

USING THE *CRAWFORD v. WASHINGTON* “FORFEITURE BY WRONGDOING” CONFRONTATION CLAUSE EXCEPTION IN CHILD ABUSE CASES.

By Tom Harbinson¹

INTRODUCTION

In *Crawford v. Washington*,² the United States Supreme Court held that when an out-of-court statement of an unavailable witness is testimonial, the Sixth Amendment requires the accused be given a prior opportunity to cross-examine the witness.³ The Court stated it would “leave for another day any effort to spell out a comprehensive definition of testimonial. Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations....”⁴ The Court’s use of the term “testimonial” appears to be directed at use of any statements taken by agents of the government when a reasonably objective person should know they are being taken for possible use in court.⁵

In *Crawford*, the Court acknowledges a Confrontation Clause exception to its new rule on the inadmissibility of testimonial statements given by unavailable witnesses.⁶ As the Court explains, “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation on essentially equitable grounds...”⁷ *Crawford* approvingly cites *Reynolds v. United States*,⁸ where the Court first applied the forfeiture by wrongdoing exception.⁹ The *Reynolds* Court held, “The Constitution does not guarantee an accused person against the legitimate consequences of his acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege.”¹⁰ The exception is based on the maxim that no one should be permitted to take advantage of his own wrongdoing.¹¹

¹ Senior Attorney, National Child Protection Training Center (at Winona State University, Winona MN).

² 2004 U.S. Lexis 1838 (March 8th, 2004).

³ *Id.* at 14.

⁴ *Id.*

⁵ *See id.* at 27-30.

⁶ *See id.* at 42.

⁷ *Id.*

⁸ 484 U.S. 145 (1878).

⁹ *Crawford* at 42.

¹⁰ *Reynolds* at 158.

¹¹ *Id.* at 159.

Crawford's approval of the forfeiture by wrongdoing exception should allow prosecutors to get a significant number of out-of-court statements of unavailable witnesses admitted. It is common in child abuse cases for the suspect to procure the child's unavailability to testify, whether by telling the child not to tell,¹² by threats against the child,¹³ the family,¹⁴ or even pets,¹⁵ or through use of others, such as family members.¹⁶ The abuser's use of secrecy is intended to prevent the child from initially disclosing and testifying against the abuser.¹⁷

Since *Reynolds*, the Supreme Court appears to have expanded the exception to allow admission of uncross-examined depositions not made under oath, if the witness was "absent from the trial by suggestion, procurement, or act of the accused," *Motes v. United States*,¹⁸ and admission of other extrajudicial statements based on the defendant's misbehavior.¹⁹

TESTIMONIAL STATEMENTS ARE ADMISSIBLE IF THE ACCUSED PROCURES THE CHILD'S UNAVAILABILITY

Since *Crawford* does not give a comprehensive definition of "testimonial" statements, prosecutors should argue child abuse videotapes and out-of-court statements by children are not testimonial.²⁰ Even if child abuse videotaped statements and other out-of-court statements are considered testimonial, the equivalent of uncross-examined depositions not taken under oath, these statements are admissible when the child's unavailability occurs due to procurement by the accused. Courts have held procurement includes persuasion and suggestion, the wrongful disclosure of information, control by the suspect,

¹² John R. Conte, ed., CRITICAL ISSUES IN CHILD SEXUAL ABUSE 118 (2002) (27% of child abuse victims warned not to reveal the abuse).

¹³ See e.g. *State v. Bewley*, 68 S.W.3d 613, 616 (Mo. 2002) (defendant told boy he would kill him if he refused to submit to sex or told anyone).

¹⁴ See e.g. *State v. Naucke*, 829 S.W. 2d 445, 448-449 (Mo. 1992) (four year old sodomy victim told she and her mother would be killed if she told about abuse).

¹⁵ See e.g. *State v. Twist*, 528 A.2d 1250, 1254-1255 (Me. 1987) (grandfather killed children's cat by burning it in oven and told children he would shoot them if they told about sexual abuse).

¹⁶ See e.g. *People v. Guce*, 560 N.Y.S.2d 53, 56 (N.Y. App. 1990) (six and eight year old sexual abuse victims told by mother they would be responsible for father's incarceration and dissolution of family if they cooperated with prosecutor).

¹⁷ See e.g. *People v. Brocklin*, 687 N.E.2d 1119, 1120 (Ill. App. 3d 1997) (grandfather told four year old sodomy victim not to tell about their "secret"). See also R. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *Child Abuse and Neglect* 177 (1983).

¹⁸ 178 U.S. 458, 471 (1900) (this interpretation is implied as the Court's holding was un-cross examined depositions not taken under oath would violate confrontation unless procurement occurred).

¹⁹ See *Diaz v United States*, 223 U.S. 442, 452 (1912).

