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“MINUTE AND SEPARATE”: CONSIDERING THE ADMISSIBILITY OF VIDEOTAPED FORENSIC INTERVIEWS IN CHILD SEXUAL ABUSE CASES AFTER *CRAWFORD* AND *DAVIS*

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Abstract: Child sexual abuse is one of the least prosecuted crimes in the United States in part because of the many evidentiary challenges prosecutors face. In 2004, the Supreme Court introduced a new standard for determining the admissibility of out-of-court statements made by declarants who are unavailable to testify at trial. In *Crawford v. Washington*, the Supreme Court held that testimonial statements are only admissible at trial if the declarant is unavailable to testify and there was a prior opportunity for cross-examination. This Note will examine *Crawford's* impact on the admissibility of videotaped forensic interviews with child victims of sexual abuse and suggest that courts adopt a “minute and separate” approach when deciding whether statements contained in those interviews are testimonial in nature.

INTRODUCTION

On June 25, 2002, Von, a six-year-old boy, told his mother that a neighborhood boy, Rolandis, had sexually assaulted him.¹ Six days later, Von's mother took him to the Carrie Lynn Children's Center in Rockford, Illinois.² The Center serves child victims of sexual abuse.³ There, a child advocate interviewed Von, and the interview was videotaped according to the Center's protocol.⁴ During the interview, Von described the incident with Rolandis and answered questions posed by the child advocate.⁵ A police officer observed the interview through a one-way

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¹ See *In re Rolandis G.*, 902 N.E.2d 600, 603–04 (Ill. 2008), *cert. denied*, 129 S. Ct. 2747 (2009). Von told his mother that “Rolandis made [him] suck his dick.” *Id.* at 603. He told a police officer that “Rolandis had been holding a stick in his hand when he forced [him] to perform this act.” *Id.* at 604. Von also stated that “he had choked while . . . performing the act and that a fluid had come out of Rolandis' penis.” *Id.*

² See *id.* at 604.

³ *Id.*

⁴ See *id.*

⁵ See *id.*

mirror, but did not participate.⁶ When the interview concluded, the police officer obtained a copy of the video into custody, placed it in an evidence bag, and kept it at the police station.⁷

At trial, Von refused to answer questions about the incident with Rolandis.⁸ Subsequently, the videotape of Von's interview at the Carrie Lynn Children's Center was entered into evidence under exceptions to the hearsay rule.⁹ The entire videotape was played at trial.¹⁰ Rolandis was found guilty of aggravated criminal sexual assault.¹¹ In 2008, the Supreme Court of Illinois held that the videotaped statements Von made during the interview with the child advocate were testimonial and as such, their admission at trial violated the Confrontation Clause of the Sixth Amendment.¹²

* * *

On December 7, 2005, Wendy Otto found her husband, Michael Arnold, alone with their four-year-old daughter in their bedroom.¹³ After noticing her husband's boxers were on improperly and discovering

⁶ See *Rolandis*, 902 N.E.2d at 604.

⁷ *Id.*

⁸ See *id.* at 603.

⁹ See *id.* at 605.

¹⁰ *Id.* at 604.

¹¹ *Rolandis*, 902 N.E.2d at 605.

¹² *Id.* at 619. The court observed:

[T]he Carrie Lynn Children's Center, where Von's interview took place, is one of several accredited child advocacy centers in this state "established to coordinate the activities of the various agencies involved in the investigation, prosecution and treatment referral of child sexual abuse." . . . [T]he record, from an objective viewpoint, indicates that the interview took place at the behest of the police so that a more detailed account of the alleged sexual abuse could be obtained by a trained interviewer and memorialized on videotape. Moreover, because the interview was witnessed by Detective Swanberg and a copy of the videotaped interview immediately turned over to him "as evidence" upon completion of the interview, the objective circumstances indicate that Von's statement was the product of an interrogation, conducted on behalf of the police, intended to gather information and establish past acts for future prosecution.

Id. at 611. Further, the court could not find "[any] indication that, in the case at bar, Weber's interview of Von was conducted, to a substantial degree, for treatment rather than investigative purposes." *Id.* As a result, it held that "Von's videotaped statement was testimonial in nature and, because Von did not testify at trial and there was no prior opportunity for cross-examination, it was improperly admitted in violation of respondent's confrontation rights." *Id.* Although the Supreme Court of Illinois found that the statements violated the defendant's confrontation rights, it also held that the admittance was harmless and thus, affirmed Rolandis's conviction. See *id.* at 619.

¹³ See *State v. Arnold*, No. 07AP-789, 2008 WL 2698885, at *1 (Ohio Ct. App. July 10, 2008), *appeal docketed*, 898 N.E.2d 967 (Ohio 2008).

her daughter's underwear around her knees, Wendy told her husband to leave the house and proceeded to call 911.¹⁴ The four-year-old child told a responding firefighter that "someone had touched her in her private parts."¹⁵ The following day, Wendy accompanied her daughter to the Child and Family Advocacy Center at Children's Hospital.¹⁶ There, a licensed social worker questioned the child about the prior day's events, and the interview was videotaped.¹⁷ "During the interview, the child accused [Arnold] of conduct that would constitute sexual abuse."¹⁸ Among other onlookers, a detective observed the interview from another room through a closed-circuit television, but did not participate.¹⁹

At trial, the four-year-old child was unavailable to testify.²⁰ Subsequently, the trial court admitted the videotaped interview conducted at the Child and Family Advocacy Center.²¹ Arnold was found guilty of rape by vaginal intercourse of a person less than thirteen years of age.²²

Faced with this in the same year that the Illinois Supreme Court decided *In re Rolandis G.*, the Court of Appeals of Ohio arrived at the opposite conclusion.²³ It held that the statements made during the videotaped interview were not testimonial and that their admission at trial did not violate the Confrontation Clause of the Sixth Amendment.²⁴

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *Arnold*, 2008 WL 2698885, at *1.

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *See Arnold*, 2008 WL 2698885, at *8 (distinguishing the interview in question from those which only serve the purpose to gather evidence instead of medical diagnosis or treatment).

²⁴ *See id.* The court held:

[The social worker] acted without police involvement during the interview and questioned the child so that the child could be properly treated. . . . The primary purpose of [the] interview was to gather information for the child's proper treatment and diagnosis and not to produce evidence for a future prosecution, even though such evidence may have been produced as a result of the interview.

Id. Thus, "the child's statements are not testimonial for purposes of the Confrontation Clause [and] [a]ccordingly, the admission of those statements did not violate appellant's Sixth Amendment right to confrontation." *Id.* The Supreme Court of Ohio has accepted appellate review of this case. *See State v. Arnold*, 898 N.E.2d 967 (Ohio 2008).

These two cases demonstrate the confusion in the lower courts regarding the implications of the Confrontation Clause on videotaped out-of-court statements made by child victims of sexual abuse.²⁵ In both of these cases, videotaped interviews with a trained questioner resulted in the child victims making statements describing the abuse and identifying the defendant as the perpetrator.²⁶ That nearly identical facts resulted in completely opposite holdings in different states suggests that guidance is necessary in order to resolve this conflict among the lower courts.²⁷

* * *

When a witness is unavailable to testify at trial, her out-of-court statements are admissible only under specific circumstances.²⁸ In 1980, the Supreme Court ruled that the reliability of the out-of-court statements would govern their admissibility at trial.²⁹ But, in 2004, the Supreme Court established a new standard for evaluating when these statements could be introduced at trial.³⁰ This standard permitted the admission of out-of-court testimonial statements only if the witness was

²⁵ Compare *Rolandis*, 902 N.E.2d at 619 (holding that admission of videotaped evidence violated the defendant's confrontation right), with *Arnold*, 2008 WL 2698885, at *8 (holding that admission of videotaped evidence did not violate the defendant's confrontation right).

²⁶ *Rolandis*, 902 N.E.2d at 604; *Arnold*, 2008 WL 2698885, at *1.

²⁷ See Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 996 (2007); Richard D. Friedman, *Further Developments and Thoughts on Child Witnesses*, The Confrontation Blog, <http://confrontationright.blogspot.com/2007/10/further-developments-and-thoughts-on.html> (Oct. 26, 2007, 15:29 EST). Professor Mosteller writes:

The most unsettled and contentious area involves statements with multiple purposes. The critical question for the future is whether videotaped statements that ultimately are used in court as the equivalent of testimony will be treated as nontestimonial if they are taken by government officials who are not explicitly pursuing a law enforcement purpose. The test case is the statement taken in a nonemergency situation that has as its primary purpose the general welfare of the child (such as the child's placement), and results in a videotaped statement which is ultimately offered in evidence at trial describing abuse and identifying the defendant as the perpetrator.

Mosteller, *supra*, at 996. Professor Friedman believes that "the confrontation issues posed by statements by children are enormously important, complex, and troubling. Sooner or later, the Supreme Court will have to begin resolving many of these issues." Friedman, *supra*.

²⁸ See *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

²⁹ See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

³⁰ See *Crawford*, 541 U.S. at 68.

unavailable to testify at trial and there was a prior opportunity for cross-examination.³¹

As *In re Rolandis G.* and *State v. Arnold* demonstrate, the testimonial standard has had a particular impact on child sexual abuse cases, with lower courts struggling in its application.³² This Note will discuss the impact of the *Crawford* rule of confrontation on statements made by child victims of sexual abuse. Particularly, it will focus on the mixed purpose statements made during videotaped interviews of child sexual abuse victims with forensic interviewers.³³

Part I will include a brief history of the Supreme Court's Confrontation Clause jurisprudence with a focus on its application to child sexual abuse cases. Part II will discuss the evidentiary challenges of prosecuting child sexual abuse and briefly discuss the implications those challenges have on the confrontation rights of the accused. Part III will examine how videotaping and forensic interviewing has helped increase the reliability of a child victim's out-of-court statements, but has ultimately created inadmissible testimonial statements under *Crawford*.

³¹ See *id.* Rule 804 of the Federal Rules of Evidence states:

- "Unavailability as a witness" includes situations in which the declarant—
- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
 - (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
 - (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
 - (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
 - (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

FED. R. EVID. 804(a)(1)–(5). Child victims of sexual abuse, however, rarely fall into these articulated categories; instead, judges often deem them unavailable to testify because of issues regarding competency and trauma. See *infra* Part II.C.

³² See *Rolandis*, 902 N.E.2d at 613 ("We are not unsympathetic to the State's concern that child abuse victims are often unavailable to testify because of their tender years and, for that reason, '*Crawford* is incompatible with the realities of child abuse prosecutions.'"); *Arnold*, 2008 WL 2698885, at *8; Prudence Beidler Carr, Comment, *Playing by the Rules: How to Define and Provide a "Prior Opportunity for Cross-Examination" in Child Sexual Abuse Cases After Crawford v. Washington*, 97 J. CRIM. L. & CRIMINOLOGY 631, 631 (2007).

³³ These mixed purpose statements may establish past events but are initially provided out of the questioner's concern for the child's well-being. See Mosteller, *supra* note 27, at 970–71. Although the primary purpose for these statements may be for medical treatment, "a prosecutorial interest may quickly follow." *Id.* at 971. Thus, mixed purpose statements that are videotaped "present a major Confrontation Clause issue because the videotape is used as evidence at trial." *Id.* at 966.

Finally, Part IV will suggest that courts should consider statements made in these videotaped forensic interviews in minute and separate assertions when determining the testimonial nature of a child victim's disclosures in order to preserve the benefits of these statements while also honoring the defendants' Sixth Amendment rights.

