorially.”⁵⁴ Similarly, the third definition recommends that testimonial declarations be defined as those “statements that were made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial.”⁵⁵ Basically, these are the same definitions phrased in slightly different terminology. Ultimately, both definitions focus on a reasonable or objective witness test, and simply ask: Under the circumstances, would an objective declarant reasonably believe that his or her out-of-court utterances could be used at a later trial proceeding?⁵⁶

Because the first and third definitions are functionally equivalent, this Note will first address why the second proposed testimonial definition is insufficient for Confrontation Clause purposes. Professor Richard Friedman, author of an amicus brief in *Crawford* and who has advocated a testimonial approach for years, provides an excellent analysis for why the second formulation iterated by Justice Thomas in *White v. Illinois* is inadequate for Confrontation Clause purposes. Friedman contends that a historical review of the Confrontation Clause demonstrates that Justice Thomas’s proposed testimonial approach is unsatisfactory.⁵⁷ Specifically, Friedman claims that Justice Thomas’s testimonial defini-

⁵⁴ See *supra* note 49.

⁵⁵ See *supra* note 51.

⁵⁶ The Second Circuit Court of Appeals, in applying *Crawford*, has also stated that a combination of these two formulations is the proper definition of a testimonial statement. In *United States v. Saget*, after a lengthy discussion of the *Crawford* decision, the Second Circuit observed, “*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial.” *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004). The Court in *Saget* further elaborated on *Crawford*’s testimonial framework, “[a]ll of these (testimonial) definitions provide that the statement may be such that the declarant reasonably expects that the statement might be used in future judicial proceedings. Although the (*Crawford*) Court did not adopt any of these formulations, its statement that ‘these formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it’ suggests that the Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony.” *Id.* at 229 (citing *Crawford v. Washington*, 541 U.S. 36, 52 (2004)).

⁵⁷ To reiterate, Justice Thomas’s proposal in *White* for a definition of a testimonial declaration is limited to “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” See *Crawford*, 541 U.S. at 51. It is im-

tion errs by concentrating solely on whether the statement was made in a formalized setting with the police or another government agent involved in the case.

Formalities such as oath are not necessary to render a statement testimonial...Indeed, such a theory is profoundly ahistorical. Even as late as the eighteenth century, most prosecutions were private lawsuits [However], [t]he right of the accused to confront his accusers [did] not lose force in a system in which an accuser rather than the State is the adverse party.⁵⁸

Thus, according to Friedman, Justice Thomas's formalized, government-involved approach to testimonial statements does not square with the historical time period in which the Sixth Amendment's Confrontation Clause was written, a time period when the prosecution of crimes usually did not include any formalized government participation.⁵⁹ Professor Friedman also argues that Justice Thomas's approach of limiting testimonial statements to government-involved, formalized declarations could be easily evaded.⁶⁰ Friedman provides specific examples of situations where a possible witness could eviscerate *Crawford* by merely making statements outside the presence of government officials

portant to note that Justice Thomas's position that a testimonial statement should be restricted to formalized testimonial materials, including depositions, affidavits, prior testimony, and defendants' confessions in the custody of police, has also been advocated by other academics, too. See, e.g., Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1046 (1998) (arguing that the Confrontation Clause should be limited to covering "government-prepared affidavits and depositions" and "[p]olice station confessions and statements"); Margaret A. Berger, *The De-Constitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restrain Model*, 76 MINN. L. REV. 557, 561 (stating the Confrontation Clause should be implicated and mainly concerned with statements made to a government official, including the police or prosecution).

⁵⁸ *Dial-In Testimony*, *supra* note 29, n. 295 (citing JOHN M. BEATTIE CRIME AND THE COURTS IN ENGLAND, 1660-1800 35-36 (1986)). According to the eminent historian Beattie, it was not until the nineteenth century (long after the Constitution was written in America) that professional police forces and the government took over the prosecution of criminal cases. Before then, criminal matters were largely pursued by the private initiative of the victim alone, without any participation from the State.

⁵⁹ If the Sixth Amendment's Confrontation Clause was ratified in an era when government involvement in the prosecution of crimes did not exist, then it is safe to say that the Framers would not have mandated that the Confrontation Clause could only be implicated in the very few instances when the government actually participated and initiated proceedings against a defendant. However, despite Professor Friedman's assertions about the original meaning of the Confrontation Clause, there are other competing historical accounts of the Clause that tend to buttress Justice Thomas's approach. As will be discussed later, this Note believes these competing accounts may be more historically correct.

⁶⁰ *Adjusting to Crawford*, *supra* note 6, at 9 (explaining how this approach, unlike Justice Thomas', avoids the potential for purposeful evasiveness of confrontation by declarants); see also *supra* note 59.

with the intention that the hearer of the statement would then go to the authorities with such a statement.⁶¹

Finally, Professor Friedman provides exceptional insight on why the first and third definitions capture the true essence of what the Confrontation Clause seeks to provide for a defendant. He states, "I believe the third of these is the most useful and accurate. It captures the idea that the Confrontation Clause is meant to prevent the creation of a system in which witnesses can offer their testimony without being subjected to cross-examination."⁶² Friedman continues,

[t]he confrontation right, as I conceive it, applies only to testimonial statements, the type of statement that makes a person a witness. Thus, a statement made in the ordinary course of business, including conspiratorial business, would not be a testimonial statement, and so would not invoke the confrontation right. But a statement describing a crime and knowingly made to authorities, or to an intermediary designated to convey the statement to the authorities, would be a testimonial one.⁶³

It is questionable whether Professor Friedman is correct in his contention that Justice Thomas's formalized definition of a "testimonial" statement does not square with the original meaning of the Confrontation Clause. First, it should be noted that most scholars agree that the history of the Confrontation Clause is fairly ambiguous.⁶⁴ Thus, any definitive answer as to whether Justice

⁶¹ *Dial-In Testimony*, *supra* note 29, at 1247. Friedman states,

Indeed, if formality was necessary to bring a statement with the Confrontation Clause, perverse incentives would arise. The government, or others interested in the creation of prosecution evidence, would have an incentive to encourage the making of statements—such as 911 calls—lacking formalities such as the oath, because the avoidance of such formalities would ensure that the statement would not be covered by the Confrontation Clause.

⁶² *Adjusting to Crawford*, *supra* note 6, at 9. While this Note greatly respects the wisdom and acumen of Professor Friedman, this Note does not believe that there are any real, practical differences between the first and third definitions. Therefore, in the opinion of this Note, Professor Friedman's statements advocating the third definition simply serves the broader proposition that the best testimonial definition is: whether a reasonable, objective declarant would have thought his or her out-of-court utterance could be used at a later trial?

⁶³ Richard D. Friedman, *The Confrontation as a Hot Topic: The Virtues of Going Back to Square One*, 21 *Quinnipiac L. Rev.* 1041, 1043 (2003).

⁶⁴ See John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 *GEO. WASH. L. REV.* 191, 234 (1999). According to Professor Douglass, "[m]ost discussions of the history of the Confrontation Clause begin with disclaimers." See also Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal For a Prosecutorial Restraint Model*, 76 *MINN. L. REV.* 557, 568 (1992) (stating that the "Clause was barely debated while the Sixth Amendment was under consideration, and American documents predating the Sixth Amendment rarely discussed the purpose of confrontation"). Even Professor Friedman concedes the trouble in pinning down the history of

Thomas or Professor Friedman is categorically correct in their historical interpretation of the Clause is likely unattainable. However, this being said, a brief look at the historical context in which this fundamental right developed in the United States demonstrates that Justice Thomas's proposed "testimonial" definition may actually be more historically accurate.

While the right to confrontation had a tumultuous past in England,⁶⁵ criminal defendants there were practically guaranteed this right at all trials by the 1730's.⁶⁶ However, in colonial America at this same time, colonists were frequently denied the right to confrontation in those crimes in which the English government had jurisdiction to prosecute.⁶⁷ Instead, the English government conducted private, *ex parte* depositions or interrogatories of witnesses and simply had this sworn, written testimony read in at trial against the defendant. In these situations, a colonial defendant lacked the ability to confront the witness or his adverse testimony at trial. In response to this method being used against the colonists, it is not surprising that around the time of the American Revolution many colonies that drafted a constitution or declaration of rights included a right to confrontation.⁶⁸ Eventually, this fundamental right would also be adopted into the Sixth Amendment of the United States Constitution.⁶⁹ In light

the Clause. Richard Friedman, *Confrontation: The Search For Basic Principles*, 86 GEO. L.J. 1011, 1023 (1998) (claiming, "The origins of the Clause are famously obscure.").

⁶⁵ See Douglass, *supra* note 64, at 234-37 (tracing the turbulent history of the right to confrontation in England) See also Natalie Kijurna, *Lily v. Virginia: The Confrontation Clause and Hearsay—"Oh What a Tangled Web We Weave . . ."*, 50 DEPAUL L. REV. 1133, 1138-40 (1991) (examining the rise, fall, and subsequent rise of the right in English history).

⁶⁶ Berger, *supra* note 64, at 577 (citing John H. Langbeign, *The Criminal Trial Before Lawyers*, 45 U. CHI. L. REV. 263, 311 (1978)) (stating "from the 1730's on defense counsel were increasingly allowed to examine and cross-examine witnesses").

