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# Throwing the Testimony Out with the Bathwater: Washington's Application of Crawford Hearsay in Child Abuse Cases

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# Throwing the Testimony Out with the Bathwater: Washington's Application of *Crawford* Hearsay in Child Abuse Cases

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## I. INTRODUCTION

Lisa Burgess and her one-year-old daughter began living with Steven Beadle in October of 2004.[1] Almost two years later, the girl told her mother about discomfort in her genital area and began frequently drawing pictures of male genitalia.[2] Her mother immediately confronted Beadle, causing the girl to cry.[3] Beadle screamed at the girl, "[D]o you love daddy[?]" and "[D]addy's going away to prison for life if you say something like this to anybody."[4]

Shortly afterwards, Beadle was sent to prison for a crime unrelated to the molestation accusation.[5] A few months later, the girl started drawing male genitalia again, calling them "tails."[6] When Lisa asked about the drawings, the girl would crumple up the paper and throw it away.[7] The girl told her

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1 Petition for Review at 3, State v. Beadle, 265 P.3d 863 (Wash. 2011) (No. 37508-7-II), *available at* http://www.courts.wa.gov/content/Briefs/A08/842043%20prv.pdf.

2 State v. Beadle, 265 P.3d 863, 866 (Wash. 2011).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

mom's husband that the drawings were of Beadle's "tail," and when she touched it, the tail made her hands sticky.[8]

Alarmed by what the girl said, the girl's mother contacted the police.[9] A detective and a Child Protective Services (CPS) worker interviewed the girl.[10] It began with a conversational tone, but once the questions turned towards Beadle, the girl shut down and became anxious and worried about getting in trouble.[11] Subsequently, the girl displayed the same emotional discomfort and distress when speaking to a therapist and a mental health clinician.[12] Eventually she was diagnosed with post-traumatic stress disorder and a psychiatric condition the court called "sexual abuse of a child."[13]

As the case proceeded to trial, the now four-year-old girl was required to come into court for a pre-trial hearing.[14] On the first day of the hearing, the girl crumpled to the floor outside the courtroom and lay there crying, refusing to talk for about an hour.[15] Even after the social worker got the girl to calm down, she still refused to enter the courtroom.[16] This behavior continued for several days, with the girl screaming and crying in the hallway so loud it could be heard in the courtroom.[17] The girl never testified at the pre-trial hearing, let alone at trial.[18] However, her out-of-court statements to the detective and the CPS worker were admitted into

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*at 867.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*

evidence.[19] At the conclusion of the criminal trial, Beadle was convicted of two counts of first-degree child molestation and given an exceptional sentence—a sentence above the standard range given the defendant's criminal history and the nature of the crime.[20]

The *Beadle* case exemplifies a traumatic situation for a child victim. Despite the good intentions of the parents, the State, the defense, and the judiciary, the girl endured a substantial amount of trauma just *trying* to face Beadle in court. Why did the little girl have to endure this emotional turmoil?

The Confrontation Clause of the United States Constitution gives a defendant the opportunity to face his or her accuser.[21] However, the courts have carved out exceptions to this rule to accommodate for extraordinary situations like in *Beadle*. In *Crawford v. Washington*, decided seven years before *Beadle*, the United States Supreme Court changed the way it evaluated Confrontation Clause cases,[22] stating courts must analyze whether the out-of-court statements that are sought to be admitted against the defendant are of a testimonial nature.[23] The *Crawford* court determined that if a statement is testimonial, it would be excluded; yet the court declined to define the term "testimonial."[24] The *Crawford* holding drew an ambiguous and seemingly malleable line as to when statements are admissible, causing much confusion and uncertainty in trial and appellate courts.[25]

Like many states, Washington has grappled with the application of *Crawford* and its progeny. Currently, the Washington Supreme Court

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[19] *Id.* at 867–68.
[20] *Id.* at 868.
[21] U.S. CONST. amend. VI.
[22] Crawford v. Washington, 541 U.S. 36, 61 (2004).
[23] *Id.*
[24] *Id.*
[25] Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409, 2419 (Dec. 2005).

applies a four-factor test to determine whether out-of-court statements are testimonial in nature: (1) whether the speaker is describing events contemporaneously or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the statements were necessary to resolve a present emergency, or instead to learn what had happened in the past; and (4) the degree to which the "interrogation" is formal.[26] Courts must apply these factors uniformly both in terms of structure and substance. At the same time, *stare decisis* requires Confrontation Clause analysis to remain faithful to the original *Crawford* decision and its progeny.

Washington courts should amend this four-factor test to consider the totality of the circumstances when evaluating whether to admit a child victim's out-of-court statement. As part of this totality of the circumstances evaluation, this Note offers several additional factors for Washington courts to consider, such as the status and role of the listener, the listener's relationship to the child, the behavior of the child during the interaction, the substance of the statement, and the environment in which the statement was made.

Part II describes the nature of child sexual abuse cases and how such cases are typically prosecuted, which can necessitate special consideration when *Crawford* is applied. Part III outlines the background of United States Supreme Court Confrontation Clause analysis, from the reliability test of *Ohio v. Roberts* through the primary purpose test of *Michigan v. Bryant*.[27] Part IV outlines the relevant framework Washington has chosen in applying *Crawford*. Part V analyzes how Washington appellate courts have applied the "testimonial" test of *Crawford*. Part VI discusses the social justice

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[26] State v. Pugh, 225 P.3d 892, 896 (Wash. 2009) (en banc) (citing Davis v. Washington, 547 U.S. 813, 827 (2006)).
[27] Michigan v. Bryant, 131 S. Ct. 1143 (2011); Ohio v. Roberts, 448 U.S. 56 (1980).

issues created by Washington's current regime. And lastly, part VII proposes changes in Washington's application of *Crawford* to take into account the unique cases of child sexual abuse.

## II. NATURE AND PROSECUTION OF CHILD SEXUAL ABUSE

Sexual abuse of children is a silent epidemic in the United States. The Department of Child Services recorded more than 63,000 instances of child sexual abuse in 2010 alone.[28] However, this figure represents only reported cases,[29] and experts estimate that only 10 percent of sexually abused children report to law enforcement and other government agencies.[30] Child victims can be extremely hesitant to report for a number of reasons. First, many cases involve abusers who the children know and trust, such as neighbors, family members, and friends of their parents.[31] Second, children are hesitant because they have feelings of embarrassment or shame about the abuse.[32] Third, studies have shown that children usually do not experience symptoms of child abuse until later in life.[33] Other contributing factors include the trauma created by the abuser's grooming process and a child's inability to describe or recognize that the abuse is wrong.[34] Therefore, if children choose to tell someone, it may be months or even years after the abuse occurred.[35] The prosecution of these cases frequently

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[28] U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 50 (2010), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf.
[29] *Id.*
[30] Matt Ledesma, *Child Sex Abuse Often Unreported: Fewer than 10% of Victims Tell Others of Incident*, TIMES RECORD NEWS (Nov. 11, 2011 1:00AM), http://www.timesrecordnews.com/news/2011/nov/11/child-sex-abuse-often-unreported/.
[31] U.S. DEP'T OF VETERANS AFFAIRS, *Child Sexual Abuse*, *available at* http://www.ptsd.va.gov/public/types/violence/child-sexual-abuse.asp.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

hangs on the sole testimony of the victim. Of the children who do testify, it can be a difficult process for those who are the most emotionally fragile because of the presence of his or her abuser in court.

Common law previously set high age thresholds for child witnesses, usually excluding those under the age of 12 from testifying.[36] When the Federal Rules of Evidence were adopted in 1975, however, they "firmly rejected arbitrary age barriers, and instead presumed all witnesses were competent."[37] By the early 1980s, child physical and sexual abuse cases became more prominent in the judicial system due to changes in reporting requirements mandated by the Child Abuse Prevention and Treatment Act (CAPTA).[38] Child testimony was, and is, critical in these cases.[39]

There are two major, and often conflicting, societal interests in prosecuting child sexual abuse cases.[40] The first is to limit the amount of trauma the child victim suffers during the process of prosecution;[41] the second is to maximize the amount of lawfully available evidence.[42] Studies have estimated that children comprise approximately 71 percent of all reported sex crime victims.[43] A 2008 study found that one in five girls ages

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[36] Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 IND. L.J. 1029, 1032–34 (2007) (noting several presumptions against child competency for certain ages).

[37] Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 240 (2010) (suggesting that this became the model for later state evidence rules, but did not eliminate pervasive hostility to presuming young children to be competent).

[38] *Id.* at 240–41.

[39] *Id.* at 240.