I. A BRIEF HISTORY OF THE CONFRONTATION CLAUSE AND CHILD SEXUAL ABUSE CASES: FROM *ROBERTS* TO *CRAWFORD*³⁴

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

—the Confrontation Clause³⁵

A. *Ohio v. Roberts: The Reliability Rule*

Until 2004, the reliability rule established in *Ohio v. Roberts* governed the admissibility of out-of-court statements from unavailable witnesses.³⁶ Under this rule, an unavailable witness's out-of-court statement could be admitted at trial if it "[bore] adequate 'indicia of reliability.'"³⁷ The Court held that such "reliability can be inferred without more" when such statements "fall[] within a firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness."³⁸

In the decade following *Roberts*, the Supreme Court applied the reliability rule to two child sexual abuse cases.³⁹ In *White v. Illinois*, the Court affirmed that the admission of a child's out-court-statements under established hearsay exceptions did not violate the Confrontation

³⁴ This history will only cover cases that address the admissibility of out-of-court statements, focusing particularly on child sexual abuse cases. Cases defining what constitutes sufficient confrontation when a child testifies at trial fall outside the scope of this Note and will not be directly addressed. For an introduction to what constitutes sufficient confrontation when a child testifies, see *Maryland v. Craig*, 497 U.S. 836, 859–60 (1990) (holding that having a child witness testify by one-way closed-circuit television did not violate the Confrontation Clause) and *Coy v. Iowa*, 487 U.S. 1012, 1016–22 (1988) (addressing the constitutionality of placing a screen between a child witness and the defendant when the child testifies and finding that face-to-face cross-examination is not an absolute component of confrontation).

³⁵ U.S. CONST. amend. VI.

³⁶ See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

³⁷ See *id.*

³⁸ *Id.*

³⁹ See *White v. Illinois*, 502 U.S. 346, 356–57 (1992); *Idaho v. Wright*, 497 U.S. 805, 827 (1990).

Clause even though the child did not testify at trial.⁴⁰ The Court found that these statements carried “sufficient guarantees of reliability” because they “[came] within a firmly rooted exception to the hearsay rule.”⁴¹ Furthermore, the hearsay statements “had substantial probative value . . . that could not be duplicated” by live testimony.⁴² Thus, in *White*, the Supreme Court affirmed the application of the *Roberts* rule to child sexual abuse cases and identified what constituted a “firmly rooted hearsay exception” in a child sexual abuse case.⁴³

In *Idaho v. Wright*, the Supreme Court held that the admission of a child victim’s out-of-court statements violated the Confrontation Clause

⁴⁰ See *White*, 502 U.S. at 356–57. In *White*, the petitioner, a friend of the victim’s mother, was charged with aggravated criminal sexual assault of a child, who was then four years old. *Id.* at 349. The child described the assault to her babysitter, mother, a police officer and an emergency room nurse and doctor, stating that petitioner had “choked and threatened her,” “touch[ed] her in the wrong places,” and that “petitioner had ‘put his mouth on her front part.’” *Id.* The child’s first statement was to the babysitter and was made immediately after the babysitter “was awakened by [the child’s] scream,” and witnessed the petitioner leaving the child’s room. *Id.* The child’s second statement was made to her mother approximately thirty minutes after the first statement. *Id.* The statement to the police officer was made about forty-five minutes after the babysitter was awakened by the scream. *Id.* at 349–50. Approximately four hours after the babysitter first heard the child’s scream, the child was brought to the hospital and was examined by an emergency nurse and doctor. *Id.* at 350. There, the child “provided an account of events that was essentially identical to the one she had given” previously. *Id.* The child never testified at trial because she “experienced emotional difficulty on being brought to the courtroom.” *Id.* The trial court permitted admission of the child’s statements to her babysitter, mother and the police officer under the hearsay exception for spontaneous declarations and admitted the statements made to the emergency room nurse and doctor under the spontaneous declarations exception and the “exception for statements made in the course of securing medical treatment.” *Id.* at 350–51.

⁴¹ *Id.* at 356. “[T]he evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.” *Id.* at 355.

⁴² *Id.* at 356. The Court noted that “[a] statement that had been offered in a moment of excitement . . . may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom.” *Id.* Likewise, “a statement made in the course of procuring medical services . . . carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.” *Id.* As a result, exclusion of these statements posed a “threat of lost evidentiary value if the out-of-court statements were replaced with live testimony.” *Id.* at 356. The Court concluded that “[t]o exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness.” *Id.*

⁴³ See *id.* at 355–56; Carr, *supra* note 32, at 639. The Court found that the *Roberts* rule applied “with full force to the case at hand.” *White*, 502 U.S. at 355. The Court continued, stating that “[t]here can be no doubt that the two [hearsay] exceptions for spontaneous declarations and statements made in the course of receiving medical care . . . are ‘firmly rooted.’” *Id.* at 355 n.8.

because they lacked “particularized guarantees of trustworthiness.”⁴⁴ Utilizing a totality of the circumstances test, the Court found that the child had been questioned suggestively and, consequently, there was “no special reason for supposing that the incriminating statements were particularly trust-worthy.”⁴⁵

While the Court did not articulate what circumstances would result in a finding of “trustworthiness,” it did draw attention to the lower court’s observation that the statements could have been found trustworthy had “certain procedural safeguards” been used.⁴⁶ Specifically, the lower court suggested that had the statements been videotaped, a jury could assess the reliability of the statements.⁴⁷ Furthermore, videotaping the statements could have ensured that the interviewing techniques did not mislead the child to make false statements.⁴⁸

Thus, under the *Roberts* rule, out-of-court statements by child victims of sexual abuse were admissible if they fell under a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.”⁴⁹ At trial, most out-of-court statements are admitted under the

⁴⁴ *Wright*, 497 U.S. at 827. In *Wright*, the petitioner was charged with two counts of lewd conduct with a minor under sixteen. *Id.* at 808. The victims were the petitioner’s daughters, who were five and a half and two and a half years old at the time the crimes were charged. *Id.* The statements in question were the ones made by the younger daughter to an examining physician. *Id.* at 809. The statements were admitted under Idaho’s residual hearsay exception. *Id.* at 811. The child did not testify at trial because it was determined that she “was ‘not capable of communicating to the jury.’” *Id.* at 809–10.

⁴⁵ *Id.* at 826. The Court found that the residual hearsay exception, under which the statements were admitted, was not a firmly rooted hearsay exception. *See id.* at 817. In addition, the statements did not meet the requirements for admission under the exceptions of excited utterances or statements made for the purposes of medical diagnosis or treatment. *See id.* at 827. Consequently, the Court evaluated the admissibility of the out-of-court statements by determining whether the statements showed “particularized guarantees of trustworthiness.” *Id.* at 818.

⁴⁶ *See id.* at 818.

⁴⁷ *See id.* at 813; Carr, *supra* note 32, at 640. Justice Sandra Day O’Connor wrote for the majority that, “The [Idaho Supreme Court] found Dr. Jambura’s interview technique inadequate because ‘the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial’” *Wright*, 497 U.S. at 812–13 (quoting *State v. Wright*, 775 P.2d 1224, 1227, 1230 (Idaho 1989)). Further, she noted that “the court found that ‘[t]he circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not [audio or video] recorded, can never be fully assessed.’” *Id.* at 813 (quoting *Wright*, 775 P.2d at 1227, 1230).

⁴⁸ *See Wright*, 497 U.S. at 813. Justice O’Connor noted that the lower court had found that the “interrogation was performed by someone with a preconceived idea of what the child should be disclosing” and that “children are susceptible to suggestion and are therefore likely to be misled by leading questions.” *Id.* (quoting *Wright*, 775 P.2d at 1227). The lower court then stated that the “dangers of reliability which, because the interview was not recorded, can never be fully assessed.” *Id.* (quoting *Wright*, 775 P.2d at 1227).

⁴⁹ *See White*, 502 U.S. at 356–57; *Wright*, 497 U.S. at 827; *Roberts*, 448 U.S. at 66.

hearsay exceptions for excited utterances, statements made for the purposes of medical diagnosis or treatment, or state law hearsay exceptions for statements made by child victims of sexual abuse.⁵⁰ Determination of whether there were “particularized guarantees of trustworthiness” required an examination of the totality of the circumstances, and courts were free to consider factors such as whether the out-of-court statements were videotaped to make that decision.⁵¹

B. *Crawford v. Washington: The Testimonial Standard*

In 2004, the Supreme Court decided *Crawford*, which severely limited the application of the *Roberts* reliability rule and introduced a new standard for testimonial statements: “Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”⁵²

⁵⁰ See Carr, *supra* note 32, at 643 (“Excited utterance and medical diagnosis were two common justifications for hearsay admission in [child sexual abuse] cases.”); Myrna S. Raeder, *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1009 (2007) (“Hearsay [is] primarily introduced in the context of excited utterances, statements for medical diagnosis or treatment, forensic interviews, or via ad hoc exceptions.”); see also White, 502 U.S. at 350–51 (out-of-court statements made to a babysitter, the victim’s mother and the police were admitted pursuant to the hearsay exception for spontaneous declarations and statements made to a nurse and a doctor were admitted under the hearsay exceptions for spontaneous declarations and statements made for the purposes of medical treatment and diagnosis); *People v. Vigil*, 127 P.3d 916, 920 (Colo. 2006) (out-of-court statements made to the victim’s father and the victim’s father’s friend admitted as excited utterances and statements made to a doctor admitted under the exception for statements made for purposes of medical diagnosis and treatment); *State v. Webb*, 779 P.2d 1108, 1110 (Utah 1989) (child victim’s out-of-court statements to her mother admitted under state hearsay exception for “hearsay statements of a child who is an alleged victim of sexual abuse”).

⁵¹ See *Wright*, 497 U.S. at 818, 826.

⁵² See *Crawford*, 541 U.S. at 68. Writing for the majority, Justice Scalia criticized the *Roberts* reliability rule, stating:

[The *Roberts* rule] departs from the historical principles [of the Confrontation Clause] 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. He continued:

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable . . . Whether a

In arriving at the decision, Justice Antonin Scalia, writing for the majority, looked to the historical background of the Confrontation Clause.⁵³ Focusing on the 1603 trial of Sir Walter Raleigh for treason, he asserted that this “paradigmatic confrontation violation” revealed “two inferences about the meaning of the Sixth Amendment.”⁵⁴ First, the Confrontation Clause is directed principally at the “use of *ex parte* examinations as evidence against the accused.”⁵⁵ Second, such statements of an unavailable witness could not be used at trial if the defendant did not have “a prior opportunity for cross-examination.”⁵⁶

With these concerns in mind, Justice Scalia fashioned a new standard by which to evaluate the admissibility of out-of-court statements when witnesses are unavailable to testify at trial.⁵⁷ Looking to the text of the Confrontation Clause, he noted that it “applie[d] to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’”⁵⁸ He then defined a class of out-of-court statements, “‘testimonial’ state-

statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. . . .

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.

Id. at 63 (citation omitted). Justice Scalia concluded: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.* at 68–69.

In *Crawford*, petitioner stabbed a man who allegedly attempted to rape his wife, Sylvia. *Id.* at 38. Police questioned Sylvia regarding the incident, and she stated that she did not see anything in the victim’s hands at the time of the stabbing. *See id.* at 39–40. At trial, petitioner claimed self-defense and the state offered Sylvia’s tape-recorded statements to the police as evidence that the attack was not in self-defense. *See id.* at 40. Sylvia did not testify at trial because of the state’s marital privilege, which bars a spouse’s testimony when there is no consent from the other spouse. *See id.* Sylvia’s statements were admitted under the hearsay exception for statements against penal interest because Sylvia had admitted to the police that she had “facilitated the assault.” *See id.*

⁵³ *See id.* at 42–43 (“The Constitution’s text does not alone resolve this case. . . . We must therefore turn to the historical background of the Clause to understand its meaning.”).

