THE EFFECT OF CRAWFORD V. WASHINGTON ON CHILD VICTIMS AND WITNESSES

In *Crawford v. Washington*[1], the United States Supreme Court discussed the Sixth Amendment rights of criminal defendants to cross-examine their accusers in court. Faced specifically with the Confrontation Clause in relation to specific hearsay statements, the Court overruled the prior paradigm, holding that the Sixth Amendment guaranteed a procedural rather than substantive guarantee: "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[2] Confrontation Clause jurisprudence before *Crawford* focused, rather, on the substantive reliability of hearsay statements, requiring "particularized guarantees of trustworthiness" as a prerequisite for admissibility.[3]

This paper seeks a manner in which trauma during the trial process to child victims and witnesses may be minimized while protecting the Sixth Amendment rights of defendants to cross-examination. Section I begins with a discussion of the history and development of Confrontation Clause jurisprudence in both Washington and federal courts. Section II analyzes the effect *Crawford* has had on child abuse proceedings, while the Conclusion suggests possible avenues for courts to take in future analysis.

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[1] 541 U.S. 36 (2004).
[2] *Id*. at 61.
[3] *Ohio v. Roberts*, 448 U.S. 56, 65,100 S.Ct. 2531 (1980).

DEVELOPMENT OF CONFRONTATION CLAUSE JURISPRUDENCE

I. THE CONFRONTATION CLAUSE BEFORE *CRAWFORD.*

Early Confrontation Clause jurisprudence focused mainly on the applicability of the Confrontation Clause to the states via the Fourteenth Amendment,[4] the burden the State carries to prove the unavailability of a witness as a prerequisite to admissibility,[5] and the propriety of "substitutes" for cross-examination.[6] The court first examined the right of confrontation as it applies to admissibility of hearsay statements in *Mattox v. U.S.*,[7] in which the court held that admission of testimony, given by witnesses now deceased at a prior trial, does not violate a defendant's Sixth Amendment right to confrontation.[8]

Dutton v. Evans[9] is one of *Crawford*'s earliest predecessors. *Dutton* dealt with a Georgia prisoner's petition for habeas corpus. Petitioner claimed that his first-degree murder conviction was unconstitutional because of the admission at trial of his co-conspirator's statement.[10] The statement was admitted under the Georgia hearsay statute, which allowed admission of co-conspirator's statements made during the "concealment phase" of a conspiracy.[11] The co-conspirator did

[4] *See Pointer v. Texas*, 380 U.S. 400 (1965).
[5] *See Barber v. Page,* 390 U.S. 719 (1968).
[6] *See Douglas v. State of Alabama*, 380 U.S. 415 (1965).
[7] 156 U.S. 237 (1895).
[8] Id. at 240.
[9] *Dutton v. Evans*, 400 U.S. 74 (1970).
[10] *Id*. at 80.
[11] *Id*. at 81. Petitioner claimed that the Georgia statute was *per se* unconstitutional because it was not consistent with the federal statute, which only allowed co-conspirator statements made during the planning phase of a conspiracy to be admitted.

not testify.[12] However, the Court held that the statement was admissible because it contained adequate "indicia of reliability," namely the fact that the statement was "spontaneous" and "against his penal interest."[13] In making this determination, the Court stated "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact' has a satisfactory basis for evaluating the truth of the prior statement."[14] Key in determining that admission of the statement was consistent with this mission was the fact that the defendant had the opportunity to "vigorously" cross-examine the proponent of the statement, an inmate in federal prison with the declarant.[15]

Two years later, the Court faced a similar issue in *Mancusi v. Stubbs*.[16] *Mancusi* also involved a petition for habeas relief, with petitioner claiming, *inter alia*, that the admission of statements made by a witness who had since moved out of the country violated his Sixth Amendment right to confront witnesses.[17] Such statements had been made at a prior trial in which defendant's counsel had fully cross-examined the witness. However, petitioner claimed that since the first conviction had been overturned by the federal court on a finding of ineffective assistance of counsel, his right to cross-examine the witness had effectively been denied.[18] The *Mancusi* court re-emphasized the importance of a witness'