[40] *See* Opinion of the Justices to the Senate, 547 N.E.2d 8, 9 (Mass. 1989) (analyzing "conflicting considerations regarding hearsay admissibility in child sexual abuse cases").

[41] *Id.*

[42] *Id.*

[43] David Finkelhor & Richard Ormrod, *Characteristics of Crimes Against Juveniles*, JUV. JUST. BULL. (U.S. Dep't of Justice/Office of Juvenile Justice & Delinquency Prevention, Rockville, Md.), June 2000, at 1, *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/179034.pdf.

14 to 17 had been victims of sexual assault or attempted sexual assault, that six percent of all surveyed children were victims in the last year, and that nearly ten percent of all the children surveyed had been victims at some point.[44] A 2006 Department of Health and Human Services (DHHS) study identified almost 80,000 child victims of sexual abuse during child services investigations.[45] Even these estimates are grossly understated in light of the large number of unreported cases.[46]

*A. Prosecution Difficulty of Child Sexual Abuse Cases*

Child sexual abuse cases are difficult to prosecute for several reasons, including that they often lack physical evidence, there are often no third party eyewitnesses to the crime, and, in extreme circumstances, the child victims may be unavailable to testify.[47] Determination of whether to allow or prohibit victim testimony in child sexual abuse cases requires a balancing of the government, defense, and victim interests.[48] The difficulty in obtaining evidence, some of which is of questionable reliability, must be balanced against the accused's rights. Additionally, jurors and judges often

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[44] David Finkelhor et al., *Children's Exposure to Violence: A Comprehensive National Survey*, JUV. JUST. BULL. (U.S. Dep't of Justice/ Office of Juvenile Justice & Delinquency Prevention, Rockville, Md.), Oct. 2009. at 1-2, 5 *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/227744.pdf.

[45] U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2006, 26–27 (2008), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm06/cm06.pdf.

[46] Tiffany Sharples, *Study: Most Child Abuse Goes Unreported*, TIME (Dec. 2, 2008), *available at* http://www.time.com/time/health/article/0,8599,1863650,00.html.

[47] *See* Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 374–76 (2005) (identifying difficulties of prosecuting child sexual abuse cases based on the nature of the crime).

[48] Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. at 214–18 (1995) (discussing conflicting issues of need for hearsay in sexual abuse cases and the possible infringements to a defendant's Sixth Amendment right to confrontation).

express concern regarding "suggestibility, manipulation, coaching, or confusing fact with fantasy,"[49] leading them to view child testimony with a more skeptical eye than adult testimony.[50]

These stereotypes are largely a result of a series of preschool sexual abuse scandals during the mid-1980s to the 1990s.[51] In the McMartin Preschool scandal, one in this series, caretakers of a preschool day care facility were charged with multiple counts of child sexual abuse.[52] After six years of prosecution, there were no convictions.[53] As a result, popular public opinion reasoned the accusers' claims must be fictitious, creating a general skepticism about these types of cases.[54] Also helping create this general perception, the suggestive interview techniques, such as positive social reinforcement (i.e. praise, approval) and negative feedback (i.e. disapproval),[55] used in those cases resulted in several "high profile

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[49] "Unfortunately, there are countless ways that can potentially compromise testimony of young children including: the use of yes [or] no questions, forced choice questions, repetitious questioning, misleading questions, repeated interviewing plausible suggestions, guided imagery, stereotyping, interpreting play with anatomical dolls, peer and parental pressure, and selective reinforcement." Raeder, *supra* note 38, at 240 (citing to Stephen J. Ceci & Maggie Bruck, AM. PSYCHOLOGICAL ASS'N, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (1995); Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, LAW & CONTEMP. PROBS. (Winter 2002) at 149, 160–65).

[50] Raeder, *supra* note 37, at 375.

[51] *See, e.g.,* Anna Richey-Allen, Note, *Presuming Innocence: Expanding the Confrontation Clause Analysis to Protect Children and Defendants in Child Sexual Abuse Prosecutions*, 93 MINN. L. REV. 1090, 1104–07 (2009). These scandals involved investigations that quickly devolved to "witch hunts." *Id.*

[52] Robert Reinhold, *The Longest Trial – A Post-Mortem; Collapse of Child-Abuse Case: So Much Agony for So Little*, N.Y. TIMES, Jan. 24, 1990, *available at* http://www.nytimes.com/1990/01/24/us/longest-trial-post-mortem-collapse-child-abuse-case-so-much-agony-for-so-little.html.

[53] *Id.*

[54] *Id.*

[55] F. James Billings et al., *Can Reinforcement Induce Children to Falsely Incriminate Themselves?*, 31 LAW & HUM. BEHAV. 125, 126 (2007).

acquittals, as well as questionable convictions."[56] This distrust of child testimony still exists in the minds of jurors, attorneys, and judges.[57]

Additionally, when child victims do take the stand, their behavior can be negatively perceived by jurors. Child victims often disclose in stages, the child disclosing different parts of an assault over time and possibly out of chronological order, which amplifies the risk of perceived inconsistency and heightened scrutiny.[58] In fact, defense counsel frequently attacks partial disclosures as inconsistencies in the victim's story.[59] Similar to domestic violence cases,[60] another problematic aspect of child victim testimony is a high probability of recantation.[61]

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[56] Raeder, *supra* note 37, at 242. *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 539-40 (2005) (discussing the child care sexual abuse cases).

[57] *See generally* Livia L. Gilstrap et al., *Child Witnesses: Common Ground and Controversies in the Scientific Community*, 32 WM. MITCHELL L. REV. 59 (2005); Michael R. Keenan, *Child Witnesses: Implication of Contemporary Suggestibility Research in a Changing Legal Landscape*, 26 DEV. MENTAL HEALTH L. 99 (2006); Stephen J. Ceci et al., *Unwarranted Assumptions about Children's Testimonial Accuracy*, 3 ANN. REV. CLINICAL PSYCHOL. 311 (2007).

[58] Raeder, *supra* note 37, at 375.

[59] *See* Thomas D. Lyon, FALSE DENIALS: OVERCOMING METHODOLOGICAL BIASES IN ABUSE DISCLOSURE RESEARCH, IN CHILD SEXUAL ABUSE: DISCLOSURE, DELAY AND DENIAL 41, 53–54 (Margart-Ellen Pipe et al. eds. 2007); Olafson & Lederson, *infra* note 62 at 27, 30.

[60] Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768 (2005) ("[v]ictims of domestic violence are more prone than other crime victims to recant or refuse to cooperate after initially providing information to the police. Recent evidence suggests that 80 to 85 percent of battered women will recant at some point."). *See also* Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002) (describing non-cooperation by recantation and failure to appear as "an epidemic in domestic violence cases"); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence & Justice for Victims of Domestic Violence*, 8 YALE J. L. & FEMINISM, 359, 367–68 (1996) ("[V]ictims of domestic violence are uncooperative in approximately eighty to ninety percent of cases.[T]he victim will usually recant her prior statements."). Most of the estimates regarding recanting appear anecdotal, since there is no known study measuring victim recanting.

However, there have been no studies to show that *all* children are particularly unreliable witnesses; in fact, children generally understand what it means to tell the truth, and do so.[62] Studies alleging suggestibility, especially during the 1980s and 1990s, usually employed methodological biases, whereas recent studies have eliminated these biases and generally found that children are not hyper-suggestible.[63]

Additionally, studies have compared the disclosures of childhood sexual abuse made by adults and children, and found many similar behaviors and rates of recantation.[64]A 2007 study of approximately 250 substantiated cases of sexual abuse found that nearly one in four children recanted at some point.[65] In comparison, some studies have found that up to 71 percent of adult rape victims recant.[66] When parental figures were the abusers, as is commonly the case in child sexual abuse cases,[67] children were more likely to recant.[68] However, the study found no evidence linking recantation to false complaints.[69] Therefore, even in cases where victims did recant, the

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Certainly, some domestic violence victims are eager to assist in the prosecution of their batterers. *See id.* There is, however, a consensus in the literature that recanting is a significant problem in domestic violence cases. *See id.*

[61] Raeder, *supra* note 37, at 250.

[62] *See, e.g.*, Erna Olafson & Cindy S. Lederman, *The State of the Debate About Children's Disclosure Patterns in Child Sexual Abuse Cases*, JUV. & FAM. CT. J. (Winter 2006) at 27, 29 (summarizing literature regarding most adults not disclosing child sexual abuse as children).

[63] *Id.*

[64] *Id.*

[65] Lindsay C. Malloy et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 162, 164-65 (2007).

[66] Holly Hogan, *The False Dichotomy of Rape Trauma Syndrome*, 12 CARDOZO J.L. & GENDER 529, 537 (2006).