⁶⁷ See Berger, *supra* note 64, at 579. One major example of the English denying the colonists in America their right to confrontation was in 1765 when the English enlarged the vice-admiralty courts' jurisdiction to try all Stamp Act offenses that were allegedly committed by the colonists. At the time, vice-admiralty courts utilized the continental civil law system over the common law procedure and had all potential witnesses to a crime answer questions in private, *ex parte* interrogatories. Thus, the result of the English enlarging the courts' jurisdiction effectively deprived the accused in all Stamp Act offenses the ability to confront witnesses against him. See also Murl A. Larkin, *Right of Confrontation: What Next?*, 1 TEX. TECH. L. REV. 67, 71-72 (1969) (explaining that soon after the Stamp Act, the English Parliament also passed legislation that all alleged traitors in the colonies would be sent to England and be tried for treason. This legislation had the practical effect of depriving the accused the right to confrontation because the Crown's evidence would be collected in the colonies through *ex parte* depositions and interrogatories of witnesses and would then be presented in written form against the accused at trial in England without permitting the accused the right to confront the witness or his testimony).

⁶⁸ Larkin, *supra* note 67, at 75-76. See also Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 551 (2003). By 1784, eight of the thirteen colonies, including Virginia, Maryland, and Pennsylvania had codified the right to confrontation in their respective founding documents.

⁶⁹ Larkin, *supra* note 67, at 76. On June 8, 1789, James Madison of Virginia initially proposed a constitutional amendment, including the right to confrontation, to the House of Representatives.

of this history, Justice Thomas's testimonial definition only activating the Confrontation Clause when "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" are at issue, appears to be more historically accurate. As one scholar has put it, "History, then, permits one reasonably safe conclusion: the Clause was intended—at least in part—to prohibit trials by *ex parte* affidavit or deposition when a court denied an accused any opportunity to challenge his accusers face-to-face."⁷⁰

Nevertheless, despite Justice Thomas's historically accurate assertion that the Founding era generation most likely envisioned the right to confrontation as a method of preventing the use of *ex parte*, formalized statements at trial against the accused, a strong argument can be made that the Confrontation Clause should not be limited to only these statements. Professor Friedman is eminently correct that Justice Thomas's view in practice could easily be evaded, intentionally or otherwise, by potential witnesses. A small illustration proves this point.⁷¹ Scenario 1: A victim of a crime makes incriminating statements about the accused to a friend or relative with the sole intention that they would pass this information onto the police. Scenario 2: This same victim goes directly to the police but makes the identical statements in a sworn affidavit. In reality, there is no real difference between either of these scenarios because they effectively serve the exact same purpose: the victim is making inculpatory statements about the accused. However, under Justice Thomas's more restrictive view, the victim's statements in the first scenario would avoid Confrontation Clause scrutiny because there is no formality surrounding the victim's statement nor is the government participating in procuring the statement. While in the second scenario, Justice Thomas would implicate the Confrontation Clause simply because the statements were procured in a formalized manner through an affidavit. The Confrontation Clause should be interpreted in a manner that avoids this illogical conclusion. A testimonial approach, disregarding formalities and implicating the Confrontation Clause anytime an objective declarant makes a statement that he or she reasonably believes could be used against the defendant at trial, would be effective way that avoids this nonsensical result. Applying this approach to the scenarios above, the Confrontation Clause would be implicated in both be-

Less than two years later, on December 15, 1791, the First Congress would debate the right for a mere five minutes and subsequently adopted the right without much disapproval.

⁷⁰ Douglass, *supra* note 64, at 236. The *Crawford* majority also acknowledged Justice Thomas's assertion of the historical purposes of the Clause. See *Crawford*, 541 U.S. at 49 (stating "[t]he principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused").

⁷¹ This is a simple example of how Justice Thomas's approach could be easily evaded. Professor Friedman provides similar examples demonstrating how Justice Thomas's approach would allow witnesses to easily avoid the Confrontation Clause. See *Adjusting to Crawford*, *supra* note 6, at 9.

cause in either case the victim would have reasonably believed that his or her statements could be used against the accused at a potential trial. Therefore, in conclusion, this Note suggests that this approach, encompassing both the first and third testimonial definitions in *Crawford*, would function best in practice.

B. Applying the Testimonial Approach to Those Child Declarants Who are Unavailable at Trial Because They are Deemed Incompetent to Testify

As with other areas of law,⁷² because children lack the maturity or mental capacity that is incorporated into a reasonable person (or declarant) standard, it is sometimes difficult to ascertain what a reasonable, objective child would think or believe in a given circumstance. Thus, the testimonial definition that asks, “under the circumstances, would an objective declarant reasonably believe that his or her out-of-court utterances could be used at a later trial proceeding” arguably poses a great amount of difficulty in its application with regards to potential child declarants in a child abuse prosecution.⁷³ While these potential problems will be explored later in this Note, one situation where arguably the testimonial definition should not govern is where a court finds that a child is incompetent to testify at trial because he or she lacks the requisite mental capacity.

Generally speaking, over the years, the federal system and most states have prescribed through their various Rules of Evidence and the common law that the competency of an individual, adult or child, to testify at trial is largely within the discretion of a trial judge.⁷⁴ Specifically, in the child witness context, a trial court usually conducts a detailed inquiry, sometimes calling expert witnesses, to assess whether the child is legally competent to testify at the trial pro-

⁷² For example, in the area of negligence in tort law, some states have applied the so-called Minority Rule of Seven. Under this doctrine, children under the age of seven cannot be found negligent because it is thought that children of this young age cannot be subjected to the reasonable person standard. Furthermore, for children between the age of seven and fourteen, there is a presumption that they cannot be found negligent, which must be rebutted by the plaintiff. Finally, all remaining children over the age of fourteen are presumptively capable of committing a negligent act. See DOMINICK VETRI, ET AL., TORT LAW & PRACTICE, at 90 (discussing this concept). See also *Kuhns v. Brugger*, 135 A.2d 395, 401 (Pa. 1957) (dividing children into these three categories for negligence purposes).

⁷³ Professor Friedman also asserts that this testimonial definition will present problems for child declarants. See *Adjusting to Crawford*, *supra* note 6, at 10 (claiming that “[a]nother type of case that will frequently test the limits of the term “testimonial” involves statements by children, typically alleging some kind of abuse. Children’s statements raised some of the most difficult questions under *Roberts*, and they will continue to do so under *Crawford*”).

⁷⁴ FED. R. EVID. 601 states that “[e]very person is competent to be a witness except as otherwise provided by these rules.” See, e.g., *United States v. Comer*, 421 F.2d 1149 (D.C. Cir. 1970) (stating that a child’s competency is left to the sound discretion of a trial judge); *State v. Ayers*, 369 S.E.2d 22, 27 (W. Va. 1988) (quoting *State v. Wilson*, 207 S.E.2d 174 (W. Va. 1974)) (explaining that “[t]he question of the competency of a witness to testify is left largely to the discretion of the trial court and its judgment will not be disturbed unless shown to have been plainly abused resulting in manifest error”).

ceeding.⁷⁵ Ultimately, there are various factors a trial judge will consider in determining whether a child is competent to testify. A trial court looks to whether the child knows and perceives the differences between truth and falsity and right and wrong and whether he or she understands the results of falsely testifying under oath.⁷⁶ Furthermore, a court often assesses whether the child has the requisite intelligence and mental capacity to understand, recall, and narrate his impressions of the event in question that will be the subject of his testimony.⁷⁷ Finally, a court can even assess the various psychiatric and psychological characteristics of the child to determine whether the child's testimony could be credible.⁷⁸ In sum, a trial judge has complete discretion to look at the totality of the circumstances and evaluate, whether in his or her judgment, a child is competent and fit to testify at the subsequent proceeding.

In response to the potential problem of a court finding an allegedly abused child incompetent to testify against the defendant at trial, the federal government and many states have provided added protections for children that enable a trial court to more likely find an abused child competent to give testimony. In 1996, the federal government passed the Victims' Protection and Rights Act, an elaborate statutory scheme that places a heavy burden on any party seeking to have a court declare an allegedly abused child incompetent to testify.⁷⁹ Specifically, this federal statute provides that children are to be presumed competent to testify at trial and that a competency evaluation of the child can only be conducted if compelling reasons exist and a party offers a written motion and offer of proof demonstrating the child's incompetency.⁸⁰ Moreover,

⁷⁵ See, e.g., *State v. Stacy*, 371 S.E.2d 614, 619 (W. Va. 1988) (holding that a trial court erred in a child abuse prosecution when the trial court refused to grant the defendant's motion to have the 5-year-old victim to be evaluated by an independent psychiatrist to make a determination of whether the child was competent to testify).

⁷⁶ See *Ayers*, 369 S.E.2d at 26 (explaining that in assessing a child's competency, "[t]he first, more traditional, challenge concerns the child's ability to perceive the distinction between truth and falsity as well as the consequences of falsely testifying under oath."); *State v. Gordon*, 342 S.E.2d 509, 512 (N.C. 1986) (discussing that a child witness was competent to testify in part because she "showed a general knowledge of the difference between right and wrong."); *Doran v. United States*, 205 F.2d 717, 719 (D.C. Cir. 1953) (holding that "[b]efore passing on competency, the court may resort to any examination which might disclose whether the child understands and appreciates the difference between right and wrong . . .").

⁷⁷ See *United States v. Perez*, 526 F.2d 859, 865 (5th Cir. 1976) (stating that the appropriate test in determining the competence of young child is whether he has the requisite capacity to understand, recall, and narrate his impressions of an occurrence). See also *State v. Frazier*, 574 N.E.2d 483, 487 (Ohio 1991) (holding for a competency determination, a trial judge "should determine through questioning whether the child of tender years is capable of receiving just impressions of facts and events and to accurately relate them").