[12] *Id*. at 87. A fellow inmate in federal prison testified to the statement of the co-conspirator. The inmate testified and was "vigorously" cross-examined by defense counsel.
[13] *Id*. at 89.
[14] *Id*., citing *California v. Green*, 399 U.S. 149, 161.
[15] *Id*. at 87.
[16] 408 U.S. 204 (1972).
[17] *Id*. at 212.
[18] *Id*. at 214.

unavailability as a prerequisite for admissibility under both the Confrontation Clause and the hearsay rule, as well as affirming the rule of *Dutton* that statements must bear some independent "indicia of reliability".[19] The Court determined that the State had sufficiently met its burden of proving the unavailability of the witness, and that the prior trial testimony bore sufficient "indicia of reliability" due to prior counsel's "adequate" cross-examination of the witness.[20]

Later, the Supreme Court's decision in *Ohio v. Roberts*[21] set forth a "general approach" to determining whether an otherwise admissible hearsay statement violates the Confrontation Clause.[22] In *Roberts*, the defendant was convicted of forgery, receiving stolen property, and possession of heroin.[23] At his trial, the victims' daughter failed to appear to testify and the state sought to offer a transcript of her testimony at a preliminary hearing to rebut the defendant's claim that he had used the victims' credit cards and checks with her permission. The trial court admitted the transcript pursuant to an Ohio statute allowing the use of prior testimony when the witness "cannot for any reason be produced at the trial.[24]" Because the witness was called by the defense at the preliminary hearing, she had not been cross-examined by the defendant.[25] However, the court found that because her prior testimony bore sufficient "indicia of reliability" and the state had met its burden of proving the witness' unavailability, the

[19] *Id*. at 213.
[20] *Id.* at 216.
[21] 448 U.S. 56.
[22] *Id*. at 65.
[23] *Id*. at 56.
[24] *Id*.
[25] *Id*.

introduction of the statement satisfied the requirements of the confrontation clause.

II. THE *CRAWFORD* DECISION

A. PROCEDURAL HISTORY

Michael Crawford was convicted in Thurston County, Washington, of first-degree assault with a deadly weapon. The conviction arose out of an incident, witnessed by Crawford's wife Sylvia, where Mr. Crawford stabbed a man after the man allegedly made sexual advances towards his wife.[26] At trial, Mr. Crawford invoked marital privilege and Sylvia did not testify.[27] However, several statements that she made to police officers the night of the stabbing were admitted over the defendant's objections.[28] The Washington Court of Appeals, Division II, reversed based on the reliability of Sylvia's statements to the police. The Washington Supreme Court reversed the Court of Appeals and reinstated the conviction, stating that although Crawford had not waived his right to cross-examine his wife by invoking the marital privilege, the statements "contain[ed] a sufficient indicia of reliability and trustworthiness to satisfy the requirements of the confrontation clause."[29] The defendant appealed the Washington Court's finding that the statements met the requirements of the Confrontation Clause and the United States Supreme Court granted certiorari.

B. US SUPREME COURT

[26] *Crawford* at 39.
[27] *Id*. at 40.
[28] *Id*.
[29] *State v. Crawford*, 147 Wash.2d 424, 434, 54 P.3d 656 (2002).

Crawford overruled the prior paradigm,[30] in which testimonial hearsay was admissible if it fit into a recognized hearsay exception or "[bore] particularized guarantees of trustworthiness,"[31] a judicial determination. In overruling this paradigm, the Court cites the original intent of the Framers, stating "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused."[32] The Court's aim in this decision is to return to the original meaning of the Sixth Amendment, providing a procedural rather than substantive guarantee: "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[33]

By necessity, *Crawford* is only applicable in a narrow set of legal proceedings, specifically, criminal proceedings in which a declarant does not testify. The Court in *Crawford* specifically stated that when a declarant does testify, all prior testimonial statements are admissible subject to the applicable rules of evidence.[34] Further, *Crawford* only applies to statements fitting within the definition of hearsay – that is, if they are offered to prove the truth of the matter asserted.[35] Additionally, the Sixth Amendment is not implicated in a majority of civil proceedings.[36]