⁵⁴ *Id.* at 50, 52. During Sir Walter Raleigh’s trial, his alleged collaborator, Lord Cobham, “implicated [Raleigh] in an examination before the Privy Council and in a letter.” *Id.* at 44. These statements were later admitted at trial. *Id.* Raleigh asserted that Cobham was lying to save himself and demanded that the judges present Cobham so that Raleigh could confront him. *Id.* The judges refused and Raleigh was found guilty and sentenced to death. *Id.*

⁵⁵ *See id.* at 50.

⁵⁶ *See id.* at 53–54.

⁵⁷ *See Crawford*, 541 U.S. at 51.

⁵⁸ *See id.*

ments,” that would trigger the protection of the Confrontation Clause.⁵⁹ Based on a dictionary definition of testimony, these statements were characterized as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁶⁰ Although Justice Scalia distinguished between out-of-court statements that are testimonial and those that are not, he left “for another day any effort to spell out a comprehensive definition of ‘testimonial.’”⁶¹

He did, however, articulate three “various formulations” that testimonial statements could take: (1) “*ex parte* in-court testimony or its functional equivalent,” (2) “extrajudicial statements contained in formalized testimonial material,” and (3) “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.”⁶² He proceeded to assert that “statements taken by police officers in the course of interrogations are . . . testimonial.”⁶³

Thus, under *Crawford*, out-of-court statements that a judge determines to be testimonial will only be admitted at trial if the witness is unavailable to testify and there was a prior opportunity for cross-examination.⁶⁴ What constituted a testimonial statement, however, remained vaguely defined.⁶⁵

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ *Id.* at 68. When distinguishing between testimonial and non-testimonial out-of-court statements, Justice Scalia noted that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* at 51.

⁶² See *Crawford*, 541 U.S. at 51–52. Materials in the first category consist of “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.” *Id.* at 51. The second formulation consists of “affidavits, depositions, prior testimony, or confessions.” *Id.* at 52. Justice Scalia further stated that “[w]hatever else the term [testimonial] 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.” *Id.* at 68.

⁶³ See *id.* at 52. Justice Scalia explained that “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.” *Id.* at 56 n.7. He also clarified that “[j]ust as various definitions of ‘testimonial’ exist, one can imagine various definitions of ‘interrogation.’” *Id.* at 53 n.4. Like the definition of testimonial, however, Justice Scalia did not expound on the definition of interrogation, stating “we need not select among [its definitions] in this case.” *Id.*

⁶⁴ See *id.* at 68. In *Crawford*, admission of Sylvia’s statements to the police violated the Confrontation Clause because her statements were testimonial and petitioner did not have an opportunity to cross-examine her. *Id.*

⁶⁵ See *id.*

C. *Davis v. Washington: The Primary Purpose Test*

Two years after *Crawford*, Justice Scalia had the opportunity to provide clarification to the definition of “testimonial.”⁶⁶ In *Davis v. Washington*, the Supreme Court considered when statements made to the police are testimonial, and thus, subject to the Confrontation Clause.⁶⁷ Justice Scalia, again writing for the Court, introduced the primary purpose test as a means to determine whether statements to the police are testimonial:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁶⁸

Davis combined two cases in which the Court evaluated, using the newly minted primary purpose test, the statements of two domestic violence victims that were made to police officers or government personnel.⁶⁹ In the first case, *Davis v. Washington*, the issue was whether “the interrogation that took place in the course of the 911 call produced testimonial statements.”⁷⁰ The Court determined that the circumstances of the call “objectively indicate[d that] its primary purpose was to enable police assistance to meet an ongoing emergency.”⁷¹ As such, the victim

⁶⁶ See *Davis v. Washington*, 547 U.S. 813, 822 (2006).

⁶⁷ See *id.*

⁶⁸ *Id.* at 822.

⁶⁹ See *id.* at 817–21. In *Davis v. Washington*, the domestic violence victim, Michelle McCottry, made statements to a 911 emergency operator identifying her abuser as Adrian Davis. *Id.* at 817–18. Davis was charged with a “felony violation of a domestic no-contact order.” *Id.* at 818. At trial, the 911 call was admitted into evidence, and McCottry did not testify. *Id.* at 819. Davis was convicted. *Id.* In *Hammon v. Indiana*, after being questioned by the police, the domestic violence victim, Amy Hammon, filled out a battery affidavit describing the actions of her husband, Hershel. *Id.* at 820. Hershel was then charged with domestic battery. *Id.* Amy’s statements to the police and the affidavit were admitted at Hershel’s bench trial, and Amy did not testify. *Id.* Hershel was found guilty. *Id.* at 821.

⁷⁰ *Id.* at 826. In regards to whether 911 operators are police officers for the purposes of the Confrontation Clause, the Court stated: “If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.” *Id.* at 823 n.2.

⁷¹ *Davis*, 547 U.S. at 828. The Court noted:

caller “was not acting as a *witness*; she was not *testifying*.”⁷² Consequently, her statements identifying her abuser were not testimonial.⁷³

The second case, *Hammon v. Indiana*, involved statements that the victim made to police during an interrogation and wrote in an affidavit.⁷⁴ The Court found that the circumstances surrounding these statements indicated that “they were not much different from the statements . . . found to be testimonial in *Crawford*.”⁷⁵ The Court held that

In *Davis*, McCottry was speaking about events *as they were actually happening*, rather than “describ[ing] past events[.]” . . . Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry’s call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator’s effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

Id. at 827 (citations omitted).

⁷² *Id.* at 828.

⁷³ *See id.* at 829.

⁷⁴ *See id.* at 820.

⁷⁵ *See id.* at 829. Regarding the circumstances surrounding the challenged statements, the Court noted:

There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) “what is happening,” but rather “what happened.”

Id. at 829–30 (citations omitted). Furthermore, the Court noted the similarities between the statements made in the present case and in *Crawford*:

What we called the “striking resemblance” of the *Crawford* statement to civil-law *ex parte* examinations is shared by Amy’s statement here. Both declarants were actively separated from the defendant-officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an ob-

“[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.”⁷⁶ Consequently, the statements were “inherently testimonial.”⁷⁷

Thus, *Davis* provides that a court should look to the primary purpose of the interrogation to determine whether out-of-court statements to law enforcement officials or their agents are testimonial.⁷⁸ Statements made during an emergency or in an effort to obtain help are not testimonial.⁷⁹ Nevertheless, statements made to establish events that may be relevant to future prosecution are testimonial.⁸⁰

D. *Melendez-Diaz v. Massachusetts: A Reaffirmation*

In 2009, Justice Scalia reaffirmed the testimonial standard set forth in *Crawford*.⁸¹ In *Melendez-Diaz v. Massachusetts*, the Supreme Court considered whether affidavits reporting the results of forensic analysis were “testimonial,” thus making those who performed the lab tests “wit-

vious substitute for live testimony, because they do precisely *what a witness does* on direct examination

Id. at 830 (citations omitted).

⁷⁶ *Davis*, 547 U.S. at 830.

⁷⁷ *See id.*

⁷⁸ *See id.* at 822.

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531–32 (2009). In the days following the *Melendez-Diaz* decision, the Supreme Court granted certiorari to *Briscoe v. Virginia*, which presents the question:

If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

Question Presented in *Briscoe v. Virginia*, United States Supreme Court Docket for 07–11191, <http://origin.www.supremecourtus.gov/docket/07-11191qp.pdf> (last visited Oct. 20, 2009); *see* *Briscoe v. Virginia*, 129 S. Ct. 2858 (2009). While the questions presented in both *Melendez-Diaz* and *Briscoe* do not directly affect the subject of this Note, any opportunity the Court has to clarify the meaning of *Crawford* will have a significant impact on evidence law. For initial commentary on the decision to grant certiorari to *Briscoe* in light of the decision in *Melendez-Diaz*, see Lyle Denniston, Analysis: Is *Melendez-Diaz* already endangered?, SCOTUSblog, <http://www.scotusblog.com/wp/new-lab-report-case-granted/> (June 29, 2009, 13:51 EST) and Colin Miller, Chicken Little or Canary In the Coal Mine?, Take 3: Could *Briscoe v. Virginia* Lead to An Immediate Overturning of *Melendez-Diaz*?, EvidenceProf Blog, <http://law-professors.typepad.com/evidenceprof/2009/07/chicken-little-or-canary-in-the-coal-mine-take-3.html> (July 1, 2009).

nesses” and subject to a defendant’s right of confrontation.⁸² In a five to four decision, Justice Scalia, writing again for the Court, asserted that “[t]his case involves little more than the application of our holding in *Crawford v. Washington*.”⁸³

In deciding whether “certificates of analysis” were testimonial, the Court noted that these documents were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’”⁸⁴ Invoking *Crawford*’s various formulations of testimonial statements, the Court stated that “[t]here is little doubt that the documents at issue . . . fall within the ‘core class of testimonial statements’ thus described.”⁸⁵ In fact, these certificates of analysis fit into all three of the various formulations set forth in *Crawford*.⁸⁶

Notably, the Court stressed, in particular, that the certificates 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.”⁸⁷ It highlighted that under Massachusetts law, the sole purpose of such documents was “to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.”⁸⁸ As such, because the analysts knew of the certificates’ evidentiary purpose, the certificates were testimonial statements and the lab analysts were “witnesses” for the purposes of the Confrontation Clause.⁸⁹ Absent a showing of unavailability and a prior opportunity for cross-examination, the Court concluded that under the Sixth Amendment, the defendant was entitled to confront the lab analysts at trial.⁹⁰

⁸² *Melendez-Diaz*, 129 S. Ct. at 2530. In *Melendez-Diaz*, the defendant, Luis Melendez-Diaz, was charged with distributing and trafficking cocaine after the police found nineteen small plastic bags in the backseat of the police cruiser where the defendant had previously been. *Id.* The police submitted these bags to the state laboratory for chemical analysis. *Id.* At trial, the prosecution entered into evidence the “‘certificates of analysis’ showing the results of the forensic analysis performed on the seized substances.” *Id.* at 2530–31. The certificates contained “the following results: The substance was found to contain: Cocaine.” *Id.* at 2531. The defendant objected to the admission of the certificates based upon Confrontation Clause concerns, asserting that *Crawford* required the lab analysts testify in person. *Id.* The objection was overruled and a jury found Melendez-Diaz guilty. *Id.*

⁸³ *Id.* at 2542.

⁸⁴ *Id.* at 2532 (quoting *Davis*, 547 U.S. at 830).

⁸⁵ *Id.*

⁸⁶ *See id.* The Court noted that “[t]he documents at issue here . . . are quite plainly affidavits” and that affidavits fall into two of the formulations described in *Crawford*. *Id.*; *see also Crawford*, 541 U.S. at 51, 52.

⁸⁷ *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 62).

⁸⁸ *Id.* (quoting MASS. GEN. LAWS ch. 111, § 13).

⁸⁹ *See id.*

⁹⁰ *See id.*

Consequently, *Melendez-Diaz* not only affirms *Crawford*'s testimonial standard, but also provides greater guidance regarding its application.⁹¹ Most importantly, the opinion rests heavily on the third formulation of "testimonial"—the standard that requires a finding of testimonial for any statement "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."⁹² The decision to apply this standard suggests that while *Crawford* articulated three forms that testimonial statements could take, lower courts should be most concerned with the third, most expansive formulation.⁹³ *Melendez-Diaz* demonstrates the Court's embrace of a broad, encompassing definition of testimonial.⁹⁴

II. CHALLENGES TO PROSECUTING CHILD SEXUAL ABUSE CASES

Notwithstanding the difficulties posed by the evolving Confrontation Clause standard, the prosecution of child sexual abuse cases itself has historically been challenging.⁹⁵ These challenges stem primarily from the nature of such cases and the overwhelming reliance on children as witnesses.⁹⁶ Consequently, these cases present unique frustra-

⁹¹ See *id.* at 2532, 2542.