⁷⁸ See *Ayers*, 369 S.E.2d at 26 (holding that a trial judge can assess "[w]hether the child, due to various psychological factors, is so inherently incredible as to require an additional psychiatric evaluation to whether the child may testify").

⁷⁹ See 18 U.S.C. § 3509 (2000).

⁸⁰ *Id.* § 3509(c)(2-4).

according to the statute, even if a party successfully obtains a competency hearing, the hearing may only focus on whether the child has an ability to understand and answer simple questions.⁸¹ Similar to the federal statute, a number of states have also enacted legislation making it easier for an abused child to be competent to testify at trial. In fact, some states have even gone so far as to statutorily mandate that an alleged child abuse victim should be allowed to testify either without any prior judicial examination, or a child should not be declared incompetent to testify even if the child does not understand the obligation of the oath.⁸²

Nevertheless, despite the federal government and some states adopting less stringent standards for admitting the testimony of child victims at trial, there is still great concern among many prosecutors that a successful prosecution of child abuse can be nullified when the child victim, who is often the only witness to the crime, is declared incompetent to testify at trial.⁸³ Prior to *Crawford*, when the child witness was declared incompetent, the prosecution would attempt to introduce some of the child's out-of-court statements through the various hearsay exceptions, which often made prosecution of child abuse somewhat difficult. After *Crawford* and its implementation of the testimonial standard to govern hearsay statements, potential child abuse prosecutions may be more challenging. *Crawford* requires that if an out-of-court statement is deemed testimonial, the Confrontation Clause bars the introduction of such a hearsay statement at trial unless the defendant has an opportunity to cross-examine the witness.⁸⁴ Consequently, in a post-*Crawford* child abuse prosecution, once an allegedly abused child is declared incompetent and thus unavailable to testify, a prosecutor's ability to introduce a child's out-of-court testimonial statements vanishes. Therefore, on its face, it would appear the ultimate inquiry is whether the child's particular utterances were testimonial in nature.

However, it stands to reason that if a trial court were to find an allegedly abused child incompetent to testify at trial, then logically that same child could

⁸¹ *Id.* § 3509(c)(8).

⁸² See, e.g., UTAH CODE ANN. § 76-5-410 ("A child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall determine the weight and credibility of the testimony."); DEL. CODE ANN. tit. 10, § 4302 ("No child under the age of 10 years may be excluded from giving testimony for the sole reason that such child does not understand the obligation of an oath. Such child's age and degree of understanding the obligation of an oath may be considered by the trier of fact in judging the child's credibility.").

⁸³ See, e.g., *Ayers*, 369 S.E.2d at 25 (stating that "[o]ften a child in an abuse proceeding is the only potential witness. Thus, the problem confronting any court at the outset of an abuse proceeding is whether the child is competent to testify Therefore, we understand a trial court's concern to determine that a child is a competent witness before she is allowed to be the prime accuser").

⁸⁴ *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

not have made an out-of-court testimonial statement in the first place.⁸⁵ As this Note has previously argued, a testimonial statement is any out-of-court statement that, given the specific circumstances, an objective declarant would reasonably expect and believe could later be used in court. Subsumed in this reasonable, objective declarant, would likely be the declarant's ability to accurately and truthfully perceive and recount information, the declarant's knowledge of right and wrong, and the declarant's overall mental capacity to objectively know the consequences of his or her utterances.⁸⁶ Similarly, when a court determines whether a child is competent to testify, the court looks at equivalent factors including whether the child knows and perceives the difference between truth and falsity, right and wrong, and whether the child has the overall requisite intelli-

⁸⁵ This Note concedes that it is theoretically possible for a child to have the requisite mental capacity to make an out-of-court testimonial statement and then subsequently lose that mental capacity to testify at trial. For example, a child could be mentally competent when he made the testimonial statement and then some intervening factor, internally or externally, could possibly cause this same child to lack the requisite mental capability to testify at a future trial proceeding. However, this would appear to be an exception not the rule. In fact, most likely, based on the maturation of a child, the reverse would likely be true. Given the time sequence alone, a typical child would more likely have a greater probability of possessing the mental capacity to testify at a later trial than have the required mental capacity to make a testimonial statement at an earlier time period.

⁸⁶ Some may argue that this Note is assuming too much for an objective declarant standard who must reasonably believe his or her statement would be used at a later trial. Further, some will argue that by engrafting whether a child could make a proper testimonial statement onto a trial court's competency determination of that same child will water down *Crawford* and the Confrontation Clause to a mere evidentiary finding. This Note disagrees. If the testimonial definition means anything and specifically requires that the objective declarant reasonably would have known the consequences of his or her statements, then, at a bare minimum, one would assume that this declarant would have an average mental capacity to recount and recall information in an accurate, functionally effective manner. Furthermore, in many other areas of law, the law assumes things about the supposed reasonable, objective person. For example, in the tort of negligence, the law presumes in the reasonable person standard that the person has a normal intellect, memory, and perception. Thus, when judging whether a person fell below the standard of care, a court looks to whether the individual defendant has met these threshold and baseline capabilities. Similarly, in Establishment Clause jurisprudence, the United States Supreme Court has assumed certain qualities and characteristics of the reasonable person in judging whether this person would believe that a religious display or depiction demonstrated an endorsement of religion. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). In *Capitol Square*, Justice O'Connor stated the Establishment Clause test that "[w]hen the reasonable observer would view a government practice as endorsing religion, I believe that it is our duty to hold the practice invalid." *Id.* at 777 (O'Connor, J., Souter, J. & Breyer, J., concurring). However, in assessing the reasonable observer, O'Connor acknowledged that the "reasonable observer . . . must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 780. (O'Connor, J., Souter, J. & Breyer, J., concurring). Therefore, the suggestion that one is assuming too much with the reasonable declarant appears to be contrary to the application of similar reasonable person standards in other areas of law. As stated above, it would be highly improbable that an individual could have the mental capacity and ability to understand the full consequences of his or her utterance to make an out-of-court testimonial statement, but the same declarant would lack this similar capacity in comprehending the consequences and overall nature of his or her testimony at the future trial.

gence and mental capacity to understand, recall, and narrate his impressions of the event that will be the subject of the child's testimony. Because the objective, reasonable declarant and a competent individual likely possess the same characteristics,⁸⁷ it is doubtful whether a trial court could find, on one hand, that a child is incompetent to testify at trial but, on the other hand, that the same child at an earlier time could make a testimonial statement which he reasonably believed could be used at a future trial. Stated another way, it would be very unlikely that a trial court could find that a child somehow possessed the requisite mental competency to reasonably believe and realize the potential consequences his or her out-of-court statement, and thus qualify it as a testimonial statement. But at the future trial, the child would suddenly lack these similar mental capacities and qualities necessary for the child to be competent to testify. Therefore, arguably in this narrow context, when a child is found to be incompetent to testify at trial because he or she lacks the requisite mental capacity then, *ipso facto*, that same child could not make an out-of-court testimonial statement in a previous circumstance.⁸⁸

V. APPLYING *CRAWFORD*'S TESTIMONIAL APPROACH TO THE MOST COMMON HEARSAY EXCEPTIONS USED IN A CHILD ABUSE PROSECUTION

A. *Federal Rules of Evidence 803(2): Excited Utterance or a State's Functional Equivalent*

Prior to *Crawford*, many prosecutors in child abuse cases would use hearsay exceptions in attempt to get an unavailable, allegedly abused child's

⁸⁷ It should not be surprising that this reasonable, objective declarant, for testimonial purposes, would possess similar qualities as an individual who is found by a court to be competent to testify at trial. As the Court in *Crawford* noted, "[t]he text of the Confrontation Clause . . . applies to witnesses against the accused—in other words, those who bear testimony. Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (internal citations omitted). Consequently, the definition of "testimonial" in *Crawford* is derived from the idea of someone who is bearing some kind of testimony, which is exactly what an individual does when he or she testifies at trial once he or she is found competent and capable of doing so.

⁸⁸ It is important to note that this is a limited context when this particular situation could arise. Only when the child declarant lacks the requisite mental capacity to know the difference between truth and falsity, reality and fantasy should this concept apply. Outside of this limited situation, there are many other examples when a child declarant could be found incompetent to testify at trial and this idea would not be applicable. For example, a child could be declared incompetent to testify when he or she has difficulty conveying her testimony on the witness stand because the child is emotionally upset about the past incident, or the child has psychological problems when he or she is around the accused. In this scenario, the child would be incompetent to testify not because she lacks the mental capacity to know the difference between truth and falsehood, but because of emotional or psychological problems that have inhibited her mental capacity. Here, because the problems are created by external stimuli, it is doubtful that he or she would have lacked the mental capacity to make a testimonial statement at an earlier time period.

out-of-court statements admitted at trial.⁸⁹ In the months following *Crawford*, prosecutors have continued to rely on a variety of these hearsay exceptions in child abuse prosecutions. One of the most frequently used hearsay exceptions that prosecutors depend upon in the child abuse context is the so-called excited utterance exception.⁹⁰ The foundation underlying the excited utterance hearsay exception is that the statement, even though made out-of-court and not subject to cross-examination, is most likely reliable because the statement is made under such excited, spontaneous circumstances that the declarant's ability to fabricate is de minimis.⁹¹ In order to qualify and be admitted under the excited utterance hearsay exception, the offering party must prove: "(1) a startling event occurred; (2) the declarant made the statement while under the stress of excitement caused by the startling event; and (3) the declarant's statement related to the startling event."⁹² Ultimately, a trial judge will make a factual determination about each of these conditions to determine whether the particular out-of-court statement at issue qualifies under the excited utterance hearsay exception.