[67] Jeffrey S. Turner, ENCYCLOPEDIA OF RELATIONSHIPS ACROSS THE LIFESPAN, 92 (1996). Although incest is difficult to assess because it mostly occurs in the privacy of the abuser's home, it is estimated that as many as 20 million Americans have been victims of incest, which is about one in ten persons. *Id.* In addition, research has also shown that incestuous families are found in every socioeconomic and educational group. *Id.*

[68] *See* Malloy et al., *supra* note 65 at 165.

[69] *Id.* at 166.

researchers found nothing to indicate that the initial allegations were false.[70] Ultimately, adults are just as capable of lying as children,[71] but children are subject to higher levels of scrutiny given the perceived credibility issues.[72]

*B. Multidisciplinary Approach to Addressing Child Sexual Abuse*

Child Advocacy Centers were created to deal with child distress and fear of the court system, and to coordinate the disjointed efforts of social services and the criminal justice system.[73] These centers recognize, prevent, and support child abuse victims by creating a single location for children to get a variety of services.[74] Many states have adopted the multidisciplinary team approach to investigating and remedying child sexual abuse.[75] Multidisciplinary teams provide "a well-coordinated response to child abuse allegations in a collaborative manner amongst the various team members, which generally include social workers, prosecutors, police officers, or mental and medical health professionals."[76] These teams are better prepared to "discern the truthfulness of allegation, lessen the trauma of repeated

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[70] *Id.*

[71] NEW ZEALAND LAW COMM'N, THE EVIDENCE OF CHILDREN AND OTHER VULNERABLE WITNESSES: A DISCUSSION PAPER 8 (October 1996).

[72] Raeder, *supra* note 37, at 252.

[73] NAT'L CHILDREN'S ADVOCACY CTR., *History*, http://www.nationalcac.org/history/history.html (last visited Jan. 11, 2014). *See generally* Theodore P. Cross et al., *Evaluating Children's Advocacy Centers' Response to Child Sexual Abuse*, JUV. JUST. BULL. (U.S. Dep't of Justice/Office of Juvenile Justice & Delinquency Prevention, Rockville, Md.), Aug. 2008, at 1–2, *available at* http:// www.ncjrs.gov/pdffiles1/ojjdp/218530.pdf.

[74] *Id.*

[75] *See generally* Jonathan Scher, Note, *Out-of-Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAM. CT. REV. 167–69 (2009) (advocating for child statements made during forensic interviews with the multidisciplinary teams to be admitted into evidence).

[76] Laura E. Ruzzo, *The Testimonial Nature of Multidisciplinary Team Interviews in Massachusetts: Applying Crawford to the Child Declarant*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 227, 229 (2011).

interviewing, and provide mental health services to traumatized children."[77] Congress showed approval of this approach through the Victims of Child Abuse Act (VCAA), which encouraged use of multidisciplinary teams to train judges, attorneys, court officers, and others involved in the prosecution of child sexual abuse cases.[78]

## III. UNITED STATES SUPREME COURT CONFRONTATION CLAUSE ANALYSIS

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him."[79] The provision, also known as the Confrontation Clause, provides criminal defendants with the right to cross-examine an adverse witness, who must testify under penalty of perjury.[80] Thus, out of court statements are generally inadmissible hearsay.

### *A. Ohio v. Roberts*

From 1980 to 2004, courts used the *Roberts* standard of reliability test to determine the admissibility of out-of-court statements.[81] In *Roberts*, the Court noted that since the Confrontation Clause prefers "face-to-face confrontation at trial," the primary interest of the defendant is the right to cross-examination.[82] However, the Court determined that this right is not absolute; it only limits the scope of admissible hearsay evidence rather than setting a complete bar.[83] So the Court established a new rule for

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[77] *See generally* Cross et al., *supra* note 73.
[78] *See* 18 U.S.C. § 3509(g)(2)(G) (2006).
[79] U.S. CONST. amend. VI.
[80] *See generally* U.S. CONST. amend. VI (requiring in-court testimony of adverse witnesses ensures sworn statements).
[81] *See generally* Ohio v. Roberts, 448 U.S. 56 (1980).
[82] *Id.* at 63.
[83] *Id.* at 64.

determining admissibility of hearsay evidence: the *Roberts* test. The *Roberts* test requires courts to look at (1) whether the declarant was available to testify and (2) whether the statement provided adequate "indicia of reliability" to be trustworthy.[84] Indicia of reliability meant that the evidence either fell within a "firmly rooted hearsay exception" or demonstrates "particularized guarantees of trustworthiness."[85]

For 24 years, the *Roberts* standard was used in courts across the nation. However, the *Crawford* decision in 2004 significantly changed the framework for hearsay admissibility. Starting with *Crawford,* the United States Supreme Court issued a series of opinions that shifted the focus of the hearsay admissibility test from reliability to the statement's "testimonial" nature.[86]

*B. Crawford v. Washington*

With Justice Scalia writing for the seven-justice majority, the *Crawford* Court overruled *Roberts*, claiming that the *Roberts* terms and factors were too ambiguous.[87] After analyzing the history of the Confrontation Clause, Justice Scalia determined that, first, the Clause was directed at "the use of *ex parte* examinations as evidence" in criminal prosecutions against the accused, and second, the Framers were specifically worried about testimonial statements of unavailable witnesses that the defendant did not

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[84] *Id.* at 66.
[85] *Id.*
[86] Crawford v. Washington, 541 U.S. 36 (2004); Michigan v. Bryant, 131 S. Ct. 1143 (2011); Davis v. Washington, 547 U.S. 813 (2006).
[87] *Crawford*, 541 U.S. at 63 (stating that "[r]eliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative"). Scalia went on further to state that "[w]hether a statement is deemed reliable depends heavily in which factors the judge consider and how much weight he accords each of them," and that the test was "so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Id.*

have a chance to cross-examine.[88] Therefore, Scalia reasoned, the Framers did not intend to focus on the reliability of the statements, but rather the testimonial quality of statements.[89]

Although the Court declined to give a precise test defining what is or is not "testimonial," it did provide three examples of potentially testimonial evidence.[90] First, testimonial evidence may be "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 prosecutorily."[91] Second, testimonial statements could include "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confession."[92] Third, the evidence could 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," also known as the objective witness test.[93] The Court suggested that a "common nucleus" existed among the three examples but declined to explain this concept further.[94] The Court also failed to define "interrogation" for purposes of this inquiry, stating only that the term be understood in its "colloquial, rather than any technical legal, sense."[95]

Despite the majority's intent to provide a clear formula for Confrontation Clause analysis, the *Crawford* test has been subject to much criticism—namely, that it causes "additional confusion, continued judicial activism,

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[88] *Id.* at 50, 53–54.
[89] *See id.*
[90] *See id.* at 51–52.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* at 52.
[95] *Id.* at 53 n.4.

and further opportunity for interjurisdictional conflict."[96] Without guiding principles for distinguishing testimonial statements from non-testimonial statements, the Supreme Court failed to fully correct the structural errors it saw in *Roberts*.[97] This failure has resulted in confusion and inconsistent judgments in lower courts across the nation.[98] By leaving the definition of testimonial "for another day,"[99] a day which has yet to come, the Court failed to address a significant gap in Confrontation Clause analysis. The Court even acknowledged in a footnote "that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty."[100] This interim period has now lasted a decade, and there has been no rule repairing the inadequacies of the *Crawford* test.

*C. Evolving Crawford Doctrine*

Two years after the decision in *Crawford*, in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana,* the Court addressed the issues of whether victims' statements to a 911 operator or in a domestic violence affidavit were testimonial.[101] However, with Justice Scalia again writing for the majority opinion, the *Davis* court also failed to clearly define what makes a statement testimonial. The Court agreed with *Crawford*'s assertion that "'[s]tatements taken by police officers in the course of

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[96] *E.g.* Andrew W. Eichner, *Preserving Innocence: Protecting Child Victims in the Post-Crawford Legal System* 38 AM. J. CRIM. L. 101, 104 (2010).
[97] *Id.*; Stephanie McMahon, Note, *The Turbulent Aftermath of Crawford v. Washington: Where for Child Abuse Victims' Statements Stand?*, 33 HASTINGS CONST. L.Q. 361, 365 (2006).
[98] *See generally* Robert O. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 921 (2007) (analyzing similar results but different reasoning in lower court decisions).
[99] Crawford v. Washington, 541 U.S. 36, 68 (2004).
[100] *Id.* at 68 n.10.
[101] Davis v. Washington, 547 U.S. 813 (2006).

interrogations,'" are typically testimonial.[102] However, the Court also recognized that in *Crawford*, it failed to define "interrogation" for purposes of this inquiry, stating only that the term be understood in its "colloquial, rather than any technical legal, sense."[103] Forced to more precisely determine what types of statements in police interrogations are considered testimonial, the Court found that when police questioning takes place during an emergency situation, witness statements might be considered non-testimonial.[104] Specifically, if the *objective primary purpose* of the interrogation is to enable police assistance to address an ongoing emergency, rather than establish or prove past events relevant to future prosecution, then the statements are non-testimonial.[105]

The Court laid out factors to determine if an emergency is present: whether a reasonable person in the listener's position would understand that the declarant's statements were a call for help during a genuine emergency, whether the statements were necessary to allow law enforcement to respond to the existing emergency, and the degree of formality of the questioning.[106]

Although the *Davis* opinion attempted to clarify issues left unresolved by *Crawford*, it ultimately "attenuated the force of its holding by drawing an extremely hazy line between what is considered testimonial versus non-testimonial interrogation . . . while simultaneously failing to offer clear guidance" to determine when a statement shifts from one category to the next.[107]

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[102] *Id.* at 822.
[103] *Id.* at 53 n.4.
[104] *Id.*
[105] *Id.*
[106] *Davis*, 547 U.S. at 826–27.
[107] Eichner, *supra* note 96, at 107.