⁹² See *Melendez-Diaz*, 129 S. Ct. at 2532. Professor Friedman, in his initial reaction to the decision, commented:

[T]hen the Court gives an underlying basis. Although it had just quoted the three definitions of "testimonial" recited by *Crawford*, now it just applied one, the right one (or at least the one closest to right)—the statements 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." And under that standard, the case is an easy one; indeed, the sole purpose of the certificates was evidentiary. Easy case.

Richard D. Friedman, An Initial Reaction to the *Melendez-Diaz* Decision, The Confrontation Blog, <http://confrontationright.blogspot.com/2009/06/initial-reaction-to-melendez-diaz.html> (June 25, 2009, 20:05 EST).

⁹³ See *Melendez-Diaz*, 129 S. Ct. at 2532; Friedman, *supra* note 92.

⁹⁴ See *Melendez-Diaz*, 129 S. Ct. at 2532; Friedman, *supra* note 92.

⁹⁵ See Brief for the National Ass'n of Counsel for Children as Amicus Curiae Supporting Respondents at 9, *Davis v. Washington*, 547 U.S. 813 (2006) (No. 05-5224) [hereinafter *Davis* Amicus Brief] ("Child abuse is one of the most difficult crimes to detect and prosecute. . . . This has long been the case." (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)); Robert D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, LAW & CONTEMP. PROBS., Winter 2002, at 243, 243 ("The adjudication of child abuse claims poses an excruciatingly difficult conundrum. The crime is a terrible one, but false convictions are abhorrent.")).

⁹⁶ See *Davis* Amicus Brief, *supra* note 95, at 7 (noting that "most sexual abuse is perpetrated by adults who are close to the child"); JOHN C. YUILLE ET AL., *Interviewing Children in*

tions in regards to ensuring the confrontation rights of the accused, especially in light of the Supreme Court's decisions in *Crawford* and *Davis*.⁹⁷ Specifically, the secretive nature of child sexual abuse, the fact that children are often the only eyewitnesses to the crime, concerns about the reliability of child testimony, and the unavailability of child witnesses to testify at trial challenge prosecutors and courts in their attempt to balance the effective prosecution of child sexual abuse and the constitutional rights of the accused.⁹⁸

A. *The Nature of the Crime and Children as Eyewitnesses*

Prosecution of child sexual abuse cases is difficult primarily because the crime is committed in secret.⁹⁹ In most cases, the perpetrator is a person close to the victim and induces silence through threats and violence.¹⁰⁰ In an amicus brief filed in support of the respondents in *Davis*, the Counsel for Children's Amicus Brief stated that "more than

Sexual Abuse Cases, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 95, 96 (Gail S. Goodman & Bette L. Bottoms eds., 1993) (stating that knowledge of what happened in child sexual abuse cases often depends on the child victim's statement); Raeder, *supra* note 50, at 1009 (noting that child sexual abuse usually takes place in secret).

⁹⁷ See, e.g., *Davis* Amicus Brief, *supra* note 95, at 11 (stating that because of reliability concerns regarding child witnesses and unrealistic jury expectations, "prosecutors may be forced in some cases to rely upon child's out-of-court statements"); Tom Lininger, *Kids Say the Darndest Things: The Prosecutorial Use of Hearsay Statements by Children*, 82 IND. L.J. 999, 1000–01 (2007) (noting the lack of guidance from the Supreme Court regarding child sexual abuse cases and confrontation rights under *Crawford*); Aviva A. Orenstein, *Children as Witnesses: A Symposium on Child Competence and the Accused's Right to Confront Child Witnesses*, 82 IND. L.J. 909, 909 (2007) (describing concerns regarding children as witnesses).

⁹⁸ See, e.g., *Davis* Amicus Brief, *supra* note 95, at 9 (stating that "prosecutors face a number of hurdles when presenting child witnesses"); YUILLE ET AL., *supra* note 96, at 95–96 (describing the dearth of helpful evidence in child sexual abuse cases); Friedman, *supra* note 95, at 243 (acknowledging the "conundrum" of "adjudication of child abuse claims" and noting that "[o]ften the evidence does not support a finding of guilt or innocence with sufficient clarity to allow a decision free of gnawing doubt"); Mosteller, *supra* note 27, at 921 (discussing the limitations and deficiencies of child testimony, including legal determinations of unavailability).

⁹⁹ Raeder, *supra* note 50, at 1009.

¹⁰⁰ *Davis* Amicus Brief, *supra* note 95, at 2; see also *In re Rolandis G.*, 902 N.E.2d 600, 604 (Ill. 2008) (child victim stated that his abuser "threatened him with a stick" . . . and made him "'pinky swear' not to tell anyone"), *cert. denied*, 129 S. Ct. 2747 (2009); *State v. Muttart*, 875 N.E.2d 944, 948 (Ohio 2007) (child victim reported that her abuser threatened that "if she told her mother or grandmothers [of the abuse], her mother would be taken to jail"), *cert. denied*, 128 S. Ct. 2473 (2008). The Counsel for Children went on to state, "child sexual abuse and other forms of child maltreatment are pervasive, yet most victims suffer in silence." *Davis* Amicus Brief, *supra* note 95, at 2. For further discussion regarding the reasons victims often fail to disclose sexual abuse, see *id.* at 6–9.

500,000 children fall victim to abuse every year” and that “only about ten percent of child sexual abuse is ever reported to the authorities.”¹⁰¹

Furthermore, if the sexual abuse is disclosed, there is often limited evidence from which to prosecute.¹⁰² Physical evidence is rare, and even if present, usually does not identify the accused.¹⁰³ In addition, the child victim and the accused are typically the only witnesses to the crime.¹⁰⁴ Consequently, child sexual abuse remains one of the least prosecuted crimes.¹⁰⁵

B. *The Reliability of Child Witnesses*

Notwithstanding the evidentiary challenges, the prosecutorial reliance on child witnesses raises general concerns about the reliability of child testimony.¹⁰⁶ Specifically, when evaluating the reliability of out-of-court statements made by child victims, courts have expressed particular concern with a child’s susceptibility to leading questioning and outside influences during investigative interviews.¹⁰⁷

Most disclosures in child sexual abuse cases occur first to family members and then to police officers, doctors, nurses, and social work-

¹⁰¹ Davis Amicus Brief, *supra* note 95, at 5–6. For more information regarding the pervasiveness of child sexual abuse, see *id.* at 5–6.

¹⁰² See *id.* at 9; YUILLE ET AL., *supra* note 96, at 95–96; Raeder, *supra* note 50, at 1009.

¹⁰³ See YUILLE ET AL., *supra* note 96, at 95. “No physical evidence . . . may be present because of the nature of the abuse or because children heal quickly and the crime is often reported well after it occurred.” Raeder, *supra* note 50, at 1009.

¹⁰⁴ See *Tome v. United States*, 513 U.S. 150, 166 (1995) (“In almost all cases [of child sexual abuse] a youth is the prosecution’s only eyewitness.”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (“Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.”); Davis Amicus Brief, *supra* note 95, at 9; YUILLE ET AL., *supra* note 96, at 95; Raeder, *supra* note 50, at 1009.

¹⁰⁵ Davis Amicus Brief, *supra* note 95, at 9.

¹⁰⁶ See Orenstein, *supra* note 97, at 909; Raeder, *supra* note 50, at 1009. Professor Orenstein writes:

Concerns that arise with adult witnesses are heightened with children. . . . With children, whose practical knowledge of the world is incomplete and who are especially dependent on others emotionally and physically, the potential for undue influence and bias increases. Relatedly, outright intimidation, another potential problem for adult witnesses, demands a more complicated and sensitive inquiry when child witnesses are involved.

Orenstein, *supra* note 97, at 909.

¹⁰⁷ See, e.g., *Idaho v. Wright*, 497 U.S. 805, 826 (1990) (finding that the child had been questioned suggestively by a doctor); *People v. Stechly*, 870 N.E.2d 333, 343 (Ill. 2007) (defendant’s expert witness, a clinical psychologist, criticized the questioning techniques utilized to interview the child victim).

ers.¹⁰⁸ Often, police officers, doctors, nurses, and social workers are not specifically trained to question children about sexual abuse; consequently, untrained questioning can lead to errors in interviewing.¹⁰⁹ The problem with untrained interviewing is two-fold.¹¹⁰ First, without specific training on how to properly question children, questioners are often unaware of developmental changes in language ability and cognition.¹¹¹ This unawareness can result in misinterpretations of the child's statements and misunderstandings between the questioner and the child.¹¹² Second, untrained questioners may engage in suggestive questioning because of professional biases.¹¹³ As a result, these untrained questioners are unable to obtain reliable and valid information.¹¹⁴

Even if, however, an interview is properly conducted, juries often perceive statements by child witnesses as unreliable.¹¹⁵ Jurors regard children's statements with skepticism as a result of "concerns about [a child's] susceptibility to suggestion, manipulation, coaching, or confusing fact with fantasy."¹¹⁶ These jury expectations ultimately make the presentation and effectiveness of child witnesses extremely difficult.¹¹⁷

¹⁰⁸ See Davis Amicus Brief, *supra* note 95, at 8.

¹⁰⁹ See YUILLE ET AL., *supra* note 96, at 97; Lindsay E. Cronch et al., *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, 11 AGGRESSION & VIOLENT BEHAVIOR 195, 196 (2006). The Cronch article notes that, "bad interviewing can lead to serious consequences. These may include eliciting false allegations, putting children and families through unnecessary stress, decreasing a child victim's credibility in court, contaminating facts, reducing probability of conviction, draining resources through unsuccessful trials and investigations, and reducing resources for legitimate abuse cases." Cronch et al., *supra*, at 196.

¹¹⁰ See YUILLE ET AL., *supra* note 96, at 98.

¹¹¹ See *id.*

¹¹² See *id.* For example, children who disclose their sexual abuse use a variety of words to describe their own anatomy and that of their abuser. See, e.g., *People v. Vigil*, 127 P.3d 916, 919 (Colo. 2006) (child victim reported that his abuser "stuck his winkie in his butt"); *State v. Henderson*, 160 P.3d 776, 778–79 (Kan. 2007) (child victim stated that her abuser touched her "potty place" with his "ding ding"); *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 222 (Mass. 2006) (child victim referred to her abuser's penis as a "pee pee"); *State v. Justus*, 205 S.W.3d 872, 876 (Mo. 2006) (child victim described her abuser's penis as "looking like a 'tail' with a 'knob' on the end"). Often, these terms are not precise and are not used consistently. See, e.g., *Henderson*, 160 P.3d at 779–80 (child victim identified a penis as both a "ding ding" and a "hot dog"); *Justus*, 205 S.W.3d at 876 (child victim referred to both her abuser's penis and her vagina as a "pee-pee").

¹¹³ See YUILLE ET AL., *supra* note 96, at 98. These professional biases can include beliefs that children are inherently incorrect or that children never lie about abuse. See *id.*

¹¹⁴ See *id.* at 97.

¹¹⁵ See Davis Amicus Brief, *supra* note 95, at 10–11.

¹¹⁶ Raeder, *supra* note 50, at 1009.

¹¹⁷ See Davis Amicus Brief, *supra* note 95, at 10–11. The Counsel for Children also cited other unrealistic jury expectations such as "medical evidence of sexual abuse" although

C. *The Unavailability of Child Witnesses at Trial*

Lastly, child victims of sexual abuse often do not testify at trial because courts usually declare them legally unavailable.¹¹⁸ The reasons for unavailability, stemming primarily from the age of the child, fall into two general categories: competency and trauma.¹¹⁹

In the first category, courts find children unavailable because they lack the competency to testify in court.¹²⁰ Generally, courts have found

“there usually is none” and “strong emotional reactions when describing abuse” when “children usually do not.” *Id.*

¹¹⁸ See, e.g., *Wright*, 497 U.S. at 809 (child victim was found unavailable to testify because of an inability to effectively communicate); *Rolandis*, 902 N.E.2d at 603 (child victim refused to answer questions regarding the abuse when called to testify); *Stechly*, 870 N.E.2d at 340–41 (child victim found unavailable because of the risk of trauma); *Henderson*, 160 P.3d at 781 (child victim unavailable to testify because she could not understand the importance of the proceedings, the oath, or the need to tell the truth).