In the brief period of time that has elapsed since *Crawford*, many prosecutors and courts across the country have struggled in determining whether a statement that is sufficient to qualify under the excited utterance hearsay exception should nevertheless be held inadmissible when the declarant does not testify and the statement is found to be testimonial. Specifically, many courts have had to decide whether an out-of-court statement made under such spontaneous and startling conditions as to meet the criteria for an excited utterance could also

⁸⁹ See, e.g., *White v. Illinois*, 502 U.S. 346, 350 (1992). In *White*, the prosecution used the hearsay exceptions of spontaneous declaration and statements made during the course of a medical treatment to successfully introduce a number of out-of-court statements made by an allegedly abused child who was unavailable to testify at trial. *Id.* See also *Idaho v. Wright*, 497 U.S. 805, 812 (1990). In *Wright*, the prosecution attempted to admit an allegedly abused child's out-of-court statements at trial through Idaho's residual hearsay exception. However, the United States Supreme Court rejected the prosecution's argument because the statement was found to lack the requisite particularized guarantees of trustworthiness that was required by the pre-*Crawford* confrontation clause framework. *Id.* at 827.

⁹⁰ The excited utterance hearsay exception is codified in the Federal Rules of Evidence under Rule 803(2). This type of out-of-court statement is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FED. R. EVID. 803(2). It should be noted that practically all of the fifty states also have the excited utterance exception under their particular state rules of evidence. See, e.g., W. VA. R. EVID 803(2).

⁹¹ See FED. R. EVID. 803(2) advisory committee's note. The Advisory Committee acknowledged that "[t]he theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." See also *United States v. Brown*, 254 F.3d 454, 458 (3d Cir. 2001) (citing *United States v. Joy*, 192 F.3d 761, 766 (7th Cir. 1999), cert denied 530 U.S. 1250 (2000)) (stating that "[t]he rationale for the excited utterance exception lies in the notion that excitement suspends the declarant's powers of reflection and fabrication, consequently minimizing the possibility that the utterance will be influenced by self interest and therefore rendered unreliable").

⁹² JACK B. WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE MANUAL STUDENT EDITION § 16-7 (6th ed. 2003).

simultaneously constitute a testimonial declaration for *Crawford* purposes.⁹³ As mentioned before, if the statement is found by the court to be non-testimonial then the statement would most likely be admissible, as the *Robert's* regime would govern, and the excited utterance hearsay exception almost always has been found to be a firmly rooted hearsay exception.⁹⁴ Therefore, in the child abuse context, the inquiry into whether an excited utterance is also testimonial for *Crawford* purposes is critical to prosecutors and defense attorneys and will likely be dispositive on whether an allegedly abused child's out-of-court statements will be admissible at trial.

A strong argument can be made that most excited utterances will not also qualify as testimonial for *Crawford* purposes. It seems facially illogical that a statement made under such startling and excited circumstances that the individual had no time to reflect or fabricate could also simultaneously qualify as a testimonial statement in which the declarant reasonably and consciously believed that his or her statement could be used at trial. In other words, if the statement was made under circumstances where the declarant couldn't reflect or fabricate, as is required for an excited utterance, then it is highly unlikely that the declarant could somehow also have the capacity to realize and believe that his statement could be used at future judicial proceeding. In fact, at least one state appellate court has categorically questioned whether any statement that is sufficient to qualify as an excited utterance could also ever be characterized as a testimonial statement.⁹⁵ While most courts have not gone as far to definitively conclude that all excited utterances are always non-testimonial statements, most courts have decided that such statements are non-testimonial for the purposes of *Crawford*.⁹⁶ Therefore, in most circumstances, if the prosecution is successfully

⁹³ See, e.g., *State v. Ferguson*, 609 S.E.2d 526 (W. Va. 2004) (holding that statements qualifying under the excited utterance hearsay exception were non-testimonial under *Crawford*). But see *Lopez v. State*, 888 So. 2d 693, 697-700 (Fla. Dist. Ct. App. 2004) (holding that out-of-court statements that were sufficient to constitute an excited utterance were inadmissible because the statements in question were testimonial for *Crawford* purposes).

⁹⁴ See, e.g., *State v. Bryant*, 38 P.3d 661, 665 (Ka. 2002) (quoting *State v. Deal*, 23 P.3d 840, 853 (Ka. 2002)) (stating, "The excited utterance exception is a firmly rooted hearsay exception."). As the Court in *Crawford* specifically stated, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts* . . ." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

⁹⁵ See *Hammon v. State*, 809 N.E.2d 945, 952-953 (Ind. Ct. App. 2004) (stating that "[w]e further note that the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be testimonial An unrehearsed statement without time for reflection or deliberation, as required to be an 'excited utterance' is not 'testimonial' in that such a statement, by definition, has been not been made in contemplation of its use in a future trial.") But see *Lopez v. State*, 888 So. 2d 693, 697-700 (Fla. Dist. Ct. App. 2004) (claiming that "[i]n our view, the findings necessary to support a conclusion that a statement was an excited utterance do not conflict with those that are necessary to support a conclusion that it was testimonial").

⁹⁶ See, e.g., *People v. Vigil*, 104 P.3d 258, 265 (Colo. Ct. App. 2004) (holding that an allegedly abused child's out-of-court statements to his father immediately after the incident had occurred constituted as an excited utterance and were non-testimonial under *Crawford*); *People v. Bryant*, 2004 WL 1882661 at *1 (Mich. Ct. App. Aug. 24, 2004) (holding that a victim's state-

able to argue that the out-of-court statements in question constitute excited utterances, it is doubtful that such statements would also be testimonial and implicate *Crawford*.⁹⁷

B. Federal Rules of Evidence 803(4): Statements For Purposes of Medical Diagnosis or Treatment or a State's Functional Equivalent

Another commonly used hearsay exception in a child abuse prosecution is the statements made for purposes of medical diagnosis or treatment.⁹⁸ The underlying rationale for allowing these out-of-court statements to be admissible at trial is that a declarant who is undergoing some type of medical examination has the motivation to be truthful and honest to his or her physician because the physician's successful treatment of the declarant mainly turns upon the accuracy of the declarant's statements to the physician.⁹⁹ Thus, because the declarant's

ments inculcating the defendant that were made right after he was allegedly shot by the defendant were admissible at trial because the statements constituted as excited utterances and were non-testimonial); *People v. Caudillo*, 19 Cal. Rptr. 3d 574, 583-90 (Cal. Ct. App. 2004) (deciding that a 911 call made by an anonymous witness to a crime came within the excited utterance hearsay exception and was also non-testimonial because "[t]he details provided by the caller were elicited in order to facilitate appropriate police response, *not to provide evidence to be used at a later trial.*") (emphasis added).

⁹⁷ However, one instance in which this general proposition may not be as clear cut is when the prosecution attempts to introduce an alleged abused child's out-of-court excited utterances that were made to a police officer or other government actor. While the conclusive definition of a testimonial statement was left open in *Crawford*, one kind of out-of-court statement that *Crawford* clearly and emphatically barred was those out-of-court statements made to the police during an interrogation. As the Court stated in *Crawford*, "[s]tatements taken by police officers in the course of interrogations are also testimonial even under a narrow standard." *Crawford*, 541 U.S. at 68. Therefore, one could conceive of an allegedly abused child responding to a police officer's questions about the alleged abuse right after the abuse occurred and the police had arrived on the scene. Because the government actor would be the recipient and most likely the facilitator of such statements made by the child, *Crawford* could potentially bar the introduction of such statements. The involvement of governmental actors, including police officers, in the child abuse context and determining what actually constitutes interrogation to implicate *Crawford* will be further discussed later in this Note. At this point, it is sufficient to say that it is conceivable to find some out-of-court statements that would constitute as both excited utterances and testimonial declarations. *But see*, *State v. Anderson*, 2005 WL 171441 at *4 (Tenn. Crim. App. June 20, 2005) (holding that a witness's statement to a police officer, which constituted as an excited utterance, was non-testimonial and thus did not trigger *Crawford*).

⁹⁸ *See, e.g.*, *State v. Reese* 2004 WL 1732460 (Wash Ct. App. August 3, 2004); *State v. Lynch*, 854 A.2d 1022 (R.I. 2004). Statements made for purposes of medical diagnosis or treatment is codified in Rule 803(4) of the Federal Rules of Evidence. The rule states that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause or external source thereof as reasonably pertinent to diagnosis or treatment" are admissible even though the declarant is available as a witness. FED. R. EVID. 803(4). *See also* W. VA. R. EVID. 803(4).