Three years later, in *Michigan v. Bryant*, the Court revisited the ongoing emergency test it had set forward in *Davis*.[108] The Court declared that *Davis* was intended to apply only in important situations bearing on the Confrontation Clause, not necessarily in every case. Specifically, the Court focused on out-of-court statements where government actors formally interrogate a declarant to obtain evidence for future prosecution.[109] In *Bryant*, the Court also enumerated considerations to objectively analyze the primary purpose test.[110] First, lower courts should look at "the circumstances of an encounter" as well as "the statements and actions of the parties."[111] Second, courts should deduce the reasonably objective purpose that these actions and statements imply.[112] Curiously, the Court added that the primary purpose test involves consideration of hearsay rules in determining reliability of the statement.[113]

Ultimately, the *Crawford* line of cases fail to comprehensively define "testimonial," which has led to confusion throughout the courts and created the existing problem in relevant Washington case law.

## IV. WASHINGTON FRAMEWORK FOR APPLYING *CRAWFORD*

Washington courts have grappled with the ambiguity resulting from *Crawford* and its progeny. In child sexual abuse cases, local appellate courts have not reached a consensus on the *Crawford* admissibility of victims' out-of-court statements.[114] However, the *Crawford* decision has severely

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[108] Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011).
[109] *Id.* at 1155.
[110] *Id.* at 1156.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 1155.
[114] These cases span from 2004, when *Crawford* was decided to 2012, when this article was written. The Washington State Supreme Court and the United States Supreme Court determined that *Crawford* is not retroactive. Whorton v. Bockting, 549 U.S. 406 (2007);

limited, if not entirely banned, the admission of child hearsay statements elicited during forensic interviews and other child sexual abuse out-of-court statements.[115] These types of cases face the greatest challenges[116] under *Crawford* because difficult child sexual abuse cases often lack physical evidence or eyewitness testimony. These cases often involve a child-declarant who is not available for cross-examination and does not appear in court.[117] Such cases are even further complicated by *Crawford* issues because of the type of proceeding addressing the abuse, such as civil commitment hearings where defendants do not have Confrontation Clause rights.[118] Initially, Washington courts analyzed the state of mind of the declarant to determine the testimonial nature of the statement.[119] This was based on language from *Crawford* which claimed that statements were

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In re Markel, 111 P.3d 249 (Wash. 2005). However, the Ninth Circuit observed the retroactivity of *Crawford* until the *Whorton* ruling. Bockting v. Bayer, 66 F.3d 1010 (9th Cir. 2005).

[115] *See, e.g.*, Raeder, *supra* note 37, at 375.

[116] Sherrie Bourg Carter & Bruce M. Lyons, *Crawford and Child Abuse, Domestic Violence, and Elder Abuse Cases*, 6 No. 5 CRIM. PRAC. GUIDE 3 (Sep/Oct 2005).

[117] A child's inability to remember facts while testifying does not implicate *Crawford* because the child is still available for cross-examination. State v. Price, 146 P.3d 1183, 1192 (Wash. 2006); State v. Robinson, 166 Wash. App. 1013 (2012); State v. Yackley, 127 Wash. App. 1017 (2005); State v. Price, 110 P.3d 1171 (Wash. Ct. App. 2005); State v. Lobos, 165 Wash. App. 1002 (2011). The child is also available for cross-examination if he or she forgets the events of the crime or past disclosures while testifying. State v. Dodgen, 198 P.3d 513 (Wash. Ct. App. 2008). Closed circuit television testimony by the child-declarant is sufficiently "available for cross examination" under *Crawford*. State v. M.G.H., 162 Wash. App. 1020 (2011).

[118] *Crawford* does not apply retroactively, because "[c]riminal defendant[s] who were denied Crawford's procedural requirements by reason of timing were not dispossessed of all meaningful opportunity to challenge the admission of the testimony." In re Markel, 111 P.3d 249 (Wash. 2005). There are no Sixth Amendment Crawford rights in a sexually violent predator (SVP) civil commitment hearing. In re Detention of Allen, 174 P.3d 103 (Wash. Ct. App. 2007). There are also no Sixth Amendment Crawford rights in a Special Sex Offender Sentencing Alternative (SOSSA) revocation hearing. State v. Marshall, 133 Wash. App. 1021 (2006).

[119] *E.g.* Crawford v. Washington, 541 U.S. 36, 51 (2004).

testimonial if the declarant "would reasonably expect [his or her statement] to be used prosecutorily," (the objective witness test.)[120]

The Washington State Supreme Court held in *Shafer* and *Beadle* that the admissibility of all out-of-court statements is determined by a four-factor test: (1) timing of statement relative to the event, (2) threat of harm, (3) need of information to resolve a present emergency, and (4) formality of interrogation. Although the four factors were not exhaustive and these opinions instructed lower courts to look to other factors,[121] typically courts, including the Washington State Supreme Court, focus solely on these factors when making determinations of admissibility.[122]

In *Shafer*, the morning after the child's aunt had babysat her, the child told her mother that her uncle had "touched [her] privates."[123] The court ultimately held that the child victim's statements to her mother, and to a family friend a week later, were non-testimonial.[124] This finding was made despite the fact that the statement to the family friend was made after the child and her mother had visited the hospital, and the crime had been reported to the authorities.[125] The court also considered the constitutionality issue of the child hearsay statute, RCW 9A.44.120, and if it conflicted with Washington State's Constitution article I, section 22 Confrontation Clause.[126] On that issue, the court determined that the statute had already

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[120] *Id.* (laying out the objective witness test).
[121] State v. Ohlson, 168 P.3d 1273, 1282–83 (Wash. 2007) (en banc).
[122] *See* State v. Beadle, 265 P.3d 863 (Wash. 2011) (where the court did not look to factors outside of the Ohlson four-factor test); *see* State v. Reed, 278 P.3d 203, 210 (Wash. Ct. App. 2012) ("[o]ur inquiry is guided by [only] four factors").
[123] *Shafer*, 128 P.3d at 89.
[124] *Id.* at 93.
[125] *Id.* at 89.
[126] *Id.*

been deemed constitutional in a previous case.[127] Rejecting the objective witness test, the *Shafer* court found that the three-year-old victim could not have possibly expected her statements would be used as evidence at trial.[128]

In *Beadle* (the facts having been laid out in Part I), the court applied only the four factors enumerated in *Ohlson*.[129] Ultimately, the court held that the child's statements to her mother, her mother's live-in boyfriend, her mother's husband, and her therapist were non-testimonial, while statements to a detective and a Child Protective Services official were testimonial.[130] However, the court stated, "[a]lthough Jensen [the CPS Worker] was not a law enforcement officer, she was present only to assist the police department–not to protect [the child's] welfare in her capacity as a CPS employee."[131] The court implied that had the CPS official not been questioning the child in assistance of the detective, those statements made to the official may have been non-testimonial.

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[127] *Id.*; State v. Ryan, 691 P.2d 197, 202 (1984).

> RCW 9A.44.120 comport[s] with the general approach utilized to test hearsay against confrontation guarantees. The statute requires a preliminary determination 'that the time, content, and circumstances of the statement provide sufficient indicia of reliability.' It requires the child to testify at the proceedings, or to be unavailable, and does not alter the necessary showing of unavailability. Neither unavailability nor reliability was shown prior to admitting the hearsay testimony.

*Id.*

[128] *Id.*

[129] State v. Beadle, 265 P.3d 863 (Wash. 2011).

[130] *Id.*

[131] *Id.* at 870.