¹¹⁹ See Davis Amicus Brief, *supra* note 95, at 9–10. Compare *Wright*, 497 U.S. at 809 (finding a child unavailable to testify because she could not effectively communicate to the jury), and *Henderson*, 160 P.3d at 781 (finding a child unavailable to testify because she was unable to understand the questions, the importance of the trial, the relevance of the oath, or the necessity to tell the truth), with *State v. Contreras*, 979 So. 2d 896, 899 (Fla. 2008) (finding a child unavailable to testify because emotional and psychological trauma would result), and *Stechly*, 870 N.E.2d at 340–41 (finding a child unavailable to testify because she “would likely experience trauma symptoms”).

¹²⁰ See, e.g., *Wright*, 497 U.S. at 809; *Henderson*, 160 P.3d at 781; *Justus*, 205 S.W.3d at 875. Professor Friedman distinguishes between “two different levels of incompetence”: “[t]he child who is capable of testifying, but not in a satisfactory manner” and “the child who is incapable of testifying.” Richard D. Friedman, *Child Witnesses on the Academic & Judicial Front*, *The Confrontation Blog*, <http://confrontationright.blogspot.com/2007/09/child-witnesses-on-academic-and.html> (Sept. 7, 2009, 17:10 EST). The first level refers to a child who “lacks a sufficient sense of obligation to tell the truth for her testimony to be accepted in court.” *Id.* In other words, “the child is not capable of testifying in court in a satisfactory manner.” *Id.* Thus, “a deeper level of incompetence [occurs when] the child is (or a child of ordinary understanding of her age would be) so insufficiently developed that the statement should not be deemed testimonial at all.” *Id.* The child “is just not capable of engaging in the kind of activity—witnessing—covered by the confrontation right.” *Id.* While this distinction is helpful in considering whether or when children are capable of making testimonial statements and may (or should, as Professor Friedman argues) influence whether the out-of-court statements are admitted at trial, it does not have direct bearing on the primary issue addressed in this Note. The distinction is mentioned here to acknowledge the academic distinction, but for the purposes of this Note, the child victim is assumed to be found unavailable for any legitimate legal reason. Case law and legal scholars support this assumption. See, e.g., *Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1102 (D. Minn. 2008) (judge ruled child victim “not competent to testify”), *aff’d*, 575 F.3d 785 (8th Cir. 2009); *Rolandis*, 902 N.E.2d at 603 (on the stand, child victim “could not bring himself to answer questions about the allegations concerning [the defendant]”); *Henderson*, 160 P.3d at 781 (judge ruled that the child witness was unavailable to testify as a witness because she is unable to understand the questions or the importance of the proceedings or oath); see also Friedman, *supra* note 95, at 252 n.34 (“The key point is that, whatever the precise nature of

a child incompetent to testify when the child demonstrates that he or she cannot effectively communicate to the jury, fails to qualify to take the oath, or generally lacks the requisite understanding of what constitutes the truth.¹²¹ In the second category, children are deemed unavailable because of the trauma associated with testifying in court.¹²² In these cases, there is a general concern that the circumstances surrounding testifying, such as the unfamiliar legal environment or the aggressive cross-examination, will emotionally and psychologically harm the child.¹²³ In addition, even if child victims take the stand, occasionally they freeze during testimony and refuse to answer questions regarding the abuse, resulting in no valuable testimony.¹²⁴ Consequently, the high rate of unavailability for child witnesses causes prosecutors to rely heavily on out-of-court statements.¹²⁵

the critical capacity may be, at some point a child will be insufficiently mature to be deemed a witness.”)

¹²¹ See, e.g., *Wright*, 497 U.S. at 809 (three-year-old victim was found unavailable to testify because she “was ‘not capable of communicating to the jury’”); *Henderson*, 160 P.3d at 781 (child victim found unavailable because she is “unable to really understand the questions,” “the importance of [the] proceedings,” “the application of the oath, the relevance of the oath or the requirement to tell the truth”); *Justus*, 205 S.W.3d at 875 (three-year-old victim found unavailable “because of severe emotional distress”).

¹²² See, e.g., *Contreras*, 979 So. 2d at 899; *Stechly*, 870 N.E.2d at 340–41.

¹²³ See, e.g., *Contreras*, 979 So. 2d at 899 (child victim was found unavailable to testify because the child would “suffer emotional and psychological harm if required to testify”); *Stechly*, 870 N.E.2d at 340–41 (child victim was found unavailable because, “if . . . forced to testify, [the child] would likely experience trauma symptoms such as anxiety, sleep disturbances, and difficulties in concentrating and paying attention”).

¹²⁴ See, e.g., *White*, 502 U.S. at 350 (child victim “experienced emotional difficulty on being brought to the courtroom and in each instance left without testifying”); *Rolandis*, 902 N.E.2d at 603 (child victim “resolutely refused to respond” to questions about the abuse and “could not bring himself to answer questions about the allegations”).

¹²⁵ See, e.g., *White*, 502 U.S. at 350 (prosecution introduced out-of-court statements the child victim made to her babysitter, mother, a police officer, nurse and doctor); *Contreras*, 979 So. 2d at 899 (prosecution introduced a videotaped interview with the child victim conducted by the coordinator of a child protection team); *Rolandis*, 902 N.E.2d at 603–04 (prosecution introduced out-of-court statements the child victim made to his mother and two police officers and a videotaped interview conducted by a child advocate at a children’s center); *Henderson*, 160 P.3d at 781 (prosecution introduced the child victim’s out-of-court statements to her mother, a nurse practitioner, and a police officer and a videotaped interview with the child conducted by a social worker).

D. *Confrontation Clause Implications*

The collective effect of these prosecutorial challenges has particular implications for the confrontation rights of the accused.¹²⁶ Because most child victims are eyewitnesses to the crime and they are usually found unavailable to testify at trial, prosecutors must rely on the child victim's initial disclosures to parents, police officers, nurses, doctors, and social workers.¹²⁷ These out-of-court statements are generally the focus of Confrontation Clause attacks because the child victim does not testify at trial and the accused rarely has an opportunity to cross-examine the child victim regarding the statements.¹²⁸

Pre-*Crawford*, these confrontation clause challenges were easily overcome as long as the prosecution could show that these out-of-court statements were sufficiently reliable—specifically, that they “[fell] within a firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.”¹²⁹ Under the “testimonial standard” set forth in *Crawford v. Washington* and clarified in *Davis*, however, these out-of-court statements remain inadmissible as long as they can be shown to be “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” and there was no prior opportunity for cross-examination.¹³⁰

¹²⁶ See Raeder, *supra* note 50, at 1009 (“*Crawford* and *Davis v. Washington* up the ante for prosecutors who are trying to protect vulnerable young children who are unable or unwilling to testify at trial, because they defeat the admission of testimonial statements.”).

¹²⁷ See, e.g., *White*, 502 U.S. at 350 (prosecution introduced out-of-court statements the child victim made to her babysitter, mother, a police officer, nurse and doctor); *Contreras*, 979 So. 2d at 899 (prosecution introduced a videotaped interview with the child victim conducted by the coordinator of a child protection team); *Rolandis*, 902 N.E.2d at 603–04 (prosecution introduced out-of-court statements the child victim made to his mother and two police officers and a videotaped interview conducted by a child advocate at a children’s center); *Henderson*, 160 P.3d at 781 (prosecution introduced the child victim’s out-of-court statements to her mother, a nurse practitioner, and a police officer and a videotaped interview with the child conducted by a social worker).

¹²⁸ See, e.g., *White*, 502 U.S. at 351 (stating that the Supreme Court granted certiorari to decide whether admission of a child victim’s out-of-court statements violated the petitioner’s confrontation rights); *Contreras*, 979 So. 2d at 900 (defendant arguing on appeal that the child victim’s videotaped out-of-court statement violated his confrontation rights); *Rolandis*, 902 N.E.2d at 605 (defendant arguing on appeal that the child victim’s out-of-court statements to a police officer and social worker violated his confrontation rights); *DeOliveira*, 849 N.E.2d at 224 (defendant arguing on appeal that the child victim’s out-of-court statements to a doctor violated his confrontation rights).

¹²⁹ See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

¹³⁰ See *Davis v. Washington*, 547 U.S. 813, 817 (2006); *Crawford v. Washington*, 541 U.S. 36, 52, 68 (2004).

III. VIDEOTAPING AND FORENSIC INTERVIEWERS: THE SOLUTION AND THE PROBLEM

A. *A Solution: Increasing the Reliability of Out-of-Court Statements Pre-Crawford*

In response to pre-*Crawford* Confrontation Clause concerns, law enforcement officials and child advocates took steps, such as using forensic interviewers and videotaping interviews with child victims, to ensure the reliability of out-of-court statements made by child victims.¹³¹ This would guarantee that, under *Roberts*, the out-of-court statements of child victims would be admissible at trial.¹³² Eventually, the use of forensic interviewers to question child victims and videotaping those interviews became best practices in order to increase the reliability of a child victim's out-of-court statements.¹³³

I. Forensic Interviewers

One of the main challenges to the reliability of a child victim's out-of-court statements arises from the concern that the interviewer is inexperienced in questioning children, which can result in misunderstandings and suggestive interviewing.¹³⁴ As a result, law enforcement officials and child advocates now rely on forensic interviewers to interview child victims of sexual abuse.¹³⁵

¹³¹ See *Idaho v. Wright*, 497 U.S. 805, 812–13 (1990) (suggesting that proper interviewing technique and recording of the interview could guarantee the reliability of a child victim's out-of-court statements so to ensure the admission of these statements at trial under *Roberts*); Cronch et al., *supra* note 109, at 196, 197 (stressing the importance of forensic interviews in protecting victims and falsely accused individuals and strongly suggesting that interviews should be videotaped).

¹³² See *Wright*, 497 U.S. at 812–13; *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

¹³³ See THEODORE P. CROSS ET AL., U.S. DEP'T OF JUST., EVALUATING CHILDREN'S ADVOCACY CENTERS' RESPONSE TO CHILD SEXUAL ABUSE 2–3 (2008) (citing forensic interviews as a way to increase the effectiveness of child sexual abuse investigations and to address concerns that "investigation procedures were insensitive to children"); 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 84–88 (3d ed. 1997) (suggesting that judges favor videotaping and identifying eight arguments for videotaping investigative interviews).

¹³⁴ See YUILLE ET AL., *supra* note 96, at 98.