⁹⁹ *See* WEINSTEIN & BERGER, *supra* note 92, §16-18 (explaining that "[t]he reliability of statements made for the purpose of medical treatment is ensured by the declarant's motive to be truth-

own self-interest in being treated properly encourages him or her to be truthful, courts will likely find that these kinds of out-of-court declarations are sufficiently reliable to be admissible at trial. Some jurisdictions have held admissible the introduction of such statements at trial when those statements are made to hospital attendants, ambulance drivers, or a declarant's family member, so long as the particular statements were made in order to obtain some kind of medical treatment.¹⁰⁰ Furthermore, several courts have found statements made by parents to a child's physician on behalf of the injured child to be admissible because it is assumed that a parent would not lie to their child's physician regarding the child's injury.¹⁰¹ Ultimately, to meet this exception, the inquiry hinges upon whether the declarant made the statement for purposes of medical diagnosis or treatment and whether the treating doctor usually relies upon such statements when performing treatment on the declarant.¹⁰² If the declarant's statements were merely made for accusatory or non-medical purposes then the declarant's conversations with a treating physician would most likely not fall under the exception and no *Crawford* testimonial analysis would be necessary.¹⁰³

A variety of courts throughout the country have begun to analyze the effects, if any, that *Crawford* may pose in a child abuse prosecution when the allegedly abused child made the particular out-of-court statements for the purpose of medical diagnosis or treatment. However, at this time, no consensus among the courts has emerged in whether such statements also qualify as testimonial. While some courts have found that the statement is testimonial when the examination appears to be a part of the police investigative process, other courts have found that even under these circumstances, a child's statement to his doctor can

ful since treatment hinges largely on the accuracy of the information imparted to the physician or other person involved in providing medical care").

¹⁰⁰ See FED R. EVID. 803(4) advisory committee's note. According to the Advisory Committee, "[u]nder the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included."

¹⁰¹ See WEINSTEIN & BERGER, *supra* note 92, § 16-18 (stating that "[i]n the case of a child, a court would undoubtedly assume the absence of any motive to mislead on the part of parents"). See, e.g., *United States v. Yazzie*, 59 F.3d 807, 812-814 (9th Cir. 1995) (holding that a mother's letter to a physician that her son was being sexually abused by his step-father was admissible under the medical treatment exception).

¹⁰² See WEINSTEIN & BERGER, *supra* note 92, §16-20.

¹⁰³ See, e.g., *State v. Lynch*, 854 A.2d 1022 (R.I. 2004). In *Lynch*, a 16-year-old made statements to a school psychologist that inculpated the defendant with sexually abusing the child. *Id.* at 1028. The Court found that the statements to the psychologist did not fall under the hearsay exception for statements made for the purposes of medical diagnosis or treatment. Specifically, the Court held that the child's statements were not for medical treatment because the psychologist sought out the child and "there was no showing that Mary's (allegedly abused child) purpose in making the statements was for diagnosis or treatment . . . and thus no showing that Mary had a strong motivation to be truthful." *Id.* at 1031-32. Therefore, because the statements did not meet the hearsay exception, the Court did not conduct the appropriate *Crawford* testimonial inquiry.

still be non-testimonial.¹⁰⁴ This Note believes that it is incorrect for some courts to find it inconsequential in conducting the *Crawford* testimonial inquiry that the medical examination of the child occurred during the course of a police investigative process. If the testimonial definition hinges on whether the declarant reasonably believed the statements could be used prosecutorially, one would expect that most children would believe that statements they made to a treating doctor would be used prosecutorially in those situations when the police officers are the very individuals who instructed the child and his or her family to retain a physician about the alleged abuse. It would not take much, even for a younger child, to make the connection between the police investigative apparatus and the subsequent medical exam, and to conclude that any statement he or she makes

¹⁰⁴ See *People v. Vigil*, 104 P.3d 258, 265 (Colo. Ct. App. 2004). In *Vigil*, an allegedly abused 7-year-old gave incriminating statements about the defendant to the doctor. The Court found that the doctor was a member of a child protection team, who conducted examinations for local area hospitals when child abuse was suspected. *Id.* The Court also found that this same doctor had provided extensive expert testimony in previous child abuse cases. *Id.* In the case at bar, the doctor was asked to “perform a ‘forensic sexual abuse examination’ on the child and spoke with the police officer who accompanied the child before performing the examination.” *Id.* Based on all of these facts, the Court concluded that the child’s statements to the doctor were testimonial because “[t]he statements were made under circumstances that would lead an objective witness reasonably to believe that they would be used prosecutorially.” *Id.* The Court noted, “[a]lthough the doctor himself was not a government officer or employee, he was not a person ‘unassociated with government activity.’ The doctor elicited the statements after consultation with the police and he necessarily understood that information he obtained would be used in a subsequent prosecution for child abuse.” *Id.* See also *People v. Harless*, 22 Cal. Rptr. 3d 625, 636 (Cal. Ct. App. 2004) (holding that an allegedly abused child’s statements to the treating doctor during a sexual abuse examination were testimonial because the examination had occurred in the course of a district attorney’s investigation of possible child abuse). *But see* *People v. Cage*, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004). In *Cage*, a mother with the help of a grandmother allegedly abused a 15-year-old child. *Id.* at 849. A police officer then found the child on the street near his home and took him to the hospital emergency room. *Id.* Prior to a doctor examining the child, the police officer interviewed the child, who elicited incriminating statements about his mother. *Id.* After the interview, a doctor examined the child, and the child reiterated to the doctor the incident again incriminating his mother. *Id.* Finally, after the medical exam, the child was interviewed again by the police officer. *Id.* Despite the intermittent involvement of the police officer before and after the medical exam, the Court concluded that the child’s statement to the doctor were non-testimonial. *Id.* at 848. The Court found that “[n]o reasonable person in John’s (child) shoes would expect his statements to Dr. Russell to be used prosecutorially, at defendant’s trial. This is true even if he thought the doctor might relay his statements to the police. After all, anyone who obtains information relevant to a criminal investigation might (and certainly should) pass it along (sic) the police. This possibility, standing alone, does not suffice to make hearsay testimonial within the meaning of *Crawford*.” *Id.* at 855 (emphasis added). See also *Heard v. Commonwealth*, 2004 WL 1367163 at *1 (Ky. Ct. App. June 18, 2004). *Heard* involved a domestic violence dispute in which an ex-husband allegedly assaulted his ex-wife by pistol-whipping her in the head. *Id.* at *1. After the assault, the police and paramedics arrived on the scene and the ex-wife made incriminating statements against her ex-husband. *Id.* The ex-wife was then taken to the hospital, and she repeated the same inculpatory statements against her ex-husband to the treating physician. Curiously, and without much analysis, the court found the ex-wife statements to the police officer to be testimonial, but the statements to the treating doctor only hours later to be non-testimonial. *Id.* at *5.

could be used against the defendant in a future trial proceeding. However, on the other hand, an allegedly abused child's statements to a treating doctor that were purely for a medical purpose and were not collateral to any police or governmental investigation would more likely be non-testimonial. In these instances, the child would have no way of reasonably knowing or believing that the medical exam concerning the alleged injuries would have anything to do with a future prosecution of the alleged abuser.¹⁰⁵ Accordingly, a strong argument could be made that the dividing line between testimonial and non-testimonial statements for these types of declarations should turn upon whether the medical exam was in some manner initiated by the police or the prosecution for investigative purposes. If this fact or some derivative of it is present, then a court should find that that a child would reasonably conclude that his or her statements could be used in a future proceeding against the accused. Conversely, if the medical examination is purely for medical purposes, it is unlikely that the child would reasonably believe his or her statement will be used at a later trial and *Crawford* should not apply.

C. *Specific State Statutes that Create a Hearsay Exception For Children Who Have Allegedly Been Abused and a Prosecutor's Ability to Utilize Them Post-Crawford*

As mentioned earlier in this Note, numerous states and the federal government have enacted statutes that ease the ability for allegedly abused children to testify at trial.¹⁰⁶ While not only relaxing the competency requirements, many state legislatures have also created a hearsay exception that specifically allows for a child declarant's statements to be admissible if certain conditions are met. These so-called "tender years"¹⁰⁷ statutes, authored by a significant amount of state legislatures, establish different parameters and provisions that

¹⁰⁵ See, e.g., *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004). In *Vaught*, the father of an allegedly abused 4 year-old was bathing the child when he noticed that the victim was swollen and red in the genital area. *Id.* at 286. The father briefly discussed the incident with the child's mother, and they decided to take the child, on their own initiative, to the emergency room. *Id.* During the medical examination, the victim made incriminating statements about the defendant and what had caused the injuries. *Id.* The court held, based on the specific facts of the case, that the child's statements to the treating doctor were non-testimonial because "the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment." *Id.* at 291 Thus, the Court found that "[t]here was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination." *Id.* See also, *State v. Scacchetti*, 690 N.W.2d 393, 396-97 (Minn. App. 2005) (holding that a child's statement to a nurse practitioner was non-testimonial because the nurse was not working in conjunction with any governmental investigation when the child made the statements).

¹⁰⁶ See *supra* notes 79-82.

¹⁰⁷ For a complete list of all of the "tender years" statutes that have been enacted by the various state legislatures see *Snowden v. State*, 846 A.2d 36, 39 n.7 (Md. Ct. Spec. App. 2004).

would allow these out-of-court statements to be admissible during a child abuse prosecution.¹⁰⁸ Generally speaking, while a minority of states have different statutory conditions that must be satisfied, twenty-seven states have statutes that hold admissible an allegedly abused child's out-of-court statements so long as the statement has a "sufficient indicia of reliability," and the trial court finds that the child was unavailable to testify at trial.¹⁰⁹ In the past, these particular statutes have greatly enhanced the state's ability to successfully prosecute the accused in a child abuse case.¹¹⁰

However, because all of these statutes were written prior to *Crawford*,¹¹¹ many post-*Crawford* courts have begun to re-evaluate the manner in

¹⁰⁸ See, e.g., CAL. EVID. CODE §1360 (2005). This statutory provision, in pertinent part, states

[i]n a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if the all of the following apply . . . (2) 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] (3) the child either: (A) *Testifies at the proceedings [or] (B) is unavailable as a witness*, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child. (emphasis added).