## V. WASHINGTON'S APPLICATION OF *CRAWFORD*

### *A. Statements to Police Officers and Prosecutors*

In Washington, statements to police officers and prosecutors are generally considered testimonial, but there are some exceptions.[132] Washington recognizes the ongoing emergency exception[133] as well as an exception when police involvement is more informal.[134] The ongoing emergency exception is a public policy consideration that such statements are necessary, but the current Washington analysis of statements to police officers and prosecutors critically limits the use of this doctrine in child sexual abuse cases.

#### 1. Ongoing Emergency as Applied to Police and Prosecution

Generally, the ongoing emergency exception in Washington requires that certain factors be met. In *State v. Koslowski*, which involved a robbery, the Washington Supreme Court set out several factors to distinguish between police officers serving in an emergency capacity and police officers serving in an investigatory capacity: (1) whether events discussed were occurring at the time of the statement or shortly thereafter, (2) whether a reasonable listener would believe there was an ongoing emergency, (3) whether the purpose of the conversation objectively indicated, and (4) whether the interrogation was formal.[135] Although *Crawford* generally sought to exclude statements made to police officers, there has been no *per se* bar to admitting these statements.

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[132] *See, e.g.*, *id. See also* State v. Price, 110 P.3d 1171 (Wash. Ct. App. 2005), *aff'd*, 146 P.3d 1183 (2006) (holding that a child victim's statements to a detective were testimonial, but holding that the defendant had a sufficient opportunity to cross-examine at trial to satisfy *Crawford*).
[133] *See* Davis v. Washington, 547 U.S. 813, 826-27 (2006).
[134] *See* Ohlson, 168 P.3d 1273 (Wash. 2007).
[135] State v. Koslowski, 209 P.3d 479, 484 (Wash. 2009).

There are also situations where police response is deemed an ongoing emergency because of the proximity in time between the alleged crime and the officer's response. For instance, in *State v. Ohlson,* statements made by a minor to a law enforcement officer during the investigation of an assault were considered non-testimonial.[136] In that case, the defendant tried to run over two juveniles on the side of the road.[137] When the officer arrived on the scene minutes later, one of the minors told him what happened and how she had to jump out of the way.[138] The court found that the purpose of the questioning was part of the ongoing emergency because the officer was on the scene within minutes of the alleged assault.[139]

However, these factors do not consider the special nature of these types of cases. First, police officers and prosecutors are key members of many multidisciplinary teams. As previously stated, incest and child sexual abuse cases frequently require the intervention from law enforcement and subsequent prosecution in order to end the cycle of violence. Many experts in the field of child sexual abuse cases would quickly and easily categorize these types of situations as ongoing emergencies, especially when the abuser lives in the same home as the victim.[140] However, the courts have yet to recognize this type of situation as an ongoing emergency because the child is not actively being assaulted when law enforcement intervenes. Police officers and prosecutors wield the ability to remove these abusers from the home, allowing the victim to escape ongoing abuse.[141]

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[136] *Id.*
[137] *Id.* at 1275.
[138] *Id.*
[139] *Ohlson*, 168 P.3d 1273.
[140] *See generally* Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children after Divorce*, 86 CORNELL L. REV. 251 (2001).
[141] *Abusive Relationships*, PLEA.ORG, http://www.plea.org/legal_resources/?a=231& searchTxt (last update Nov. 4, 2013).

Additionally, the four factors announced in *Koslowski* ignore the nature of child sexual abuse and isolate these cases from other crimes. The first factor ignores the fact that it is rare for a child to immediately report abuse as it happens or even minutes later.[142] The second factor (whether a reasonable listener would believe that there was an ongoing emergency) is equally disserving because detecting child sexual abuse requires special expertise and training that a reasonable listener may not have. The third factor ignores the fact that child interview specialists, who are sometimes also law enforcement, interview the child for the purpose of prosecuting the abuser.[143] Lastly, while the nature of child questioning by law enforcement and prosecution requires the questioning to be simplified, bringing a child to a prosecutor's office and asking them about every detail of the abuse will likely be interpreted as formal interrogation. Therefore, these factors are not helpful in child sexual abuse cases because a large number of these cases are excluded just based on their nature as child victim cases.

**2. Police and Prosecution in Informal Contexts**

Distinguishing between casual and formal police interactions is what *Crawford* intends to do and, theoretically, such an analysis will produce good results. However, the applied factors fail to recognize this difference. First, *Crawford* and its progeny exclude information based on how closely the statement resembles in-court testimony. This requires a case-by-case analysis. However, as explained above, the four-factor test used in Washington generally does not favor admission of statements made to law enforcement. Therefore, it seems like most cases involving informal

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[142] *See, e.g., id.*

[143] ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SRVS., *Techniques for the Child Interview and a Methodology for Substantiating Sexual Abuse*, https://www.childwelfare.gov/pubs/usermanuals/sexabuse/sexabusee.cfm (last visited April 7, 2013).

statements to police could still be inadmissible based on the nature of child sexual abuse and the investigation. Second, the *Davis* court expressed the importance of admissibility of statements to resolve an ongoing emergency,[144] yet Washington courts use factors that narrowly identify "ongoing" as singular events.[145] Because by the time a child reports he or she is not actively being abused, child sexual abuse is not considered an ongoing emergency.

**3. Police in 911 Calls**

When the call is for emergency help, 911 calls are sometimes considered non-testimonial.[146] However, children who experience sexual abuse rarely call 911.[147] A 911 call about child sexual abuse is more likely to be the result of the child victim telling a confidant who then reports it to law enforcement. In such a case, hearsay is an issue. Therefore, any hope for admission of statements by abused children, through a 911 exception, is highly unlikely. Overall, most out-of-court statements to police or prosecutors will generally be excluded as violations of the Confrontation Clause.

*B. Statements to Child Welfare and Social Workers*

Statements to social workers are usually classified as testimonial because they are government employees who record and report incriminating information to law enforcement, which are used primarily for

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[144] Davis v. Washington, 547 U.S. 813 (2006).
[145] *See* State v. Koslowski, 209 P.3d 479, 484 (Wash. 2009).
[146] State v. Davis, 111 P.3d 844 (Wash. 2005); State v. Pugh, 225 P.3d 892 (Wash. 2009); State v. Saunders, 132 P.3d 743 (Wash. Ct. App. 2006).
[147] THE CHILDREN'S ASSESSMENT CTR., *Child Sexual Abuse Facts*, http://cachouston.org/child-sexual-abuse-facts/ (last visited April 7, 2013).

prosecution.[148] However, courts have sometimes recognized that the primary purpose of a social worker interview is "not only to collect evidence of past events to secure the prosecution of an offender but to protect prospectively a child in need."[149]

In *Beadle*, a Child Protective Services (CPS) worker, while accompanied by a police officer, interviewed a three-year-old victim.[150] Based on *Shafer,* the Court of Appeals found the statements were non-testimonial where a three-year old child victim was found unable to have possibly expected her statements to be used in a criminal prosecution.[151] However, the Washington State Supreme Court rejected this concept—that the primary purpose test should be declarant-centric when police interrogation is involved, and decided instead to look at the officer's state of mind.[152] The court ultimately determined that the police officer's presence tainted the admissibility of those statements and that the CPS worker was "only present to assist the police department, not to protect the [child's] welfare," in [the CPS worker's] professional capacity.[153]

Although the Washington Supreme Court was unwilling to consider child welfare as a primary purpose in these investigations, in *State v. Hopkins,* Division 2 of the Washington State Court of Appeals did exactly that.[154] In that case, a CPS worker met with the child victim on two occasions.[155] The court found the purpose of the first meeting was a safety check to assess and

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[148] Stephanie McMahon, *The Turbulent Aftermath of Crawford v. Washington: Where Do Child Abuse Victims' Statements Stand?*, 33 HASTINGS CONST. L.Q. 361, 382 (2006).
[149] State v. Buda, 949 A.2d 761, 788–89 (N.J. 2008).
[150] State v. Beadle, 265 P.3d 863 (Wash. 2011).
[151] *Id.*
[152] *Id.*
[153] *Id.* at 870.
[154] State v. Hopkins, 154 P.3d 250 (Wash. Ct. App. 2007).
[155] *Id.* at 257.

ensure the child was safe and secure where she was living.[156] The court reasoned that the worker used innocuous, non-leading questions and the child spontaneously reported information about her abuser.[157]

However, the court stated that, although the second meeting could be characterized as an attempt to protect the child, the information gathered was also meant for subsequent prosecution.[158] The social worker testified that her role in the second meeting was to investigate; she recorded information gained in the interview and asked questions based on the disclosures.[159] She also testified that the explicit purpose of documenting the visit was because the victim was disclosing information about a crime.[160]

Ultimately, the court believed that the CPS worker's child welfare role overlapped with her investigatory law enforcement role, thus her role produced incriminating statements elicited outside the course of an ongoing emergency.[161] The court focused its analysis on the primary purpose of the investigation from the listener's point of view.[162] By recognizing the dual-purpose of social workers in such cases, the court balanced the constitutional rights of the defendant against those interests of the victim and the search for justice. This balance is particularly just because it recognizes the multifaceted role of the CPS worker, or anyone acting as a confidant of a child who has been the victim of sexual abuse. The investigatory role of CPS workers protects the defendant's rights, while the welfare role reflects the victim's interests.