¹³⁵ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1101 (police contacted a social worker who was trained in the "CornerHouse technique" — an approach used . . . in interviewing children about allegations of sexual abuse" to interview the child victim); *State v. Hooper*, No. 31025, 2006 WL 2328233, at *1 (Idaho Ct. App. Aug. 11, 2006) (responding police officer arranged for a nurse at the Sexual Trauma Abuse Response (STAR) Center to interview the child victim); *Bentley*, 739 N.W.2d at 297 (police and child protective services arranged for a counselor at a child protection center to interview the child victim); *State v. Hender-*

Forensic interviews typically serve multiple purposes: they gather information to ensure the health and safety of the child victim while also obtaining evidence for law enforcement officials.¹³⁶ Forensic interviewers are trained specifically to speak to and interview children who are victims of abuse.¹³⁷ Their training thus benefits investigations of child sexual abuse by overcoming two distinct obstacles.¹³⁸ First, be-

son, 160 P.3d 776, 779 (Kan. 2007) (police detective and social worker, both members of the Exploited and Missing Children Unit, were contacted to interview child victim); *State v. Snowden*, 867 A.2d 314, 316 & n.3 (Md. 2005) (police detective requested that a social worker, who testified that she had “extensive training in sexual abuse investigation, forensic interviewing, and sexual abuse interviewing,” interview the child victim). Forensic interviewers are typically social workers, nurses or police officers who are trained in some sort of structured interview technique. *See Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1101 (D. Minn. 2008) (noting that the “CornerHouse protocol” is a forensic interviewing approach that can be used by “police officers, social workers and others”); Cronch et al., *supra* note 109, 196 (“Interviews are typically conducted by law enforcement officers, child protective services personnel, or specialized forensic interviewers, although medical and mental health professionals often participate as well.”); Mosteller, *supra* note 27, at 966 (identifying that “trained questioners” can be “a nurse or social services caseworker”). Often forensic interviewers will work at a child protection center or child advocacy center. *See, e.g., In re Rolandis G.*, 902 N.E.2d 600, 604 (Ill. 2008) (a child advocate at the Carrie Lynn Children’s Center, “a facility which provides services to child victims of sexual and severe physical abuse” interviewed the child victim), *cert. denied*, 129 S. Ct. 2747 (2009); *State v. Bentley*, 739 N.W.2d 296, 297 (Iowa 2007) (a counselor at St. Luke’s Child Protection Center interviewed the child victim); *State v. Justus*, 205 S.W.3d 872, 876 (Mo. 2006) (a counselor and licensed social worker for the Northwest Missouri Children’s Advocacy Center interviewed the child victim); *In re S.R.*, 920 A.2d 1262, 1264 (Pa. Super. Ct. 2007) (a forensic interview specialist employed by the Philadelphia Children’s Alliance interviewed the child victim). This Note will generally adopt Professor Mosteller’s understanding of trained questioners, although he uses the term “social worker” to refer to them. *See* Mosteller, *supra* note 27, at 966 (“The individual asking the questions is a trained questioner, a nurse or social services caseworker, which I will interchangeably term a social worker.”).

¹³⁶ *See Bobadilla*, 570 F. Supp. 2d at 1111 (recognizing that a social worker’s interview serves “two important purposes: child protection and criminal investigation”); Mosteller, *supra* note 27, at 971 (noting that “social services caseworker[s]’ professional interests include the health, physical placement, and safety of the child [which] clear[ly] overlap with the prosecutorial interest”); Cronch et al., *supra* note 109, at 196 (“[T]he purpose of the forensic interview is ‘to elicit as complete and accurate a report from the alleged child or adolescent victim as possible in order to determine whether the child or adolescent has been abused (or is in imminent risk of abuse) and, if so, by whom.’” (quoting the American Professional Society on the Abuse of Children)).

¹³⁷ *See Bobadilla*, 570 F. Supp. 2d at 1101 (noting that the forensic interviewer used a technique that “instructs the interviewer to ask nonleading questions, to use terms children would understand, and to progress quickly since young children have short attention spans”); CROSS ET AL., *supra* note 133, at 1 (stating that Children’s Advocacy Centers employ forensic interviewers who are “specially trained to work with children”).

¹³⁸ *See* CROSS ET AL., *supra* note 133, at 1 (stating that Children’s Advocacy Centers correct the problems of stress on child victims due to the investigatory process and untrained questioning).

cause of their training, forensic interviewers can minimize the trauma upon the child victims when they recount their abuse.¹³⁹ Second, they are knowledgeable about the developmental issues that can complicate efforts to secure accurate information about the abuse.¹⁴⁰

As a result, forensic interviews increase the reliability of a child victim's out-of-court statements because they counter the main challenge of an inexperienced questioner.¹⁴¹ The forensic interviewer's training in questioning children lessens the risk of misunderstanding and misinterpretation between the interviewer and the child victim.¹⁴² In addition, the use of particular interviewing techniques by forensic interviewers minimizes the possibility of suggestive and leading questioning.¹⁴³ Lastly, a thorough forensic interview preserves the child victim's fresh recollection of the abuse, thus resulting in more reliable statements.¹⁴⁴

2. Videotaped Interviews

Videotaping interviews with child sexual abuse victims also helps increase the reliability of their out-of-court statements.¹⁴⁵ Videotapes capture the demeanor of the child victim during the interview, which allows a more accurate presentation of the child's reactions to questions and their behavior while answering questions.¹⁴⁶ They also provide assurances against suggestive and leading questioning because those viewing the videotape can observe how the interviewer questioned the child.¹⁴⁷

¹³⁹ See *id.* at 8 (finding that "children tended to report feeling less scared during [Children's Advocacy Center] interviews"); *What Is Forensic Interviewing?*, CHILD. SERVICES PRAC. NOTES (N.C. Div. of Soc. Servs. & The Family & Child Res. Program) Dec. 2002, at 1, 2, available at http://ssw.unc.edu/fcrp/cspn/vol8_no1/cspn_v8no1.pdf.

¹⁴⁰ *What Is Forensic Interviewing?*, *supra* note 139, at 2.

¹⁴¹ See CROSS ET AL., *supra* note 133, at 1; YUILLE ET AL., *supra* note 96, at 97–98, 111; *What Is Forensic Interviewing?*, *supra* note 139, at 2.

¹⁴² See YUILLE ET AL., *supra* note 96, at 97–98, 111; *What Is Forensic Interviewing?*, *supra* note 139, at 2.

¹⁴³ See *Bobadilla*, 570 F. Supp. 2d at 1101; YUILLE ET AL., *supra* note 96, at 97–98, 111; *What Is Forensic Interviewing?*, *supra* note 139, at 2.

¹⁴⁴ See *What is Forensic Interviewing?*, *supra* note 139, at 2–3.

¹⁴⁵ See *Wright*, 497 U.S. at 812–13; MYERS, *supra* note 133, at 84–88; Cronch et al., *supra* note 109, at 197 (“[S]upervision is highly beneficial in reducing improper and clumsy interviewing. Interviews should be taped” (citations omitted)).

¹⁴⁶ MYERS, *supra* note 133, at 85.

¹⁴⁷ See *Wright*, 497 U.S. at 812–13; *Torres v. Warden*, No. CV054000278S, 2008 WL 2426600, at *4 n.1 (Conn. Super. Ct. May 28, 2008) (expert witness testified that the “documents and video reflect that there were a variety of problems with the way in which the victim in this case was interviewed, both by professionals and by her mother”); MYERS, *supra* note 133, at 85.

Furthermore, videotapes have the added benefit of reducing trauma on the child victim by limiting the number of interviews.¹⁴⁸ Instead of the child having to retell the account of the abuse multiple times to different agencies (law enforcement officials, health care providers, social workers, and prosecutors), the interview can be videotaped and passed along to the different agencies.¹⁴⁹ This encourages and facilitates inter-agency cooperation.¹⁵⁰

3. Confrontation Clause Implications Pre-*Crawford*

Under the *Roberts* rule of reliability, a child victim's out-of-court statements were admissible at trial only if they fell under a "firmly rooted exception to the hearsay rule" or contained "particularized guarantees of reliability."¹⁵¹ Using forensic interviewers and videotaping the interviews work primarily to ensure that these statements have those "particularized guarantees of reliability" so that they are admissible at trial.¹⁵² As stated earlier, the Supreme Court noted in *Wright* that "certain procedural safeguards" could help determine the trustworthiness of a child

¹⁴⁸ See *Bobadilla*, 570 F. Supp. 2d at 1110; CROSS ET AL., *supra* note 133, at 2; MYERS, *supra* note 133, at 85; Mosteller, *supra* note 27, at 966; *What Is Forensic Interviewing?*, *supra* note 140, at 2. In *Bobadilla v. Carlson*, the District Court noted the Minnesota Supreme Court's observation:

Avoiding multiple interviews is a critical concern when dealing with children not only because the interviews are often traumatic for the child, but also because multiple interviews increase the chance that the children will be confused by unnecessarily suggestive questions. . . . Given the clear need to limit a child's exposure to stressful and confusing interviews, and the accompanying need to accurately assess risks to the child, there is a compelling need for a single recorded assessment interview solely in order to best protect the health and welfare of the child.

570 F. Supp. 2d at 1110 (quoting *State v. Bobadilla*, 709 N.W.2d 243, 255 (Minn. 2006)). The Cronch study on forensic interviewing techniques also reported that "[r]epeated interviewing and repeatedly asking similar questions have both been associated with inaccurate reporting and recanting allegations, particularly if early interviews are conducted inappropriately. Furthermore, the child's suffering is exacerbated when they are repeatedly and unnecessarily subjected to stressful and upsetting interviews with multiple strangers." Cronch et al., *supra* note 109, at 203.

¹⁴⁹ See *Rolandis*, 902 N.E.2d at 604 (videotape of the interview conducted by a child advocate at a children's center was given to police); *Bentley*, 739 N.W.2d at 300 (copy of videotape of interview conducted by child protection center counselor given to police according to protocol); *State v. Barnes*, 149 Ohio Misc. 2d 1, 29 (Ct. Common Pleas 2008) (social worker testified that "videotapes of the interviews [with victims of sexual abuse] would be turned over to the police"); Mosteller, *supra* note 27, at 966.

¹⁵⁰ See Mosteller, *supra* note 27, at 966.

¹⁵¹ See *Roberts*, 448 U.S. at 66.

¹⁵² See *Wright*, 497 U.S. at 812-13.

victim's out-of-court statements.¹⁵³ In fact, the Supreme Court specifically stated that videotaping interviews could create circumstances under which a court could find out-of-court statements reliable.¹⁵⁴

B. *A Problem: Creating Inadmissible Testimonial Statements Post-Crawford*

While forensic interviewers and videotaped interviews worked to increase the reliability of out-of-court statements made by child victims of sexual abuse, the testimonial standard of *Crawford* has essentially rendered these statements inadmissible.¹⁵⁵ In general, courts have evaluated the circumstances surrounding the videotaped statements to forensic interviewers and concluded that they fall into the definitional formulations of "testimonial" laid out in *Crawford*.¹⁵⁶

1. Forensic Interviewers

Despite the introduction of forensic interviewers as a means to increase reliability, the very presence of forensic interviewers has led many lower courts to deem the resulting statements as testimonial.¹⁵⁷

¹⁵³ See *id.* at 818.

¹⁵⁴ See *id.* at 812–13.

¹⁵⁵ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1107, 1112 (finding that the Minnesota Supreme Court was "unreasonable" in holding that the admission of a child victim's videotaped interview with a forensic interviewer was "not a 'police interrogation' within the meaning of *Crawford*"); *State v. Contreras*, 979 So. 2d 896, 905, 911 (Fla. 2008) (finding that the Child Protection Team (CPT) interviewer's videotaped interview with the child victim was testimonial and thus, its admission at trial violated the Confrontation Clause); *Rolandis*, 902 N.E.2d at 611 (finding that a child advocate's videotaped interview with a child victim was testimonial and that its was "improperly admitted" at trial); *Bentley*, 739 N.W.2d at 301–02 (affirming the state district court's ruling that the child protection center (CPC) counselor's videotaped interview with the child victim was testimonial, and thus violated the defendant's Confrontation Clause rights when admitted at trial); *Justus*, 205 S.W.3d at 880–81 (holding that a social worker's videotaped interview with a child victim was testimonial and its admission at trial violated the Confrontation Clause).