See also FLA. STAT. ANN. §90.803(23) (2004):

Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse . . . is admissible in any civil or criminal proceeding if (1) The Court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provided sufficient safeguards of reliability; and (2) The child either: (a) *Testifies; or (b) Is unavailable as witness* Unavailability shall include a finding by the court that the child's participation in the trial proceeding would result in a substantial likelihood of severe or mental harm." (emphasis added).

But see GA. CODE ANN. §24-3-16 (2004):

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another or performed with or on another in the presence of the child is admissible in evidence by the testimony of the person or persons to whom made *if the child is available to testify in the proceedings* and the court finds that the circumstances of the statement provide sufficient indicia of reliability. (emphasis added).

¹⁰⁹ For examples of the specific language of these statutes, see *supra* note 108.

¹¹⁰ See, e.g., *Fortner v. State*, 582 So. 2d 581 (Ala. Crim. App. 1990), *writ denied* 582 So. 2d 587 (holding that the prosecution's successful application of Alabama's Tender Year's statute against the defendant was constitutionally valid).

¹¹¹ A quick glance at these statutes demonstrates that the statutes were crafted to comply with *Ohio v. Roberts*. While some states differ on whether the child must be deemed unavailable, all of

which the prosecution utilizes them.¹¹² In light of *Crawford*, these statutes, and the manner in which prosecutors use them, could be unconstitutional. Most often, prosecutors have used these statutes for admission of an allegedly abused child's out-of-court statements made to a variety of governmental actors who were acting with an eye towards a possible criminal prosecution and during an investigative process.¹¹³ In most cases, state appellate and supreme courts have struck down prosecutor's use of the tender years statute under these circumstances because it violates the rigors of *Crawford*.¹¹⁴ As noted above, while *Crawford* did not create a complete and firm definition of a testimonial statement, the Court did specifically state that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."¹¹⁵ Many state courts have interpreted this statement in *Crawford* to directly prohibit prosecutors from utilizing the tender years statute at trial for all child hearsay made to any government worker who is investigating suspected child abuse, unless that child was subject to cross-examination.¹¹⁶ These courts have substantial justification for

the statutes would allow the child declarant's testimony to be admissible so long as the court found "sufficient indicia of reliability," which was clearly the framework of *Roberts*.

¹¹² See, e.g., *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 756-57 (Cal. Ct. App. 2004) (evaluating the prosecution's use of California's tender years statute); *State v. Herrmann*, 679 N.W.2d 503, 508-510 (S.D. 2004) (analyzing the prosecutions use of South Dakota's tender years statute); *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004) (discussing the post-*Crawford* applicability of Illinois' tender years statute).

¹¹³ See, e.g., *Snowden v. State*, 846 A.2d 36, 47-48 (Md. Ct. Spec. App. 2004) (using Maryland's tender years statute to admit an allegedly abused child's statements to a government child protective services worker who was investigating suspected child abuse); *State v. Herrmann*, 679 N.W.2d 503, 510 (S.D. 2004) (applying South Dakota's tender years statute for out-of-court statements made by the child to a social worker and two investigating police officers); *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 756 (Cal. Ct. App. 2004) (utilizing California's tender years statute to admit at trial a child's out-of-court statements made to two police officers and a trained interviewer of County's Multidisciplinary Interview Center, which specifically focuses on investigating and interviewing suspected victims of child abuse).

¹¹⁴ See *supra* note 112.

¹¹⁵ *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (emphasis added).

¹¹⁶ See, e.g., *T.P. v. State*, 2004 WL 2418045 at **2-4 (Ala. Crim. App. Oct. 29, 2004). In *T.P.*, the child did not testify, and the prosecution, pursuant to Alabama's applicable statute, had both an investigating police officer and a Department of Human Resources social worker testify at trial concerning what the allegedly abused child had said to them during their interviews and investigation. *Id.* at *2. The court held, "[u]nder these circumstances, we conclude . . . that because the interview was intended to be used as an investigative tool for a potential criminal prosecution, the interview is similar to a police interrogation and, thus, falls with the definition of "testimonial" in *Crawford v. Washington*." *Id.* at *4. *People ex rel. R.A.S.*, 111 P.3d. 487 (Colo. Ct. App. 2004). In *R.A.S.*, the prosecution, pursuant to Colorado's tender years law, had a police investigator testify about what the allegedly abused child told him about the abuse in a forensic interview that he conducted three days after the alleged incident. *Id.* at 488. The child was held unavailable to testify at trial. *Id.* The Court held, "[h]ere, the statement was taken by an investigating officer in a question and answer format appropriate for a child. The statement was "testimonial" within even the narrowest formulation of the Court's definition of that term." *Id.* at 490.

their analysis of *Crawford*. Despite the lack of clarity in defining a testimonial statement, the Court throughout its opinion was adamant that out-of-court declarations made to government officials were plainly testimonial and should not be admissible unless the declarant was unavailable and subject to prior cross-examination.¹¹⁷ Accordingly, *Crawford* will severely inhibit a prosecutor's ability to utilize these tender years statutes and have a government actor testify at trial concerning conversations that official had with the allegedly abused child during the pre-trial investigation.¹¹⁸

Moreover, a strong contention can be made that these statutes are potentially problematic in other ways, as well.¹¹⁹ The majority of these tender years statutes hold admissible a child's out-of-court statements so long as the court finds that the statements have a "sufficient indicia of reliability" and the child is unavailable to testify at trial.¹²⁰ Because of *Crawford*, these particular statutes are facially problematic for two additional reasons. First, the *Crawford* majority was highly critical of allowing court's to make ad-hoc decisions on the types of out-of-court statements they deem to be sufficiently reliable.¹²¹ While the Court did not hold that such analysis would always violate the Confrontation Clause, it did state that if the out-of-court statement in question is deemed testimonial then the declaration would be inadmissible, regardless of the apparent reliability, unless the declarant was unavailable and subject to prior cross-examination.¹²² On the other hand, *Crawford* states it is constitutionally acceptable for a court to admit non-testimonial statements if they are found to possess an indicia of reli-

See also *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 757-758 (Cal. Ct. App. 2004) (holding that a child's out-of-court statements to an investigating police officer and a multi-disciplinary interviewer were testimonial). *But see* *State v. Herrmann*, 679 N.W.2d 503, 510 (S.D. 2004) (refusing to analyze whether a child's out-of-court statements to two police officers and a social worker were testimonial because the court found that even if the statements were testimonial they would be subject to harmless error).

¹¹⁷ *See generally* *Crawford*, 541 U.S. at 53. The *Crawford* majority stated, "In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." "[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

¹¹⁸ It is important to note, as mentioned earlier, that a child's out-of-court statements made to a government official investigating possible child abuse would likely be testimonial under many other hearsay exceptions as well, not just when the prosecution utilizes the tender-years statute. *See, e.g., supra* note 97 (discussing how statements made by an allegedly abused child that qualified under the excited utterance hearsay exception could be deemed testimonial when there was government involvement in procuring such a declaration from the child).

¹¹⁹ For example, the prosecutors could also use the statute to get admissible out-of-court statements made by a child to a parent or friend.

¹²⁰ As noted above, the tender years statutes that allow judges to admit statements they deem to be reliable stems from the *Roberts* decision, *see supra* note 2. *See also supra* note 108.

¹²¹ *See supra* note 4.

¹²² *Crawford*, 541 U.S. at 68.

ability. Tender years statutes fail to make this distinction and allow even a testimonial statement to be admissible so long as the court finds the statement to be reliable.¹²³ Secondly, and as a corollary to the first problem, most of these statutes do not require the allegedly abused child to be subject to cross-examination. *Crawford* specifically mandates that if a court finds the out-of-court declaration to be testimonial in nature then the declarant must be subject to prior cross-examination.¹²⁴ Not surprisingly, these statutes do not require prior cross-examination of the allegedly abused child. Therefore, for both of these reasons, these statutes, in their current form, seem to violate the rigors of *Crawford* and are most likely unconstitutional as currently written.

VI. CRAWFORD AND FORFEITURE OF A DEFENDANT'S RIGHT TO CONFRONTATION

Crawford's adoption of the testimonial approach was an effort by the United States Supreme Court to restore and safeguard what the Court believed to be the procedural protections that a defendant's Sixth Amendment right to confrontation provides. However, one instance where the Court explicitly believed that this testimonial approach and the defendant's constitutional right to confrontation would be completely inapplicable is where a defendant forfeits his or her right to confrontation by wrongdoing.¹²⁵ In most jurisdictions, a defendant's potential forfeiture of his constitutional right to confrontation is governed as a hearsay exception listed in the rules of evidence.¹²⁶ Generally speaking, a

¹²³ *Crawford* noted this exact problem with the *Robert's* analysis. As the Court stated, [t]his test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of ex parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that do consist of ex parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations. *Id.* at 60 (emphasis added).

The Court further added, "[t]o add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial." *Id.* at 65.

¹²⁴ *Id.* at 68.

¹²⁵ *Crawford* noted, "the rule of forfeiture by wrongdoing (*which we accept*) extinguishes confrontation claims on essentially equitable grounds . . ." *Id.* at 62 (emphasis added). A number of post-*Crawford* courts have acknowledged that the possibility that a defendant could forfeit his confrontation right is still viable after *Crawford*. See, e.g., *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004) (applying the rule of forfeiture to a defendant who killed a declarant); *People v. Moore*, 2004 WL 1690247 at *4 (Colo. Ct. App. July 29, 2004) (holding that a defendant forfeited his right to confrontation when he killed the declarant).