²⁰ These statements should not be considered testimonial because they are not specifically prepared for court, young children are unlikely to comprehend the statement could be used at trial, or in court. See Victor I Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of Crawford v. Washington*, UPDATE, Vol. 16 No. 12 (2004).

asking others to persuade the witness not to testify, and acquiescence in others performing acts of procurement.²¹

Prosecutors must use the *Motes*' language "...or act of the accused,"²² to argue for the forfeiture by wrongdoing exception to include as many acts as possible. The act that constitutes the procurement, by itself, need not be wrongful or a threat. Things the child could view as being "beneficial," such as gifts or money, should constitute procurement if they result in the child being unavailable.²³

ACTS DURING THE CRIME SHOULD BE USED TO SHOW PROCUREMENT

Can the suspect's procurement made during the crime be used in applying the forfeiture by wrongdoing exception, or does the exception only apply to procurement made after the crime? The critical wrongdoing the exception attempts to prevent is not based on when the act occurs, but whether the act caused a witness to be unavailable. Thus, the question should be was the accused's act responsible for the witness being unavailable to testify?²⁴

Although the United States Supreme Court has not ruled on whether the exception applies to procurement made during the crime, the rationale behind the rule supports doing so. In a seminal decision, *New Jersey v. Sheppard*,²⁵ a ten-year-old girl stated her stepfather told her, during the time sexual abuse was occurring, he would kill her if she revealed the abuse. Prosecutors moved for use of two-way television because an examining psychiatrist said it would be too traumatic for the girl to be present with her stepfather in the courtroom and the trauma would render her unavailable to testify.²⁶

New Jersey v. Sheppard illustrates acts of the accused during the crime should be allowed for purposes of determining whether procurement of unavailability occurred. If the accused's acts are responsible for the child being in a condition where the child refuses to testify,²⁷ states she cannot remember,²⁸ or becomes non-responsive,²⁹ the requirement of

²¹ See e.g. *Motes* at 471 (persuasion); *United States v. Aguiar*, 975 F.2d 45, 47-48 (2nd Cir. 1992) (defendant threatened to expose witness's criminal activity if witness testified); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir. 1982) (witness under control of defendants' who procured her refusal to testify) *cert. denied*, 460 U.S. 1053. (1983); *United States v. Mastrangelo*, 693 F. 2d 269, 273-274 (2nd Cir. 1982) (defendant knew witness would be murdered and did nothing to prevent it).

²² *Motes*, *supra* at 471.

²³ See e.g. *cf. State v. Henry*, 820 A.2d 1076, 1078 (Conn. 2002) (involving an adult victim where defendant offered the victim money if she would leave the state).

²⁴ See e.g. *United States v. White*, 838 F. Supp. 618, 621 (D.D.C. 1993). The actions of procurement can be "a pattern of conduct" even if no specific verbal threat is made. See *Black v. Woods*, 651 F.2d 528, 531 (8th Cir. 1981). A majority of federal Circuit Courts have not required a finding the accused acted with intent or purposefully to procure the witness's absence. See *John R. Kroger, The Confrontation Waiver Rule*, 76 B.U.L. Rev. 835, 855-857 (1996).

²⁵ 484 A.2D 1330, (N.J. Super. Ct. Law Div. 1984).

²⁶ *Id.* at 415-418.

²⁷ See. *State v. Yednock*, 541 A.2d 887, 891 (Conn. 1988) (child was "unavailable" when traumatized by testifying in front of defendant and refused to testify further).

²⁸ See e.g. *United States v. McHorse*, 179 F.3d 889 (10th Cir. 1999) (when 7 year old child sex abuse victim states she could not remember what defendant did, admission of her out-of-court statements does not

unavailability should be considered to be met. Non-verbal acts and threats may assist the accused in committing the crime, but are also used to traumatize the victim so the victim will not tell.³⁰ The State should also be allowed to show, in a pre-trial hearing, it has made a good faith effort to have the witness testify and should not be required to call the child at trial (or the pre-trial hearing) to show the child is unable to testify.³¹

PROCUREMENT BY TRAUMATIZATION SHOULD RESULT IN TESTIMONIAL STATEMENTS BEING ADMISSIBLE

One of the most common acts of procurement is procurement of unavailability by trauma. It is widely accepted that children can have Post Traumatic Stress Disorder (PTSD), Acute Stress Disorder (ASD), or Traumatic Stress Disorder (TSD).³² In just the last few years, the psychiatric community has become better at diagnosing PTSD or ASD in children as young as three years old.³³ Research shows that 50% of sexually assaulted individuals have had PTSD.³⁴ Talking to family members, caretakers, teachers, the child in pre-trial preparation, and perhaps referral to a child clinical psychologist may assist a prosecutor in determining if an accused's acts of procurement caused trauma that renders a child unavailable to testify. Under PTSD and AST one of the symptoms of the condition is desperately and strenuously trying to avoid thoughts or being reminded of the event or person that caused the condition.³⁵ It is possibly this condition, not simply because these children are young and have to face the defendant, which may be

violate confrontation as defendant had opportunity to cross examine); *See also United States v. Owen*, 484 U.S. 554 (1985) (Confrontation Clause only guarantees an opportunity for effective cross examination).