¹⁵⁶ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1107–09 (considering the time between when the abuse took place and when the interview was conducted, who initiated the interview, the location of the interview, and the forensic training of the social worker when determining whether the videotaped interview was testimonial); *Contreras*, 979 So. 2d at 905 (considering the coordination between police and the child protection team, the influence the police had over the interview, and the presence of police at the interview in determining whether the videotaped interview was testimonial); *Rolandis*, 902 N.E.2d at 611 (considering who initiated the interview, the purpose of the interview, and the fact that the videotape was turned over to the police in determining whether the videotaped interview was testimonial); *Justus*, 205 S.W.3d at 880–81 (holding that a social worker's videotaped interview with a child victim was testimonial and its admission at trial violated the Confrontation Clause).

¹⁵⁷ Mosteller, *supra* note 27, at 961.

For some courts, the term “forensic” automatically results in a finding of testimonial for the resulting statements.¹⁵⁸ In these circumstances, the court relies on the definition of the word “forensic” to determine that the child victim’s out-of-court statements are testimonial under the formulations set forth in *Crawford*.¹⁵⁹ Here, the term “forensic” implies a prosecutorial or trial use, and thus, falls under any of *Crawford*’s three formulations of “testimonial.”¹⁶⁰

Other courts determine that forensic interviewers are government agents, and are thus, testimonial under *Davis*.¹⁶¹ Under the primary purpose test established in *Davis*, statements made to government officials are testimonial if the primary purpose of the interview was to establish past events as opposed to information being provided during an emergency.¹⁶² In these instances, courts often look to the circumstances in which the forensic interviews take place, find that there is no ongoing emergency, and conclude that the resulting statements are testimonial because they establish past events.¹⁶³ Particularly, the courts look to how the forensic interviewers came to interview the child victim.¹⁶⁴ In many cases, the police invite forensic interviews to question

¹⁵⁸ See *id.* at 961 & n.157.

¹⁵⁹ See Mosteller, *supra* note 27, at 961 n.157; see also *Hooper*, 2006 WL 2328233, at *4 n.6 (relying on the New Oxford American Dictionary for definitions of forensic).

¹⁶⁰ See *Crawford*, 541 U.S. at 51–52; Mosteller, *supra* note 27, at 961 n.157.

¹⁶¹ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1108–09 (finding that the social worker “was acting as a ‘surrogate interviewer’ for the police” and that the interview “appeared to be aimed toward one goal: getting [the child victim] to repeat, on videotape, his assertion that Bobadilla had abused him”); *Contreras*, 979 So. 2d at 905 (finding that “the CPT coordinator was serving as a police proxy in this interview” and that “the primary, if not the sole, purpose of the CPT interview was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to a later criminal prosecution”); *Rolandis*, 902 N.E.2d at 611 (holding that the social worker “was acting as a representative of the police” and that “there is absolutely no indication that . . . [the social worker’s] interview of [the child victim] was conducted, to a substantial degree, for treatment rather than investigative purposes”); *Justus*, 205 S.W.3d at 880 (finding that the social worker “was acting as a government agent” and that the “interview was performed to preserve [the child victim’s] testimony for trial”).

¹⁶² *Davis v. Washington*, 547 U.S. 813, 822 (2006).

¹⁶³ See, e.g., *Henderson*, 160 P.3d at 790–79 (finding that “[t]here was no emergency; [the child victim] was speaking of past events . . . ; her demeanor was calm”); *Justus*, 205 S.W.3d at 880 (holding that the child victim’s videotaped statements “were not produced in the midst of an ‘on going emergency’” and that the child victim’s “demeanor in the videotaped interview was calm”).

¹⁶⁴ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1108 (noting the testimony of the social worker who stated, “[the detective] from the Police Department asked me to assist him in interviewing [the child victim]”); *Rolandis*, 902 N.E.2d at 611 (noting that “the interview took place at the behest of the police so that a more detailed account of the alleged sexual abuse could be obtained by a trained interviewer and memorialized on videotape”); *Bent-*

the child.¹⁶⁵ This police invitation often contributes to some courts' findings that there is sufficient government involvement to support a decision that the resulting interview contains testimonial statements.¹⁶⁶

Finally, some courts hold that the forensic interviews are themselves the functional equivalent of police interrogations and serve a law enforcement purpose.¹⁶⁷ As a result, the statements obtained through forensic interviews are testimonial under the *Crawford* formulations and the *Davis* primary purpose test.¹⁶⁸

2. Videotaped Interviews

While videotaping interviews also helped to ensure the reliability of interviews with child victims, the very act of videotaping has led courts to find that the resulting statements are testimonial.¹⁶⁹ Some lower

ley, 739 N.W.2d at 299 (noting that “[t]he police department’s standard operating procedure calls for the referral of child victims of sexual abuse to the CPC for ‘forensic interviews’”).

¹⁶⁵ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1108 (police detective invited social worker to interview child victim); *Rolandis*, 902 N.E.2d at 611 (interview with child advocate “took place at the behest of the police”); *Bentley*, 739 N.W.2d at 299 (“[t]he police department’s standard operating procedure calls for the referral of child victims of sexual abuse to the CPC for ‘forensic interviews’”).

¹⁶⁶ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1112 (finding unreasonable the Minnesota Supreme Court’s holding that the videotape interview was not testimonial despite “that a recorded interview . . . was conducted at the request of a police detective”); *Contreras*, 979 So. 2d at 905 (noting that “the CPT coordinator was serving as a police proxy in this interview” when concluding that the child victim’s videotaped statements were testimonial); *Rolandis*, 902 N.E.2d at 611 (noting that the videotaped interview was “conducted on behalf of the police” when holding that the child victim’s “videotaped statement was testimonial in nature”).

¹⁶⁷ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1110–11 (finding that “the social worker’s interview of a child is expressly intended to substitute for a separate interrogation by the police” and that the purpose of the interview was both child protection and law enforcement); *Contreras*, 979 So. 2d at 905 (noting that the “CPT coordinator was serving as a police proxy in this interview” and that “the primary, if not the sole, purpose of the CPT interview was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to a later criminal prosecution”); *Rolandis*, 902 N.E.2d at 611 (holding that the child advocate “was acting as a representative of the police” and that “there is no indication that . . . [the] interview . . . was conducted, to a substantial degree, for treatment rather than investigated purposes”); *Justus*, 205 S.W.3d at 880 (holding that the social worker “was acting as a government agent when she interviewed [the child victim]” and that “[w]hile there is no doubt that one purpose of the interrogations was to enable assistance to the child, the circumstances indicated that their primary purpose was to establish or prove past events potentially relevant to later criminal prosecution”).

¹⁶⁸ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1112; *Contreras*, 979 So. 2d at 905; *Rolandis*, 902 N.E.2d at 611; *Justus*, 205 S.W.3d at 880–81.

¹⁶⁹ See, e.g., *Rolandis*, 902 N.E.2d at 611; *Bentley*, 739 N.W.2d at 300; *Henderson*, 160 P.3d at 790.

courts find that videotaping interviews evinces a formality that overwhelmingly points to the testimonial nature of the resulting statements.¹⁷⁰ In these cases, the formality of videotaping suggests future evidentiary use, and as such, the court finds the videotape testimonial under *Crawford*.¹⁷¹

In addition, for some courts, the fact that the videotape can be shared between agencies is yet another reason to support a finding of "testimonial."¹⁷² In many instances, the videotaped interview takes place at a child protection center, and the video is then passed onto the police and placed into evidence.¹⁷³ While this share-ability originally served as a benefit to encourage inter-agency cooperation and reduce the potential trauma on the child victim by reducing the number of interviews, it now only heightens the risk that a court will find the child victim's statements "testimonial" because of its potential evidentiary use.¹⁷⁴

¹⁷⁰ See, e.g., *Bentley*, 739 N.W.2d at 300, 301 (stating that the "video equipment that was used to make a record of the interview" contributed to an "indicia of 'formality' surrounding [the child victim's] statements" and concluding that the videotaped interview was testimonial); *Henderson*, 160 P.3d at 790, 794 (observing that "the interview was conducted in a formal setting with question and answer format and was recorded, with both video and audiotape," which led to a conclusion that the videotaped statements were testimonial) (citations omitted); see also Mosteller, *supra* note 27, at 961 (noting that "courts are concerned about the degree of 'formality' of the statement, which may also involve its recordation, often on videotape").

¹⁷¹ See, e.g., *Bentley*, 739 N.W.2d at 300, 302 (stating that the videotaping equipment contributed to an "indicia of 'formality' surrounding [the child victim's] statements" and concluding that the videotaped interview was testimonial); *Henderson*, 160 P.3d at 790, 794 (observing that "the interview was conducted in a formal setting, with question and answer format and was recorded, with both video and audiotape," which led to a conclusion that the videotaped statements were testimonial) (citations omitted).

¹⁷² See, e.g., *Rolandis*, 902 N.E.2d at 611 (observing that "because the interview [was] immediately turned over to [the police] 'as evidence' . . . the objective circumstances indicate that . . . the videotaped evidence was testimonial"); *Bentley*, 739 N.W.2d at 300 (stating that because the videotaped interview was given to the police, the "factual circumstances make it objectively apparent that 'the purpose of the [recorded interview] was to nail down the truth about past criminal events'" (quoting *Davis*, 547 U.S. at 830)).

¹⁷³ See, e.g., *Rolandis*, 902 N.E.2d at 604 (videotape of the interview conducted by a child advocate at a children's center was given to police); *Bentley*, 739 N.W.2d at 299-300 (copy of videotape of interview conducted by child protection center counselor given to police according to protocol); *Barnes*, 149 Ohio Misc. 2d at 29 (social worker testified that "videotapes of the interviews [with victims of sexual abuse] would be turned over to the police").

¹⁷⁴ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1110, 1112 (noting the benefits of videotaped interviews with child victims of sexual abuse, but still finding the videotape testimonial); *Rolandis*, 902 N.E.2d at 611 (also noting the benefits of videotaped interviews but finding the videotape testimonial); *Bentley*, 739 N.W.2d at 302 (likewise acknowledging the treatment benefits of the interview circumstances, but ultimately concluding that the videotape was testimonial).

Lastly, these videotaped statements often contain powerful “identity statements,” statements in which the child victim identifies his or her abuser.¹⁷⁵ The fact that these statements are made even more reliable because they are videotaped only increases the courts’ scrutiny of the admissibility of these statements in order to prevent violations of defendants’ Sixth Amendment constitutional rights.¹⁷⁶

3. Confrontation Clause Implications Post-*Crawford*

Overall, the attempts to increase the reliability of out-of-court statements by child victims in order to assure their admissibility at trial under *Roberts* has essentially provided lower courts with more leverage to find the statements inadmissible under *Crawford*’s testimonial standard.¹⁷⁷ While the use of forensic interviewers and video recording directly addressed the evidentiary concerns that prosecutors face regarding the reliability of child witnesses and jury expectations, these improvements are minimally beneficial if the statements remain inad-

¹⁷⁵ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1101; *Henderson*, 160 P.3d at 779; *Justus*, 205 S.W.3d at 876. For example, in *Bobadilla*, the following exchange occurred between the child protection worker (CPW) and the child victim (T.B.), where the child victim ultimately identified the defendant as her abuser:

CPW: [H]as anyone hurt your body?
 T.B.: Mmm, MmmMmm (affirmative)
 CPW: Yeah. Who hurt your body?
 T.B.: Orlando did.

570 F. Supp. 2d at 1101 (footnote omitted). Likewise, in *State v. Henderson*, the following exchange took place between the social worker (LC) and the child victim (FI), and again, the child victim identified the defendant as her abuser:

LC: A body, you’re right. That’s what you said. It’s a body and that nobody is supposed to touch us on our body. Did you know that?
 FI: Tae touched my body and it was hurting.
 LC: He did?
 FI: With the ding ding.
 LC: With the ding ding?
 FI: Uh huh (positive).

160 P.3d at 779.

¹⁷⁶ See Mosteller, *supra* note 27, at 996 (“Where the interview is mechanically recorded, its formality and enormous utility for use at trial should cause courts to presume the statement’s testimonial character absent clear evidence of a substantial independent purpose.”).