¹²⁶ The concept of a defendant forfeiting his right to confrontation is codified in Rule 804(b)(6) of the Federal Rules of Evidence. Rule 804(b)(6) states that "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is admissible even though the declarant is unavailable as a

defendant can be found by a court to have forfeited his constitutional right to confrontation of a particular witness when the court finds by a preponderance of the evidence that the defendant, through some manner of wrongdoing or misconduct, which at least was partially motivated by a desire to prevent the declarant from testifying at trial, procured and obtained the unavailability of that witness at trial.¹²⁷ The principal justification for preventing a defendant to assert his or her constitutional right under these circumstances is to deter the defendant from committing wrongful acts against potential witnesses at his or her trial.¹²⁸

As discussed throughout this Note, the testimonial approach of *Crawford* will likely make it more difficult for the prosecution to introduce out-of-court statements made by the allegedly abused child at trial. In large part, this difficulty stems from a child's refusal to testify at trial because of the potential psychological and emotional problems that may be caused if the child is forced to confront and testify against the accused. One manner in which prosecutors could deal with this dilemma is to argue that the defendant's alleged abuse of the child has tormented and plagued the child to such an extent that the defendant effectively forfeited his right to confrontation of the child at trial. Thus, under this scenario, if the prosecution could prove by a preponderance of the evidence that the child was unavailable to testify at trial because of the alleged abuse caused by the defendant then the child's out-of-court statements would be admissible without the statements being subject to the requirements of *Crawford*. Professor Richard Friedman is one academic commentator who strongly

witness. Many states also accept the idea of a defendant forfeiting his right to confrontation. *See, e.g.*, PA. R. EVID. 804(b)(6).

¹²⁷ *See, e.g.*, *United States v. Ochoa*, 229 F.3d 631, 638 (7th Cir. 2000) (applying the preponderance of the evidence standard governs for determining whether the defendant forfeited and effectively waived his right to confrontation by procuring the unavailability of a witness); *United States v. Augiar*, 975 F.2d 45, 47-48 (2d Cir. 1992) (also applying the preponderance of the evidence standard for Rule 804(b)(6)); *United States v. Emery*, 186 F.3d 921, 926-27 (8th Cir. 1999) (stating that in order to forfeit one's right to confrontation, a defendant must procure the unavailability of the declarant and did so, at least in part, because the defendant intended to make the declarant unavailable to testify against him or her at trial); *See also* FED R. EVID. 804(b)(6) advisory committee's note. According to the Advisory Committee, "[t]he usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage." The Advisory Committee also notes that for forfeiture purposes, a defendant's wrongdoing does not need to actually consist of an illegal act.

¹²⁸ *See id.* (citing *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert denied* 467 U.S. 1204 (1984)). "This [Rule] recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'" *See also* *United States v. White*, 116 F.3d 903, 911 (D.C. Cir 1997) (stating that "[s]imple equity supports a forfeiture principle, as does a common sense attention to the need for fit incentives. The defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him." Accordingly, "[w]here a defendant has silenced a witness through the use of threats, violence or murder, [the] admission of the victim's prior statements at least partially offsets the perpetrator's rewards for his misconduct." *Id.*).

advocates this position for post-*Crawford* child abuse prosecutions.¹²⁹ According to Professor Friedman, the forfeiture rule should logically apply to those situations where the alleged criminal act for which the accused is being tried is the same act that forfeited his right to confront a particular witness.¹³⁰

Applying this reasoning presents a number of potential problems. First, prosecutors have rarely, if ever, used such an argument per se, and instead have only argued that a defendant's threats directed at the child after the alleged

¹²⁹ See *Adjusting to Crawford*, *supra* note 6, at 12. Friedman states that “[t]he idea that the accused cannot claim the confrontation right if his or her own misconduct prevents the witness from testifying at trial is a very old one. *Crawford* explicitly reaffirms it, and justifiably so.” *Id.* (emphasis added).

¹³⁰ See *The Conundrum of Children*, *supra* note 29, at 247. Friedman explains,

The forfeiture principle prescribes that if the accused's own wrongful conduct is responsible for the inability of the witness to testify under the conditions ordinarily required, the accused cannot object to use of the witness's prior statement. This principle is well established as a matter of confrontation and hearsay law, and it potentially has an important, though difficult, role to play in child abuse cases. It is plain enough that the forfeiture principle is not rendered inapplicable when the witness who was prevented from testifying at trial is the victim of the crime being charged. The same logic should be taken one step further: The forfeiture principle remains applicable even when the conduct that allegedly rendered the witness unavailable to testify is the same criminal conduct for which the accused is now on trial.

One potential problem with applying the forfeiture principle in this context is that defendants would likely argue that it is fundamentally unfair and potentially unconstitutional to have a trial judge on one hand assess whether the defendant, by a preponderance of the evidence, procured the unavailability of the child by his or her abuse, and, on the other hand, having the jury later decide the ultimate issue in the case of whether the defendant, beyond a reasonable doubt, committed the underlying child abuse crime against the child.

To this argument, Friedman responds,

On closer analysis, I do not believe the objection carries weight. The situation is analogous to the one that traditionally and often arises when a defendant is accused of conspiracy charges and the prosecution argues that the hearsay rule poses no bar to admission because the statement was made by a conspirator of the defendant and in support of the conspiracy. The same factual issue may arise as a threshold matter for evidentiary purposes and on the merits for determining guilt, but so what? The issue will likely be decided for the two different purposes by two different fact finders—the judge deciding threshold evidentiary matters and the jury determining guilt—and on different factual bases, given that in determining admissibility issues the judge is not constrained by the ordinary rules of evidence.

ADJUSTING TO CRAWFORD, *supra* note 6, at 12.

See also *People v. Baca*, 2004 WL 2750083 at *11 (Cal. Ct. App. Dec. 2, 2004) (finding the rule of forfeiture does govern when a court must determine “whether the rule of forfeiture by wrongdoing applies to cases such as this, where the defendant is being prosecuted for the same conduct that rendered the hearsay declarant unavailable.”); *Meeks*, 88 P.3d at 794 (agreeing with Richard Friedman and others that the forfeiture principle should apply in this situation).

abuse occurred could constitute forfeiture.¹³¹ This line of argument has received mixed results from the courts.¹³² Secondly, a determination of whether a child's refusal or inability to be available to testify at trial was based on the defendant's actions or some other motivating factor would be a very difficult question for a trial court. A child may be effectively unavailable to testify at trial for a number of reasons outside of and not related to the actual alleged abuse, including a child's age and maturity level, his or her general fear of a courtroom environment, or simply a parent or guardian specifically urging the child not to testify at trial for fear that the child will become emotionally upset.¹³³ Clearly, if any of these reasons were the sole justification for the child's unavailability to testify at trial then a court would find that a defendant did not forfeit his right to confrontation and the *Crawford* analysis would still be applicable. Furthermore, it is conceivable that an allegedly abused child could be unavailable partly due to the defendant procuring his or her unavailability and partly because a parent or guardian, in good faith, convinces the child not to testify at trial. Finally, there is also an argument that the forfeiture of the defendant's right to confront a witness because of the very act he or she is on trial for committing could violate a defendant's basic due process protections. Undoubtedly, all of these potential questions are very difficult, would require careful scrutiny by a trial judge, and possibly could necessitate the trial judge appointing an expert to interview the

¹³¹ This Note was unable to find a single case that directly dealt with this particular argument. While it is conceivable that some prosecutor somewhere will use this unique argument, this Note was unable to find a court case on the issue. However, even though this Note did not find such a case, this does not mean that such an argument would not be effective. In fact, considering how *Crawford* dramatically changed the landscape on the introduction of hearsay at trial and its application to a defendant's right to confrontation, prosecutors should be searching for innovative and novel arguments to get an allegedly abused declarant's statements admissible at trial.

¹³² See *State v. Sheppard*, 484 A.2d 1330, 1348 (N.J. Super. Ct. Law Div. 1984) (holding that a defendant forfeited his right to confrontation when the Court found, by a preponderance of the evidence, that the defendant procured the unavailability of the child to testify at trial by threatening to kill the child if the child told anyone about the alleged abuse). But see *State v. Jarzbek*, 529 A.2d 1245, 1253 (Conn. 1987) (holding that "although the threats made by the defendant against the minor victim were similarly designed to conceal his wrongdoing, they were made during the commission of the very crimes with which he is charged. We acknowledge that threats such as those made by the defendant could potentially inhibit a witness, causing the witness to testify untruthfully or to refuse to testify at all. The constitutional right of confrontation would have little force, however, if we were to find an implied waiver of that right in every instance where the accused, in order to silence his victim, uttered threats during the commission of the crime for which he was on trial").

¹³³ See *The Conundrum of Children*, *supra* note 29, at 253. Friedman catalogs the potential problems in determining whether a child is unavailable solely because of the defendant's actions. He states, "[t]he difficulties of applying the forfeiture principle in the context of child abuse are, I concede, substantial. First, as in any case in which the principle is invoked, the court must resolve the basic question that is often very difficult: Did the accused actually commit, or acquiesce in, the wrongful act that assertedly rendered the witness unavailable? But in the case of a child witness, the complexities only begin there." Furthermore, "[a]nother issue the court must resolve is whether, assuming the accused committed the conduct, that conduct really amounts for the child's silence." *Id.*

child in order for the trial judge to make an ultimate decision on what actually caused the child to be unavailable. Nevertheless, in light of the prospective problems that *Crawford* may pose for a successful prosecution of child abuse, prosecutors could make an argument, given the right set of circumstances, that the defendant forfeited his or her right to confrontation by his alleged abuse and could consequently render *Crawford* inapplicable to the particular case.