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[30] See *Ohio v. Roberts*, 448 U.S. 56.
[31] *Id*.
[32] *Crawford* at 50.
[33] *Id*. at 61.
[34] *Id*. at 59.
[35] See e.g., *State v. Moses*, 129 Wn.App. 718, 119 P.3d 906 (2005), *State v. Mason*, 127 Wn.App. 554, 110 P.3d 245 (2005).
[36] Philips, Allie. *Out of Harm's Way: Hearings that are Safe from the Impact of* Crawford v. Washington*, Part 1*. Update of the American Prosecutors Research Institute's National Center for Prosecution of Child Abuse. Vol. 18 No. 8, 2005. Located at www.ndaa-apri.org/publications/newsletters/update_index.html, 6/6/2006. (hereinafter Philips, *Out of Harm's Way*)

Once it has been determined that *Crawford* does in fact apply, the key step in the analysis is determining whether an otherwise admissible statement is testimonial or non-testimonial. The Court in *Crawford* declined to set forth a specific definition of testimonial statements. However, the Court did state that the definition does include "at a minimum prior testimony at preliminary hearing, before a grand jury, or at a former trial, and statements elicited during police interrogations."[37] In interpreting this, many courts have determined that "the testimonial question turns on whether government questioners or declarants take or give a statement 'with an eye toward trial.'"[38]

III. DEVELOPMENT OF CONFRONTATION CLAUSE LAW IN WASHINGTON

A. WASHINGTON'S CONFRONTATION CLAUSE: ART I § 22.

Article I Section 22 of the Washington State Constitution requires, *inter alia*, that a criminal defendant be given the right "to meet witnesses against him face to face.[39]" The Washington Supreme Court first analyzed this provision in the 1897 case of *State v. Cushing*.[40] In *Cushing*, the defendant was charged with and convicted of second degree murder, a killing which he claimed was in self-defense. After his conviction was overturned due to a faulty jury instruction, the state sought to admit in his second trial testimony given in his first trial by a witness who had since died. In determining that the intent of the drafters of the

[37] *Crawford* at 58.
[38] *Minnesota v. Bobadilla*, 709 N.W.2d 243, 251, citing *Crawford* at 56 n. 7.
[39] Washington State Constitution, Art. 1 § 22.
[40] 17 Wash. 544, 50 P. 512 (1897), *superseded by statute on other grounds, see* RCW 9A.04.110(25)(a).

Washington Constitution was not to exclude such evidence, the Court cited the U.S. Supreme Court's decision in *Mattox*: "The substance of the constitutional protection is preserved…in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of cross-examination.[41]

Washington courts eventually adopted a similar paradigm to that set forth by the U.S. Supreme Court in *Roberts*, finally stating that "a criminal defendant's state and federal rights to confront witnesses against him are identical."[42] The court held that in order for a hearsay statement to be constitutionally admissible the declarant either be produced or that unavailability be demonstrated and that the statement bear "particularized guarantees of trustworthiness.[43][44] In addition, the Court adopted five "attendant circumstances," set forth by the Fifth Circuit in *United States v. Alvarez*[45] "for use as guidelines in determining the trustworthiness of extra-judicial statements."[46] In so determining, the court must determine whether there is an "apparent motive to lie," the "general character of the declarant," whether others heard the statements, the spontaneity with which the statements were made, the "timing of the declaration" and the "relationship between the declarant and the witness."[47] In *Parris* the court also specifically adopts the *Dutton* factors for such determination.[48] The *Dutton* factors adopted by the *Parris* court are

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[41] *Id*. at 564, citing *Mattox*, 156 U.S. at 338.
[42] *State v. Foster*, 135 Wash.2d 441, 957 P.2d 712 (1998).
[43] *State v. Ryan*, 103 Wash.2d 165, 691 P.2d 197 (1984).
[44] The specific application of the Confrontation Clause to the child hearsay statute will be discussed in depth in the next section.
[45] *State v. Parris*, 98 Wash.2d 140, 146, 654 P.2d 77 (1982), citing *Alvarez*, 584 F.2d 694 (5th Cir. 1978).
[46] *Id*.
[47] *Id*.
[48] *Id*.