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[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* at 258.
[162] *See id.* 256–58.

Unfortunately, the holding in *Beadle* supersedes *Hopkins*. Despite the judicial system's general adversity to looking into the mind of police officers,[163] and despite the *Davis* court requiring a declarant-centric primary purpose,[164] the *Beadle* court reasoned that, as long as a CPS worker is aware of an ongoing criminal investigation, the primary purpose of his or her questioning is for subsequent prosecution.[165] This holding forecloses the possibility of CPS conducting investigations in many child sexual abuse cases where law enforcement or government action is necessary to remove the child from danger because courts will characterize CPS action as criminal investigation.

### *C. Statements to Medical Personnel and Other Hospital Employees*

Statements made by children to medical personnel are typically perceived as non-testimonial[166] because the purpose of the conversation is to ascertain the child's medical history, to diagnose, and to treat.[167] In *State v. Borboa*, the child victim was brought to a hospital where she disclosed sexual abuse by her father.[168] Because neither the child nor the family spoke English, a

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[163] *See, e.g.*, Holyfield v. State, 711 P.2d 834, 838 n.4 (Nev. 1985).
[164] Davis v. Washington, 547 U.S. 813, 828 (2006).
[165] *See* State v. Beadle, 265 P.3d 863, 870 (2011).
[166] *See generally* Dave Gordon, *Is There an Accuser in the House?: Evaluating Statements Made to Physicians and Other Medical Personnel in the Wake of Crawford v. Washington and Davis v. Washington*, 38 N.M. L. REV. 529 (2008).
[167] State v. Sandoval, 154 P.3d 271 (Wash. Ct. App. 2007) (holding that a domestic violence victim's description of the incident to an emergency room physician was admissible, despite inclusion of statements identifying the perpetrator); State v. Saunders, 132 P.3d 743 (Wash. Ct. App. 2006) (holding that a domestic violence victim's statements to a paramedic and to an emergency room physician were non-testimonial, despite the victim's identification of the assailant); State v. Moses, 119 P.3d 906 (Wash. Ct. App. 2005) (victim's statements to medical personnel in a murder case were found to be non-testimonial); State v. Fisher, 108 P.3d 1262 (Wash. Ct. App. 2005) (victim's statements to medical personnel in a case for assault on a child were non-testimonial.
[168] State v. Borboa, 135 P.3d 469, 471 (Wash. 2006).

hospital interpreter was present at the physical examination.[169] Although the Washington Supreme Court did not decide whether the statements were testimonial, because the issue was not briefed on appeal and defense conceded the issue at oral arguments, it signaled its assent to the lower court's holding.[170] A finding that the statements were not testimonial is supported by the fact that the hospital interpreter was present to relay medically relevant information to the doctors and assist the medical team, not to assist law enforcement or other government actors.[171]

In *State v. Anderson*, Division 2 of the Washington Court of Appeals addressed whether statements to a nurse during a sexual assault exam were testimonial or non-testimonial.[172] In that case, the prosecution alleged that the defendant had lured a little boy into a public restroom, persuaded him to lie down on his back, and then got on top of him to engage in sexual conduct.[173] Because the State wanted to introduce molestation evidence of a different minor who was unavailable to testify, the prosecutor sought to call a nurse who had had a conversation with the minor.[174] The minor had come to the nurse following a forensic interview with a detective who told the nurse what the child had already disclosed.[175] The court determined that the examination was part of a "team approach" to investigations, referring to the multidisciplinary teams used frequently in child sexual abuse cases.[176] Additionally, the court concluded, but did not find dispositive, that the nurse had received information from a detective to whom the child had disclosed information to prior to the exam; thus, her conversation with the

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[169] *Id.*
[170] *Id.* at 475, n.3.
[171] *Id.* at 471.
[172] State v. Anderson, 153 Wash. App. 1026, *1 (2009).
[173] State v. Anderson, 254 P.3d 815, 815 (Wash. 2011).
[174] *Id.*
[175] *Id.*
[176] *Anderson*, 153 Wash. App. at *2.

child could be considered part of the investigation.[177] However, the court believed that the statements to the nurse were elicited in the course of obtaining medical history to treat and diagnose the child, not to investigate on the detective's behalf.[178] The factual finding that the nurse never used leading questions supported this holding.[179]

On appeal, the Supreme Court of Washington reversed the ruling because the nurse had knowledge that the child had already disclosed information to law enforcement.[180] The court did not look at whether the child believed the statements would later be used for future prosecution.[181] This suddenly shifted the analysis from looking at the declarant-based primary purpose test to a *Davis* listener-based test.

The Court of Appeals Division 2 signaled agreement with the State's argument in *State v. Earl*, but ultimately decided the issue based on harmless error.[182] In that case, the victims' abuser was the father, who had impregnated one of the child victims.[183] While at a prenatal appointment, the pregnant child made statements to a nurse who later testified at trial.[184] The court acknowledged that the State's argument to the appeals court was likely correct, that the statements were non-testimonial because they were made for the purposes of medical diagnosis and treatment, not elicited for subsequent prosecution.[185]

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[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Anderson*, 254 P.3d 818 (holding that the statements were admissible anyways under a harmless error analysis).
[181] *See id.* at 817.
[182] State v. Earl, 143 Wash. App. 1004, *6–*7 (2008).
[183] *Id.* at 1–2.
[184] *Id.* at 2.
[185] *Id.* at 6.

Lastly, the Division 2 Court in *State v. Hopkins* addressed the out-of-court statements made to a nurse,[186] but applied a completely different standard of analysis.[187] Although the nurse's statements were introduced through the nurse's report in this case, the substantive analysis of the primary purpose test should be the same as if the nurse had testified; the only difference is the additional level of hearsay presented by the report. [188] Instead of looking at the primary purpose of the nurse from the declarant's point of view, the court used an objective witness test.[189] The court held that an objective witness would believe the report would be used for later prosecution.[190] The court reasoned that the nurse knew there was an ongoing investigation and that the nurse manifested this knowledge and intent by forwarding the report to a deputy officer.[191]

These cases reveal inconsistencies in reasoning and holdings within Court of Appeals Division 2 level and at the Supreme Court level. For example, although the Washington Supreme Court in *Shafer* stated that objective witness tests should not be used, only six months later, the Division 2 *Hopkins* court proceeded under this objective-witness analysis.[192] Division 2 subsequently decided multiple cases without overruling use of the objective witness test, or overruling the *Hopkins* court's dismissal of statements to nurses if they are aware of criminal investigation. The prior cases are still good law; therefore, there is a lack of clarity that will continue to create confusion in the trial courts and appellate divisions..

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[186] State v. Hopkins, 142 P.3d 1104, 1105 (Wash. Ct. App. 2006).
[187] *Id.* at 790–91.
[188] *Id.* at 787.
[189] *Id.* at 790–91.
[190] *Id.* at 791.
[191] *Id.*
[192] *Id.*; State v. Shafer, 128 P.3d 87 (Wash. 2006).

By shifting between objective-witness tests, declarant-centric tests, and listener-centric tests, appellate courts have confused the proper inquiry for these types of cases. When courts found these statements to be non-testimonial, it was because they confused the primary purpose with the secondary purpose. For example, although the nurse in *Hopkins* likely intended to eventually give the report to law enforcement, her primary purpose as a nurse was medical, and any collateral effect on an investigation was secondary. Furthermore, through application of the declarant-centric test prescribed by *Davis*, the child would reasonably view the nurse's primary purpose was for her own health and well-being.