²⁹ *See e.g. State v. Ross*, 451 N.W.2d 231, (Minn. App. 1990) *pet. for rev. denied* (Minn. April 13, 1990) *cert. denied* 498 U.S. 837 (1990) (admission of out-of-court statements does not violate confrontation when child became non-responsive due to trauma of testifying in defendant's presence).

³⁰ *See Richard D. Friedman, Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506-535, 533 (1997) (in cases where "the child has been intimidated by either the abusive conduct itself or by a threatening statement—Don't tell anyone!—that accompanied or followed the conduct...the forfeiture principle may be appropriate."). Cases involving children could be considered to be a unique exception just as dying declarations possibly are. *See Crawford* at 33 n. 6 (if dying declarations must be accepted, it is *sui generis*).

³¹ *See Barber v. Page*, 390 U.S. 719, 724-25 (1968) (witness not unavailable until State makes good faith effort to obtain witness's presence at trial). If pre-trial evidence shows the child will be unable to testify, that should be sufficient. Cases where the State has tried to make service of process and the witness is unavailable because he has fled the jurisdiction use a somewhat similar analysis. *See cf. United States v. Papadakis*, 572 F. Supp. 1518 (S.D.N.Y. 1983) (accused gave money and made threats resulting in witness going to Greece).

³² *See Brett T. Litz, EARLY INTERVENTION FOR TRAUMA AND TRAUMATIC LOSS*, especially pages 1-65 and 112-146 (2004); Dr. Eth Spencer, ed., *PTSD IN CHILDREN AND ADOLESCENTS* (2001).

³³ Michael S. Scheeringa and Theodore J Gaensbauer, Post Traumatic Stress Disorder, in C.H. Zeanah, Jr., Charles H. Zeanah, Jr., ed., *HANDBOOK OF INFANT MENTAL HEALTH*, 2nd Ed., 369-381 (2000);

³⁴ Brett T. Litz ed., *supra* at 228 (1985) (the numbers may be similar for children).

³⁵ *See Diagnostic and Statistical Manual of Mental Disorders-TR 309.81* (DSM-IV-TR) American Psychiatric Association (4th Ed. 2000) (PTSD diagnostic criteria include persistent avoidance of stimuli associated with an event including persons or thoughts associated with the trauma); *DSM-IV-TR 308.3*, (AST criteria include marked avoidance of stimuli that arouse recollections of the trauma such as thoughts, or persons involved).

responsible for some children “freezing” in the courtroom.³⁶ Unlike the standard enunciated in *Maryland v. Craig*,³⁷ where the trauma of seeing the accused makes the child unavailable; under this analysis, it is the acts of the accused that constitute procurement by trauma that make the child unavailable.

The argument child trauma should not be considered by courts in determining admissibility of out-of-court statements because most children who appear in court, in the long-term, are not unduly traumatized is irrelevant.³⁸ In determining unavailability, the trial court makes the decision about availability based on the witness’s condition at the time of the hearing or trial—not what the witness’s long term condition will be.³⁹

STANDARD OF PROOF

What should the standard of proof be for determining procurement occurred? The United States Supreme Court has not ruled on this issue, but a majority of the federal Circuit Courts have applied the “by a preponderance of evidence standard.”⁴⁰ Applying this lower standard effectuates the purpose of the exception and parallels case law on the admissibility of other evidentiary statements.⁴¹

CONCLUSION

In light of *Crawford*, it is critical for prosecutors to learn to use the forfeiture by wrongdoing exception. Prosecutors must educate themselves, law enforcement, caretakers, teachers, medical care providers, and Child Protection workers on the importance of documenting or asking the child, in a forensically appropriate way, about acts or words that may show procurement. Effective prosecuting is aggressively investigating and building the case, to make a strong record that will convince trial and appellate courts the accused has procured the child’s unavailability.

³⁶Some children may exhibit dissociative symptoms. Dissociation involves “particular alterations in phenomenal experience that are related to a disconnection or disengagement regarding the self and/or the environment.” Stephen J. Lyn and W. Rhue, ed., *DISASSOCIATION: CLINICAL AND THEORETICAL PERSPECTIVES*, 23 (1994). AST includes disassociation as one of its diagnostic criteria. See DSM-IV-TR 308.3 B (1) to (5).

³⁷ 497 U.S. 836, 857 (1990).

³⁸ See Richard D. Friedman, *supra* at 532.

³⁹ See FEDERAL RULES OF EVID. 804 (a).

⁴⁰ *White v. United States*, 116 F.3d 903, 911-913 (App. D.C. 1997) (other Circuit Courts have adopted “preponderance” standard because higher standard would not deter misconduct).

⁴¹*Id.*