> (1) the statement contains no express assertion about past fact, (2) cross-examination could not show declarant's lack of knowledge, (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement…are such that there is no reason to suppose the declarant misrepresented defendant's involvement.[49]

B. CHILD HEARSAY STATUTE – RCW §9A.44.120[50]

Washington's child hearsay statute, RCW §9A.44.120, was written in part in response to the requirements of *Ohio v. Roberts*.[51] This statute allows that certain statements made by child victims that would otherwise be inadmissible under the Rules of Evidence, are admissible if the court finds that the circumstances of the statement provide sufficient indicia of reliability and the child

[49] *Ryan*, 103 Wash.2d at 176, citing *Parris*, 98 Wash.2d at 146, citing *Dutton*, 400 U.S. 88-89.
[50] RCW 9A.44.120 reads: "A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as described by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if: (1) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (2) the child either: (a) testifies at the proceedings; or (b) is unavailable as a witness: PROVIDED, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement."
[51] McKimmie, Heather L. *Repercussions of Crawford v. Washington: A Child's Statement to a Washington State Child Protective Services Worker may be Inadmissible*. 80 Wash. L. Rev. 219, 224 (2005).

either testifies or is unavailable. However, if the child is unavailable, the statements are admissible only if there is corroborative evidence of the act.[52]

The Washington Supreme Court first analyzed the admissibility of children's statements under the child hearsay statute in *State v. Ryan*.[53] In *Ryan*, the defendant was convicted of indecent liberties involving two victims, ages four and five.[54] The children did not testify, and prior statements made by them to their mothers regarding the abuse were admitted through the testimony of their mothers pursuant to the child hearsay statute.[55] Although both parties stipulated to the fact that the children were incompetent to testify,[56] they disagreed at trial over whether their incompetence rendered them "unavailable" as required by the statute and the Confrontation Clause.[57]

The *Ryan* court adopted the *Roberts* test for determining whether hearsay admissions meet Confrontation Clause requirements, and specifically the portion thereof stating "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[58] However, the court recognized that Washington's child hearsay statute is by its terms "not within the category of firmly rooted hearsay exceptions…" although the statute's requirements for admission generally comport with the requirements of *Roberts*.[59]

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[52] RCW 9A.44.120, *supra* at FN 14.
[53] 103 Wash.2d at 167.
[54] *Id*.
[55] *Id*. at 167.
[56] *Id*.
[57] *Id*. at FN 1.
[58] *Id*. at 170, citing *Roberts*, 448 U.S. at 66.
[59] *Id*.

With the *Roberts* framework in mind, the court determined that neither unavailability of the witnesses nor reliability of the statements had been proven satisfactorily.[60] The court found that "incompetence" for purposes of testifying did not satisfy the constitutional requirement for unavailability, stating specifically that the prosecutor did not make a good faith effort to obtain the witnesses' presence at the trial as required by *Roberts*. Further, the court found that the witnesses' "incompetence" actually functioned to render their hearsay statements inadmissible under the terms of the statute itself and the *Roberts* test, as "the declarant's competency is a precondition to admission of his hearsay statements…"[61] The court stated "adequate indicia of reliability must be found in reference to the circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act."[62] Because the trial court indicated that it found reliability based only on the defendant's subsequent confessions, the court ruled that the admission of the statements was constitutionally erroneous.[63]

USE OF CHILD HEARSAY IN CHILD ABUSE PROSECUTIONS

Since *Crawford*,[64] the admissibility of hearsay testimony hinges on the distinction between "testimonial" and "non-testimonial" hearsay. As stated

[60] *Id*.
[61] *Id*. at 173.
[62] *Id*. at 174.
[63] *Id*.
[64] 541 U.S. 36.

above, the Court in Crawford declined to define testimonial hearsay, stating only that the definition includes "at a minimum prior testimony at preliminary hearing, before a grand jury, or at a former trial, and statements elicited during police interrogations."[65] The *Crawford* court also set forth three "formulations of the core class" of such statements, described as:

> (1) ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extra-judicial statements…contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) [statements] made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[66]

Washington courts have on several occasions determined whether specific types of hearsay statements are testimonial, and therefore subject to the rigors of *Crawford*, or non-testimonial. For example, statements given during interviews with police are almost always considered testimonial when "elicited in response to structured police questioning pursuant to police investigation."[67]

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[65] *Id.* at 58.
[66] *State v. Fisher,* 130 Wash.App. 1, 11, 108 P.3d 1262 (2005), citing *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004), quoting *Crawford* 541 U.S. at 51. Numbering added.
[67] *State v. Walker*, 129 Wn.App. 258, 119 P.3d 935 (2005).