*D. Statements to Family Members and Friends*

Courts usually hold statements made to family and close friends as non-testimonial.[193] The circumstances surrounding these statements usually reflect the close personal relationship between the child-declarant and the listener.[194] These are the types of casual statements the original *Crawford* court believed to be non-testimonial because the personal nature of the statements shows the unlikelihood they were intended for use in later prosecution.[195] This is also the standard in Washington cases of child sexual abuse.[196]

The issue in *Shafer* revolved around statements made to a family friend who had been a confidential informant for several law enforcement

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[193] *See* State v. Beadle, 154 Wash. App. 1021, *7 (2010); State v. Borboa, 135 P.3d 469, 471 (Wash. 2006*),* Shafer, 128 P.3d 87; State v. Walker, 118 P.3d 935 (Wash. Ct. App. 2005); State v. Dezee, 125 Wash. App. 1009 (2005), State v. J.J.S.H., 158 Wash. App. 1050 (2010); State v. Hopkins, 154 P.3d 250 (Wash. Ct. App. 2007).
[194] *Id.*
[195] Crawford v. Washington, 541 U.S. 36, 51 (2004).
[196] *See Beadle*, 154 Wash. App. at *7 (2010); *Borboa*, 135 P.3d at 471; *Shafer*, 128 P.3d 87; *Walker*, 118 P.3d 935; *Dezee*, 125 Wash. App. 1009; J.J.S.H., 158 Wash. App. 1050; *Hopkins*, 154 P.3d 250.

agencies, including the CIA and the FBI.[197] The court held that the statement was non-testimonial partly based on the close proximity in time between the abuse and when the child made the statements to the family friend.[198] The court refused to conclude the statements were testimonial even though it acknowledged the ethical and legal implications of this case; simply put, the statements were elicited by a confidential informant using learned questioning techniques, with the full intent to use them in a future criminal investigation.[199] Instead, the court decided that the informant was not acting on behalf of any law enforcement agency at the time of the questioning and the child had no reason to expect that her statements would later be used for prosecution.[200] The court was uneasy about statements which the informant videotaped, however, and excluded that evidence.[201]

This case demonstrates the problems of a mixed-test analysis. Although the child may not have realized the testimonial nature of such structured and formal questioning, the court cannot disregard that this questioning is very similar to police interrogation. Friends of children whose parents are police can now circumvent the Confrontation Clause limits on the admissibility of out-of-court statements. Although this is good news for child victims and the prosecution, this particular case only further complicates what should be clear rules.

*E. Statements in Business Records*

Business documents are usually non-testimonial because they are prepared for public records or business purposes rather than for evidence in

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[197] *Shafer*, 128 P.3d at 89.
[198] *Id.* at 97–98.
[199] *Id.* at 92.
[200] *Id.*
[201] *Id.*

a criminal case.[202] However, one appellate court found an exception in a child sexual abuse case and held business documents to be testimonial.[203] One exception was noted when a nurse submitted a report to an investigating deputy and the nurse knew there was an ongoing investigation.[204]

Several cases demonstrate how documents submitted by out-of-court declarants are non-testimonial in the context of child sexual abuse cases. In *State v. Graciano*, the Division 2 Court of Appeals found Department of Licensing certification was non-testimonial.[205] The court did not explain much of its reasoning, but rather cited to *State v. Mares*. The *Mares* court reasoned that business and public records are generally non-testimonial because they are created for administration of an entity's affairs and not for

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[202] *See, e.g.*, State v. Benefiel, 128 P.3d 1251 (Wash. Ct. App. 2006) (holding that certified copies of the defendant's underlying conviction and sentence were non-testimonial). The court claimed that these documents were typical public records and were not statements written for the purpose of subsequent prosecution, rejecting the defendant's argument that the State had a duty to prosecute the clerk who certified the copies of the judgment and sentence so that the defendant could cross-examine the clerk. *Id. See also* State v. Fleming, 228 P.3d 804 (Wash. Ct. App. 2010) (holding that business records showing the value of a property in a theft case were non-testimonial because the records were prepared for business purposes long before the alleged theft took place); State v. Bellerouche, 120 P.3d 971 (Wash. Ct. App. 2005) (holding that business records are never testimonial, and that a "no trespass" notice is a business record in a trespassing prosecution).

[203] *See* State v. Hopkins, 134 Wash. App. 1034 (2006) (holding that a report written by a nurse concerning the child victim's statements and physical condition was testimonial because the report was prepared at the request of law enforcement and the nurse was not available for cross-examination). Business records are usually defined narrowly to include only objective, nearly clerical, information and to not always include reports of opinion. *See, e.g.*, In re Welfare of J.M., 125 P.3d 245 (Wash. Ct. App. 2005) (holding that written expert reports of persons who were not present in court were testimonial because they reflected professional judgment and expertise and not the sort of "routine clerical notations" that are admissible).

[204] *See Hopkins*, 134 Wash. App. 1034.

[205] State v. Graciano, 163 Wash. App. 1014, *4 (2011).

the purpose of establishing or proving some fact at trial.[206] Specifically, the business records in both cases only attested to the authenticity of a public record and offered no interpretation of the record or assertions of "its relevance, substance, or effect."[207]

Similar in character to cases involving business records, *State v. Earl* found that a blood-draw form was non-testimonial.[208] The victims in that case were two sisters who had been raped by their father.[209] A Child Protective Services worker asked both children to get blood tests and drove them to an appropriate facility with their mother.[210] The Division 2 court determined that the blood-draw form was a business record.[211] The court also found the form non-testimonial on the basis that it was not an accusatory statement, but rather only stated when the blood draw occurred and whose blood it was.[212] The court supported this holding by citing the corroboration by other evidence and testimony.[213]

Similarly, a Division 3 case decided that a letter from the attorney of the defendant's brother to the victim's mother was non-testimonial.[214] In *Merrick*, the mother was a widow and had remarried her late husband's brother, the defendant.[215] After the defendant was accused and tried for first-degree rape of a child, the prosecution sought to admit the letter because it raised concerns about the defendant contacting the victim.[216] Ultimately, the court held that the purpose of the letter was not for later

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[206] *Id.*; State v. Mares, 248 P.3d 140, 143 (Wash. Ct. App. 2011).
[207] *Id.*
[208] State v. Earl, 143 Wash. App. 1004, *3–*4 (2008).
[209] *Id.* at *1–*2.
[210] *Id.* at *3.
[211] *Id.* at *5.
[212] *Id.* at *6.
[213] *Id.*
[214] State v. Merrick, 130 Wash. App. 1026, *3–*4 (2005).
[215] *Id.* at *1.
[216] *Id.* at *3–*4.

prosecution, but to express concerns to the victim's mother.[217] Additionally, the letter was not written by a government officer.[218]

Only one child sexual abuse case found documentation to be testimonial in nature—*Hopkins*.[219] In that case, the nurse did not testify but the prosecution sought to admit her report. There the court employed the objective-witness analysis rather than the business record exception.[220]

*F. Statements to Therapists and Counselors*

Statements made to therapists and counselors may or may not be testimonial based on a variety of circumstances.[221] Such statements are more of a hybrid between multiple categories. These types of statements may also fall under medical personnel or prosecutorial categories, depending on the employment of the therapist. As the following case implies, courts could deal with statements to therapists in a number of ways.

The *Beadle* court did not have the opportunity to directly address whether the child's statements to a mental health clinician and to a therapist were testimonial because the issue was not raised on appeal.[222] However, the court implicitly seemed to agree with a non-testimonial characterization, citing the mother's role in getting both professionals involved in order to

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[217] *Id.*
[218] *Id.*
[219] State v. Hopkins, 134 Wash. App. 1034 (2006).
[220] *Id.* at 791.
[221] *See* State v. Moses, 119 P.3d 906 (Wash. Ct. App. 2005), where the court held that part of a victim's interview with a social worker was testimonial and part of it was non-testimonial. The social worker told the murder victim halfway through the interview that Child Protective Services would become involved because of the defendant's violent propensities and the risk it posed to their child. *Id.* The court reasoned that because the victim was aware of possible prosecution from that point on, the later statements were testimonial. *Id.*
[222] State v. Beadle, 265 P.3d 863, 867 n.8 (2011).

begin the mental healing process for her daughter.[223] Furthermore, the disclosure to the therapist was completely unprompted, and the girl by her own volition showedthe therapist on a doll where her assailant touched her.[224]

## VI. PROBLEMS WITH WASHINGTON'S CURRENT APPLICATION

Even though a child's statements of sexual abuse are unlikely to fall within the three categories of testimonial statements enumerated in *Crawford,* a court will likely categorize the statements as testimonial because of the nature of these cases. Under *Crawford,* testimonial statements are : (1) ex parte in-court testimony or its functional equivalent, (2) extrajudicial statements contained in formalized testimonial materials, and (3) statements where an objective witness would reasonably believe the statement would be used in court. Because trauma from child sexual abuse is ongoing and pervasive,[225] children who are unavailable to testify at trial due to said trauma were also likely unavailable before trial to give a proper affidavit, deposition, or sworn testimony. Like the victim in *Beadle*, children can be psychologically traumatized by the time a criminal investigation begins. Thus, these statements are unlikely to fit within the three *Crawford* categories.