VII. ALTERNATIVES TO LIVE CHILD TESTIMONY

Crawford requires that an out-of-court statement that is deemed testimonial be held inadmissible unless the declarant is both unavailable and subject to cross-examination.¹³⁴ As discussed above, there are some hearsay statements made by the allegedly abused child that will unquestionably fit this testimonial classification.¹³⁵ Therefore, in these circumstances, if the prosecution wants the child's out-of-court statements to be admissible at trial, then the child must be cross-examined.¹³⁶ Here, the greatest obstacle a prosecutor will face is finding a successful method that will allow the child to be subject to effective cross-examination by the defendant, but, at the same time, will also supply procedural safeguards for the child witness that will take into account the child's potential mental and emotional anguish that may arise from such cross-examination. Fortunately for prosecutors, many states and the federal government already have statutes that meet these seemingly incompatible goals.

In 1990, the United States Supreme Court addressed the constitutionality of a Maryland statutory scheme that allows a child to testify at trial, and hence be subject to cross-examination, through closed circuit television.¹³⁷ In *Maryland v. Craig*, a defendant was charged with, *inter alia*, child abuse on a six-year old child.¹³⁸ Based on expert testimony, the prosecutor claimed that if the child were forced to testify in the courtroom with the defendant present, the child would suffer serious emotional distress and be unable to effectively communicate her testimony.¹³⁹ Therefore, the prosecutor invoked a state statute that allowed a child, in such a situation, to testify via closed-circuit television.¹⁴⁰

¹³⁴ *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

¹³⁵ *See supra* note 118.

¹³⁶ As mentioned in *supra* note 41, while unavailability is definitely part of the *Crawford* analysis, the Court was silent in mandating a more stringent policy, compared to the more lenient pre-*Crawford* analysis, for finding a child witness unavailable.

¹³⁷ *Maryland v. Craig*, 497 U.S. 836 (1990). For a more detailed discussion of *Maryland v. Craig*, see Jan Sanders, *Protecting the Child Victim of Sexual Abuse While Preserving the Sixth Amendment Confrontation Rights of the Accused: Maryland v. Craig*, 35 ST. LOUIS U. L.J. 495 (1991).

¹³⁸ *Craig*, 497 U.S. at 840.

¹³⁹ *Id.* at 842.

¹⁴⁰ In short, the Maryland statute allows a victim of child abuse to testify through a one-way closed circuit television if the trial court determines that the child would suffer serious emotional

Despite the defendant's objection, the trial court granted the prosecutor's request, and the defendant was subsequently convicted.¹⁴¹ On appeal, the defendant argued that the use of such a statutory procedure violated the Confrontation Clause.¹⁴² The Supreme Court, by a 5-4 decision, disagreed. The Court held that "[w]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation."¹⁴³ The Court outlined the necessary constitutional requirements that a trial court must make in order to permit such a procedure to be used.¹⁴⁴

In light of *Crawford's* necessity of cross-examination in order for a trial court to admit any out-of-court testimonial statements made by a child witness, prosecutors should seek to use these kinds of statutory procedures, such as the one used in *Maryland v. Craig*, on a more frequent basis. Currently, many states and the federal government have statutes that authorize allegedly abused children to testify via one-way closed circuit television, two-way closed circuit television, or even by videotaped deposition.¹⁴⁵ While a minority of states have found that these statutes violate a defendant's state constitutional right to confrontation,¹⁴⁶ an overwhelming majority of states have constitutionally author-

distress if forced to testify in the courtroom. See MD. CTS. & JUD. PROC. CODE ANN. § 9-102. The statute further provides that

[o]nce the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room, the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness's testimony in the courtroom. During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom."

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

¹⁴¹ *Id.* at 843.

¹⁴² *Id.* at 842.

¹⁴³ *Id.* at 857.

¹⁴⁴ The Court specifically mandated that the "trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Finally, the trial court must find 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." *Id.* at 855-56.

¹⁴⁵ For a list of some of the state statutes that authorize these various procedures see *id.* at 854 n. 2,3, and 4. See also 18 U.S.C. § 3509 (2000).

¹⁴⁶ See, e.g., *People v. Fitzpatrick*, 633 N.E.2d 685, 687 (Ill. 1994) (holding that Illinois' Constitution mandates that a defendant be entitled to face-to-face confrontation with a witness. Thus,

ized the use of such a statutory scheme.¹⁴⁷ The prosecution's use of these statutes in some circumstances could be vital in a post-*Crawford* world. Most importantly, one scenario where a prosecutor should definitely invoke this type of statute is when the trial court has deemed the allegedly abused child's out-of-court statements to be testimonial. In this situation, because cross-examination is necessary under *Crawford*, a prosecutor should argue to the trial court that both examination and cross-examination of the child should occur through the various alternative means that are specified in the particular state statute. Once the prosecution makes the appropriate motion, so long as the prosecutor can demonstrate that the child will suffer serious mental or emotional anguish by testifying in the courtroom in front of the defendant, a trial court will most likely grant the prosecutor's request.¹⁴⁸ Where a trial court finds that the child's out-of-court statements are testimonial, these statutes provide an excellent compromise among all of the interested parties in a child abuse prosecution. The defendant's constitutional guarantee to effectively cross-examine the child witness is secured, the prosecutor will likely be able to successfully introduce the child's out-of-court testimonial statements, and the allegedly abused child will be able to testify in an alternative setting that, at the very least, will ease some of the emotional and mental anguish that the child could potentially suffer.¹⁴⁹ In a

the Court held that "a witness who is examined by closed circuit television does not provide the defendant with the face-to-face encounter envisioned by the drafters of the Illinois Constitution."); *Commonwealth v. Ludwig*, 594 A.2d 281, 282 (Pa. 1991) (holding that the use of closed circuit television to transmit the testimony of the allegedly abused child violates Pennsylvania's constitutional right to confrontation).

¹⁴⁷ See, e.g., *Strickland v. State*, 550 So. 2d 1042 (Ala. Crim. App. 1988), *aff'd* 550 So. 2d 1054 (holding that Alabama's statute allowing an allegedly abused child to testify under certain circumstances by videotape deposition, which is then played in front of the jury at trial, constitutionally protects a defendant's right to confrontation.); *Glendening v. State*, 536 So. 2d 212 (Fla. 1988), *cert. denied* 492 U.S. 907 (upholding a similar statute as constitutional); *State v. Thomas*, 425 N.W.2d 641 (Wisc. 1988) (holding the state statute constitutionally acceptable and not in violation of the defendant's right to confrontation). Some state courts, however, have yet to actually address the state constitutionality of such statutes. See, e.g., W. VA. CODE § 62-6B-1 to 5 (2001) (authorizing the taking of testimony of child witnesses through live, two-way closed-circuit television); COLO. REV. STAT. ANN. §18-6-401.3 (West 2000) (authorizing a child witness to be examined and cross-examined by videotaped deposition). Generally speaking, most of these state statutes allow for an alleged victim of child abuse to testify either through videotaped deposition or closed circuit television so long as the trial court makes the requisite finding that the child will suffer serious harm if he or she is forced to testify in the courtroom with the defendant present.

¹⁴⁸ In reality, this kind of showing by a prosecutor will likely not be difficult. Undoubtedly, almost all children, who have been allegedly abused, will suffer mental and emotional anguish from the experience. Factor this anguish with forcing a child to testify in detail about the actual event in front of the defendant, a prosecutor will most likely be able to demonstrate that the child's testimony in the courtroom would seriously harm the child emotionally and mentally.

¹⁴⁹ Obviously, in some circumstances, a child testifying by alternative means will have very little impact on the child's mental and emotional anguish. Furthermore, it is possible that some children or their caretakers will refuse to testify in this alternative manner, as well. However, this should not deter prosecutors from at least attempting to use these alternative methods of testimony. If a prosecutor can explain to the child (or likely the child's caretaker) that a successful

post-*Crawford* world, prosecutors should look to these statutes as a viable method to successfully admit an allegedly abused child's out-of-court testimonial statements at trial.

VIII. CONCLUSION

Crawford v. Washington marked a radical change in the United States Supreme Court's jurisprudence regarding a defendant's right to confrontation. The adoption by the Court of the so-called "testimonial" approach to govern Confrontation Clause analysis, and the Court's failure to outline the boundaries of such an approach, has created more questions than it has provided definitive answers regarding the types of out-of-court statements forbidden by the Confrontation Clause. One important area where these questions will certainly be raised is in the prosecution of child abuse and the introduction of an allegedly abused child's out-of-court statements at trial. While the specific facts in *Crawford* had nothing to do with child abuse prosecution per se, it is undoubtedly true that *Crawford* will present significant obstacles to prosecutors all over the country in their attempt to successfully prosecute child abuse crime. Hopefully, this Note has addressed some of these potential difficulties. In the future, as more courts begin to analyze and attempt to define the boundaries of *Crawford*, prosecutors will likely begin to understand the full ramifications that *Crawford* poses to a successful child abuse prosecution. However, as it stands today, *Crawford's* effect on child abuse prosecution remains to be seen.

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prosecution of the accused could hinge upon whether the child can at least testify in this alternative method then it is possible that some children or their caretakers will consent to this kind of substitute testimony in order to secure a conviction against the accused.

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