However, statements made during less formal conversations with the police can be non-testimonial when the declarant has "no reason to believe that his statements would be used as evidence…at trial."[68] The court has similarly analyzed 911 calls, distinguishing between "pure calls for help" and "calls to provide information to the police." Calls for help are non-testimonial, while calls for the purpose of providing information are testimonial.[69]

Statements to social workers are of great importance in many child abuse proceedings. In *State v. Moses*,[70] Division 1 distinguished between statements given before the victim was aware that CPS would be involved and those given after. The court held that the statements made before the warning were "for the purpose of diagnosis and treatment," while the victim could infer after being informed that CPS would be involved that statements given could be used prosecutorially.[71] Similarly, in *State v. Hopkins*,[72] the court cites the proposition that "the common thread uniting testimonial statements is 'some degree of involvement by a government official…'"[73] to find that statements in an initial interview of a child victim by a social worker, conducted for the purpose of ensuring the child's safety,[74] were non-testimonial in nature.[75] These statements included a spontaneous disclosure of sexual abuse. However, statements

[68] Washington Practice Series §1300.13B: Post-*Crawford* Case Law, citing *State v. Mason*, 127 Wn.App. 554, 110 P.3d 245 (2005).
[69] *Id*., citing *State v. Powers*, 124 Wn.App. 92, 99 P.3d 1262 (2004).
[70] 129 Wn.App. at 731.
[71] *Id*.
[72] ---P.3d---, 2007 WL 657430 (Div 2 2007).
[73] *Id*. at paragraph 39.
[74] *Id*. at paragraph 36.
[75] *Id*. at paragraph 40.

made in a second interview, conducted with the "potential to lead to criminal prosecution,"[76] were testimonial for *Crawford* purposes.[77]

Statements made to physicians are treated similarly and are almost always non-testimonial in nature.[78] In *State v. Fisher*, a child assault victim told a treating physician that "[defendant] hit me right here" when the physician asked him what happened. The Court of Appeals held that this was not testimonial because the statement was not made to police, the child could not have expected the statement to be used at trial, and the physician testified that she needed to know what happened for the purpose of diagnosing and treating the child's injuries.[79] Most recently, the Court of Appeals discussed this issue in *State v. Sandoval*,[80] stating that "statements may be deemed 'testimonial' by looking at the witness' purpose in making the statements, specifically whether the witness expected the statements to be used at trial."[81] In *Sandoval*, the Court determined that

> witness statements to a medical doctor are not testimonial (1) where they are made for diagnosis and treatment purposes , (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State.[82]

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[76] *Id*. at paragraph 37.
[77] *Id*. at paragraph 42.
[78] See Washington Practice Series §1300.13B, *supra*, citing *Moses*, 129 Wn. App. At 731 and *Fisher*, 130 Wn.App. 11.
[79] *Fisher*, 130 Wn.App at 11. *See also State v. Saunders*, 132 Wash.App. 592, 608, 132 P.3d 743 (Div 1 2006), *State v. Sims*, 77 Wash.App. 236, 239-40, 890 P.2d 521 (1995).
[80] ---P.3d.---, 2007 WL 738165 (Div. 3 2007)
[81] *Id*.
[82] *Id*.

A final category of hearsay that has been analyzed by Washington courts is the excited utterance exception, including disclosures by children to family members. Excited utterances in general,[83] and specifically disclosures by child victims to family members, have generally been held to be non-testimonial in nature for two reasons: *Crawford's* differentiation between a "formal statement to government officers" and "casual remarks to acquaintances" and the reasoning that "a victim's statements to friends and family are generally non-testimonial statements because there is no 'contemplation of bearing formal witness' against the accused."[84]

I. EFFECT OF *CRAWFORD* ON CHILD ABUSE PROCEEDINGS IN WASHINGTON.

Under the rule of *Ohio v. Roberts,*[85] testimonial hearsay was admissible if it fell under a recognized hearsay exception or "[bore] particularized guarantees of trustworthiness."[86] For example, in *White v. Illinois*,[87] and subsequent cases, courts generally allowed admission of statements made by children to medical professionals, social workers, and other professionals investigating abuse cases without the children themselves needing to testify, based on the general likelihood that such statements are reliable. *Crawford* overruled *Roberts* and replaced it with a more stringent rule; one more protective of defendants' Sixth