¹⁷⁷ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1110–11; *Contreras*, 979 So. 2d at 905; *Rolandis*, 902 N.E.2d at 611; *Bentley*, 739 N.W.2d at 300; *Henderson*, 160 P.3d at 789–93; *Justus*, 205 S.W.3d at 880.

missible at trial.¹⁷⁸ Thus, in practice, *Crawford* does very little to help the prosecution of child sexual abuse; instead, it often stands directly in the way of prosecuting one of the least prosecuted crimes in the nation.¹⁷⁹

¹⁷⁸ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1110; *Rolandis*, 902 N.E.2d at 611; *Bentley*, 739 N.W.2d at 302. In *Bobadilla*, the District Court for the District of Minnesota criticized the observations of the Minnesota Supreme Court, stating:

The problem with [the Minnesota Supreme Court's] explanation is that it skips over the reason *why* making a videotape of the assessment interview protects "the health and welfare of the child." It protects the child by minimizing the chances that the child will have to be interviewed a second time, and it minimizes the chances that the child will have to be interviewed a second time by giving law enforcement officers a recorded statement for use in their investigation.

570 F. Supp. 2d at 1110. In this way, the District Court asserts that the reason why a single recorded interview protects the "health and welfare of the child" is not by virtue of the fact that there is only one interview, but rather, because the single recorded interview produces an interview that is beneficial to law enforcement. See *id.* Consequently, the District Court ruled that the Minnesota Supreme Court was unreasonable in concluding that the videotaped interview was not testimonial. *Id.* at 1112. Furthermore, in *Rolandis*, the Supreme Court of Illinois recognized that "the purpose of this type of interdisciplinary, collaborative protocol is to 'minimize the stress created for the child and his or her family by the investigatory and judicial process, and to ensure that more effective treatment is provided for the child and his or her family.'" 902 N.E.2d at 611 (quoting ILL. COMP. STAT. 80/3(d) (2008)). However, the court still found the videotaped statements testimonial and thus, improperly admitted at trial. *Id.* In *Bentley*, the Supreme Court of Iowa stated:

We credit the State's assertion that the CPC performs very important and laudable services in furtherance of the protection of children. . . . It is beyond dispute that information gathered from [the child victim] in such a child-friendly, safe environment could have been very useful in the treatment of her well-documented psychological conditions.

739 N.W.2d at 302. Nevertheless, the court still held:

The actors were doing important work intended to investigate past alleged crimes and prevent future crimes. Although one of the significant purposes of the interrogation was surely to protect and advance the treatment of [the child victim] . . . , the extensive involvement of the police in the interview rendered [the child victim's] statements testimonial.

Id.

¹⁷⁹ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1113 (in finding the videotape interview testimonial, the court granted petitioner's habeas corpus petition, vacated his conviction, and ordered his release); *Contreras*, 979 So. 2d at 911-12 (in finding the videotaped interview testimonial, the court found the trial court's error not harmless in regards to the defendant's capital sexual battery conviction); *Henderson*, 160 P.3d at 794 (affirming the appeals court's finding that the videotaped interview was testimonial and reversal of conviction); *Justus*, 205 S.W.3d at 881 (in holding that the circuit court "erred in admitting the videotaped interview," the court reversed the judgment and remanded the case). In some cases, however, the court will find that despite the use of testimonial statements at trial in violation of the Confrontation Clause, the admission constituted harmless error and the court will uphold the defendant's conviction. See *Rolandis*, 902 N.E.2d at 619. In other cases,

IV. A LIMITED SOLUTION

A brief examination of case law in the area of child abuse prosecution reveals that prosecutors rely heavily on the out-of-court statements of child victims when the child victims are unavailable to testify.¹⁸⁰ While forensic interviewers and videotaping work to address health and policy concerns regarding the investigation of child abuse claims, these efforts have generally ensured that the resulting out-of-court statements are inadmissible at trial despite claims that the interviews serve health and treatment purposes in addition to law enforcement objectives.¹⁸¹ A simple solution may be to encourage courts to look at videotaped interviews in “minute and separate assertions” when determining the primary purpose of the statement.¹⁸²

Currently, courts appear to admit videotapes of forensic interviews in their entirety.¹⁸³ This approach fails to consider that videotaped forensic interviews often encompass multiple purposes, suggesting that testimonial and non-testimonial statements could be dispersed throughout a single interview.¹⁸⁴ Adoption of the “minute and separate” approach would allow a court to closely examine a videotaped interview for testimonial statements and exclude only those statements.¹⁸⁵

there still may be sufficient evidence for a retrial. *See Bobadilla*, 570 F. Supp. 2d at 1113; *Henderson*, 160 P.3d at 782, 794.

¹⁸⁰ *See, e.g., Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1101 (D. Minn. 2008) (videotaped interview admitted into evidence when judge found child victim not competent to testify); *In re Rolandis G.*, 902 N.E.2d 600, 603–04 (Ill. 2008) (videotaped interview played at trial when child victim refused to respond to question), *cert. denied*, 129 S. Ct. 2747 (2009); *State v. Henderson*, 160 P.3d 776, 781 (Kan. 2007) (judge determined that child victim was unavailable to testify and the child victim’s videotaped interview was played at trial).

¹⁸¹ *See, e.g., Bobadilla*, 570 F. Supp. 2d at 1110 (recognizing the benefits of videotaped forensic interviews but still finding them testimonial); *Rolandis*, 902 N.E.2d at 611 (recognizing the benefits of videotaped forensic interviews but still finding them testimonial); *State v. Bentley*, 739 N.W.2d 296, 302 (Iowa 2007) (recognizing the benefits of videotaped forensic interviews but still finding them testimonial).

¹⁸² Mosteller, *supra* note 27, at 956 n.132.

¹⁸³ *See, e.g., State v. Hooper*, No. 31025, 2006 WL 2328233, at *1 (Idaho Ct. App. Aug. 11, 2006) (child victim was “too frightened to take the oath or testify” so the “trial court admitted the videotaped interview in lieu of her live testimony”); *Rolandis*, 902 N.E.2d at 604 (“videotape was played in its entirety for the court”); *State v. Justus*, 205 S.W.3d 872, 877 (Mo. 2006) (“the videotape was played for the jury”); *State v. Arnold*, No. 07AP-789, 2008 WL 2698885, at *1 (Ohio Ct. App. July 10, 2008) (“trial court ruled that the victim was unavailable to testify” and “allowed the State to present, in lieu of the victim’s live testimony, her recorded interview from the Child and Family Advocacy Center”).

¹⁸⁴ *See* Mosteller, *supra* note 27, at 955–56, 956 n.132.

¹⁸⁵ *See id.* at 956 n.132.

In fact, this approach is suggested in *Davis*.¹⁸⁶ In *Davis*, the Court encouraged trial courts to “redact or exclude the portions of any statement that have become testimonial.”¹⁸⁷ Furthermore, courts are accustomed to performing this type of fact-intensive inquiry.¹⁸⁸ For instance, when determining whether a statement is against interest, the Supreme Court held in *United States v. Williamson* that courts cannot assume that a statement is self-inculpatory just because it falls within a greater confession.¹⁸⁹ Instead, the Court found that “[w]hether a statement is in fact against interest must be determined from the circumstances of each case.”¹⁹⁰ This type of analysis is exactly the approach being encouraged here.

This approach, however, does leave one obstacle of how to address the powerful “identity statements” that are often found within these videotaped interviews with forensic interviewers.¹⁹¹ Luckily, prosecutors may have to address this issue in very limited circumstances where the videotaped interview is the only evidence suggesting the accused’s involvement in the alleged abuse.¹⁹² In the majority of cases, courts find a

¹⁸⁶ See *Davis v. Washington*, 547 U.S. 813, 829 (2006).

¹⁸⁷ *Id.*

¹⁸⁸ See *Williamson v. United States*, 512 U.S. 594, 599–602 (1994) (suggesting a minute and separate approach to determining whether statements made within a confession are statements against interest); Mosteller, *supra* note 27, at 956 n.132.

¹⁸⁹ *Williamson*, 512 U.S. at 600–01. The Court stated:

In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Id.

¹⁹⁰ *Id.* at 601.

¹⁹¹ *Bobadilla*, 570 F. Supp. 2d at 1101 (Child victim identified the defendant as his abuser in the course of a forensic interview.); *Henderson*, 160 P.3d at 779 (Child victim identified the defendant as his abuser in the course of a forensic interview.); *Justus*, 205 S.W.3d at 876 (Child victim identified the defendant as his or her abuser in the course of a forensic interview.). This problem has arisen in instances regarding a child victim’s statements to medical treatment personnel. See Mosteller, *supra* note 27, at 950–51, 950 n.115. Some courts have found that the accusatory nature of identity statements demands a finding of testimonial although, generally, statements to medical treatment personnel are not considered testimonial. See *id.* at 950–51.

¹⁹² There is a lack of case law in which a videotaped interview with a forensic interviewer is the only inculpatory evidence probably because initial disclosures are “usually to a family member or friend, and virtually never to authorities.” See *Davis* Amicus Brief, *supra* note 95, at 8. Thus, the prosecutor has the child victim’s out-of-court statements to family members as evidence in addition to the videotaped interview. See, e.g., *Rolandis*, 902 N.E.2d at 603–04 (child victim’s mother testified at trial as to the child victim’s disclosure to her);

child victim's identity statements to a family member or nurse or doctor non-testimonial, and thus, admissible at trial.¹⁹³ As a result, even if courts exclude a child victim's videotaped identity statement, there still may be sufficient evidence to support a conviction.¹⁹⁴

CONCLUSION

The adoption of a "minute and separate" approach by the courts could lessen *Crawford's* impact on the prosecution of child sexual abuse. A "minute and separate" approach to determining whether a child victim's statements in a videotaped interview with a forensic interviewer are testimonial will better address the medical and prosecutorial concerns that these interview protocols were developed to address. This approach would take advantage of the developments in child sexual abuse investigations without fully forestalling the prosecution of this abhorrent crime. While the impact of the suggested solution would be minimal in scope, this suggestion would work to better balance the desire to adequately prosecute child sexual abuse with the accused's Confrontation Clause rights in a post-*Crawford* world.

Henderson, 160 P.3d at 781 (child victim's mother testified at trial as to the child victim's disclosure); *Justus*, 205 S.W.3d at 875-76 (child victim's mother and grandmother testified at trial as to the child victim's disclosures to them).

¹⁹³ See Mosteller, *supra* note 27, at 950. Professor Mosteller writes, "[w]ith only highly infrequent exceptions, statements by children to parents, family members, and friends are treated as nontestimonial. . . . Even if the child's statement is strongly accusatory, the outcome is generally the same." *Id.* at 944-45. Likewise, Professor Mosteller states, "statements of children to doctors and nurses who are the first to examine the child after the report of assault are almost universally treated as nontestimonial." *Id.* at 950. He notes, however, that some courts have treated "the specific identity of the perpetrator" with exception, finding that "the part of the child's statement that names the perpetrator as testimonial based on its accusatory nature." *Id.* at 950-51.

¹⁹⁴ See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1110 (noting that the prosecution offered other evidence of Bobadilla's guilt, granted his habeas corpus petition, but ordered the state to "take[] affirmative steps to reinstate a criminal prosecution of petitioner within sixty days," suggesting a belief that there is sufficient evidence without the videotaped interview to prosecute); *Rolandis*, 902 N.E.2d at 619 (stating that "the error in admitting [the videotaped interview] was harmless beyond a reasonable doubt because the properly admitted evidence overwhelmingly supports respondent's conviction"); *Henderson*, 160 P.3d at 794 (holding that after "[r]eviewing all of the remaining evidence, . . . a rational factfinder could have found Henderson guilty beyond a reasonable doubt").