[83] *See State v. Vincent*, 131 Wash.App. 147, 120 P.3d 120 (Div. 1 2005); *State v. Walker*, 129 Wash.App. 258, 118 P.3d 935 (Div. 1 2005).
[84] *Hopkins* at paragraph 31.
[85] 448 U.S. 56.
[86] *Id*.
[87] 502 U.S. 346 (1992)

Amendment rights of confrontation. However, the Supreme Court specifically declined to address *White* in the *Crawford* decision, stating that it was unnecessary because the only question addressed in *White* was the necessity of the unavailability requirement, while Crawford addressed the necessity of cross-examination.[88]

In *State v. Price*,[89] the Court of Appeals confronted the issue of what constitutes "constitutionally acceptable" testimony under *Crawford*. The child victim in *Price* disclosed sexual abuse by the defendant to her mother and a police detective. She testified at trial, however, when the prosecutor asked her about the abuse and about the statements she had made to her mother and the detective, she was unable to remember. The court determined that this was sufficient to satisfy the requirements of *Crawford* for the child's out-of-court statements' admissibility.

Many commentators are of the opinion that *Crawford* does not impact child victims' ability to testify via closed circuit television.[90] In *Maryland v. Craig*,[91] the Supreme Court held that the defendant's Sixth Amendment right to confront witnesses face-to-face was outweighed by the public policy interest in protecting already traumatized children, particularly considering that the children were testifying live and were available for cross-examination by the defense. In *Craig*, the court enumerated a two-part test for determining that testimony via closed-circuit television is necessary to protect the welfare of the child victim:

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[88] Sluyter, Kristen. *Testimonial Trumps Reliable: The United States Supreme Court Reconsiders the Confrontation Clause in Crawford v. Washington, 541 U.S. 36 (2004).* 27 U. Ark. Little Rock L. Rev. 323.
[89] 127 Wash.App. 193, 110 P.3d 1171 (Div. 2 2005).
[90] Philips, Out of Harm's Way.
[91] 497 U.S. 836 (1990).

first, that the presence of the accused would traumatize the child victim, and second, that the damage would be greater than *de minimis*.[92] In a post-*Crawford* 2004 decision,[93] the 11th Circuit impliedly upheld *Craig*, stating in dicta that the public policy interest in protecting traumatized children outweighed the Sixth Amendment right of defendants to directly confront their accusers in court.[94] Washington courts have not yet addressed the constitutionality of Washington's closed-circuit television statute, RCW §9A.44.150.

CONCLUSION

There are several avenues the court may take in deciding future cases involving children's testimonial hearsay that adequately protect child victims while at the same time protecting the constitutional rights of defendants. Several previously settled areas of law need to be re-examined in light of *Crawford.* One such area is that of children testifying via closed circuit television in abuse prosecutions. Given case law as it has developed up to this point, it appears that testifying via closed-circuit television satisfies the requirements of *Crawford* so long as the defendant has the opportunity to cross-examine the witness and there is a finding that the child is "unable to testify in open court because of the

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[92] *Id*.
[93] *U.S. v Yates*, ___ F.3d ___ (2004).
[94] Philips*, Out of Harm's Way*. In *Yates*, the court did not allow witnesses residing in Australia, and therefore outside the subpoena power of the federal courts, to testify via closed-circuit television, determining that the right of the defendant to confront the witnesses face-to-face outweighed the government's need to have these witnesses to testify via closed-circuit television. In so determining, the court specifically stated that the government's interest involved here was not as weighty as when allowing child witnesses to testify via closed circuit television.

presence of the defendant."[95] However, Washington courts have not yet examined RCW §9A.44.150, which sets forth procedures for allowing children to testify via closed-circuit television, in light of *Crawford*.

In light of the lack of clarity surrounding some *Crawford* issues, many commentators recommend that prosecutors focus on making witnesses available for trial rather than attempting to prove that the witness does not need to be made available.[96] More focus on creative solutions, such as increased reliance on testimony by closed-circuit television as well as on programs such as Kids' Court,[97] may be a better use of prosecutorial resources than attempts in each individual case to prove that the witness need not testify.

[95] *U.S. v. Bordeaux*, 400 F.3d 548, 553 (8th Cir. 2005).
[96] Lininger, Tom. *Yes, Virginia, There Is a Confrontation Clause*. 71 Brooklyn L. Rev. 401 (2005).
[97] See http://www.metrokc.gov/proatty/kids/index.htm