However, due to this trauma, children are likely to receive substantial assistance (whether by therapists, doctors, or law enforcement) during the criminal investigation process or at a child advocacy center. Therefore, many of the statements a child makes in that time will be categorized as testimonial'.

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[223] *Id.*
[224] *Id.* at 866.
[225] *See generally* KAREN A. DUNCAN, HEALING FROM THE TRAUMA OF CHILDHOOD SEXUAL ABUSE (2004).

Washington state cases also contradict one another, and internal contradictions exist within cases as well. For example, in both *Beadle* and *Shafer*, the court drew a distinction between law enforcement officers acting in their official capacities and family friends not acting in their official capacities.[226] This difference in results is inconsistent with the *Beadle* court's holding that the *Shafer* test does not apply to law enforcement, albeit without overruling *Shafer*, because the court did in fact apply the test to this family friend who was a law enforcement official. The two factual cases are substantially the same, except for that the law enforcement in *Shafer* had a prior relationship to the child. However, this family friend took a recorded statement,[227] used interrogation techniques and methods learned from law enforcement training,[228] and prompted the child with questions long after becoming informed about the abuse,[229] rather than an "in the moment" inquiry like the mother in *Beadle*.[230] Additionally, Beadle argued that the presence of a CPS official while the police questioned the child was still testimonial.[231] However, the *Beadle* opinion implies that if police had not been present and the CPS official was operating in her capacity as a guardian of the child's welfare, the statement would have been non-testimonial.[232]

Generally, if the child's guardian is willing to waive privilege and bring the counselor into court, these statements will be non-testimonial.[233] However, because child victims often seek counseling after the initiation of the prosecutorial process, it is possible, if not likely, that a court would be

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[226] *See* Beadle, 265 P.3d at 866; State v. Shafer, 128 P.3d 87, 89 (2006).
[227] Shafer, 128 P.3d 87 at 89.
[228] *Id.*
[229] *Id.*
[230] Beadle, 265 P.3d at 866.
[231] *Id.* at 869.
[232] *See id.*
[233] *See* State v. Anderson, 254 P.3d 815, 818 (Wash. 2011).

hostile to these statements' admissibility on the principle that the counselor and the guardian are aware of the pending trial. This issue has not been fully argued before the Washington appellate courts yet.

If such an issue were to arise, the courts should look to the overall intent of the conversation. Unlike in *Beadle*, there would not be the presence of a law enforcement officer, nor would a law enforcement officer request the counseling similar to *Hopkins*. Rather, a therapist's testimony would fall squarely in line with the facts of *Shafer* and the court would have to consider whether the child reasonably believed her statements in therapy would be used for prosecution. Moreover, even under a listener-centric regime, the therapist or counselor is occupationally driven to address the pain and trauma of the child, not to investigate and prosecute criminals. Simply being in contact with police or fulfilling mandatory reporting obligations should not wholly preclude this type of testimony as non-testimonial.

## VII. PROPOSED CHANGES

Because of the inconsistencies in both holding and reasoning among Washington courts, it is clear that either the state legislature or the state supreme court must provide clarity. *Crawford* is heavily criticized in the legal community, and there are several proposals to fix the problems it has caused.[234] Attorney Andrew Eichner discusses the possibility of placing a large screen between the child victim and the defendant when the child

[234] *See generally* Eichner, *supra* note 96 (outlining possible interpretations of Crawford that protect both the interests of the child victim and the defendant's constitutional rights).

takes the stand.[235] Alternatively, many states, including Washington,[236] have enacted processes to allow testimony through closed-circuit, one-way televisions after this procedure was allowed in *Maryland v. Craig*.[237] Eichner argues that the *Crawford* interpretation of admissible statements is far too narrow and needs to be broadened to even the balance between victims and defendants.[238]

Another consideration is the rebuttable presumption test. Judge Advocate Major Rebecca K. Connally proposed that courts use a rebuttable presumption because it establishes a rule *and* creates avenues for exceptions to the rule.[239] After the prosecution establishes the presumption that a statement is non-testimonial, the burden would shift to the defendant to prove the statement is testimonial.[240]

Although the reliability of a statement is no longer the test of its admissibility, courts should make a preliminary inquiry as to whether the child-declarant is capable of making a testimonial statement.[241] Specifically, the age of a child along with the circumstances of disclosure may render the child unable to "bear witness" in the formal sense that Crawford sought to exclude.

Overall, a totality of the circumstances approach is the most just and equitable method for balancing the defendant's rights and the interests of justice. By using a totality of the circumstances test, courts could take

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[235] *Id.* at 111–12 (citing Coy v. Iowa, 487 U.S. 1012 (1988) (court ultimately held that the screen was a violation of the defendant's right to a face-to-face encounter," but leaving open the possibility for other exceptions when public policy demanded such)).
[236] WASH. REV. CODE 9A.44.150 (2005).
[237] Eichner, *supra* note 96; *Maryland v. Craig*, 497 U.S. 836 (1990).
[238] Eichner *supra* note 96, at 116.
[239] Maj. Rebecca K. Connally, *"Out of the Mouth[s] of Babes": Can Young Children Even Bear Testimony?*, 2008-MAR ARMY LAW. 1, 20 (March 2008).
[240] *Id.*
[241] *Id.* at 4.

information about the nature of child sexual abuse and how it is often underreported into consideration, while still upholding the principles of *Crawford*.

For example, if the substance of the statement was minimally accusatory or innocuous, a court could allow its admission under *Crawford*. Other jurisdictions have looked to the nature and substance of the child's statement in determining its testimonial quality. Some courts have analyzed the degree of the statement's accusatory nature, meaning statements that directly incriminate the defendant are subject to a higher level of confrontation scrutiny.[242] Another relevant inquiry would be whether the statement falls under a hearsay exception, such as excited utterance, that diminishes the possibility of fabrication.[243] This allows a court to determine whether the statement also falls under a hearsay exception under an evidentiary analysis as well as under a Confrontation Clause analysis.

One court already used this totality of circumstances approach. Although the Alaska Court of Appeals has not directly addressed how the Confrontation Clause should be applied in sexual abuse cases, the court has used an "entirety of the circumstances" analysis.[244] In contrast to Washington, this totality of the circumstances analysis allows Alaska courts to categorize statements made to social workers, like CPS workers, to be non-testimonial.[245] John J. Gochnour proposed that the Alaska legislature codify these general rules into Alaska law in order to increase consistency and fairness of prosecutions, facilitate compliance with the Confrontation

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[242] *See* In re E.H., 823 N.E.2d 1029, 1037 (Ill. App. Ct. 2005).
[243] *See, e.g.*, State v. Anderson, 2005 WL 171441 (2005).
[244] John J. Gochnour, *The First Complaint: An Approach to the Admission of Child-Hearsay Statements under the Alaska Rules of Evidence*, 27 ALASKA L. REV. 71, 85 (2010).
[245] *Id.*

Clause, and recognize the reliability and necessity of child hearsay testimony in child sexual abuse cases.[246]

Similarly, adoption of a totality of the circumstances approach would help facilitate more fair and just results in Washington courts, which have used a variety of frameworks as compared to the unified framework used in Alaska courts. This action could be taken either by the Washington legislature or judiciary. Such legislation could take into account all of the factors and realities of child sexual abuse so when judges evaluate the admissibility of such statements, they are less inclined to be wedded to the four factors currently in force.

Courts employing a totality of the circumstances approach would need to consider factors such as: the status and role of the listener (including what capacity that person was acting in at the time); the listener's relationship to the child; the behavior of the child during the interaction; the substance of the statement (different parts maybe testimonial or non-testimonial); and the environment in which the statement was made.

This list of factors is not exhaustive and shows the variety of circumstances and nuances that can be present in any child sexual abuse case. Given the gravity of emotional and psychological damage caused to all parties in child abuse cases, these cases are examples of how a specific crime needs to be considered in a *Crawford* analysis to truly understand the mental state of declarants and listeners.

Additionally, government teams that aid in child sexual abuse cases, including law enforcement, child interview specialists, CPS workers, and counselors, are better equipped to maintain the accuracy and integrity of an out-of-court statement. Moreover, defendants have the ability to base their defense on the validity of the statement itself as well as the procedures and

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[246] *Id.* at 101–02.

circumstances under which the statement was made and observed by these government actors.

Although the reliability of a statement is no longer the test of its admissibility, courts should make a preliminary inquiry as to whether the child-declarant is capable of making a testimonial statement.[247] Specifically, the age of a child along with the circumstances of disclosure may render the child unable to "bear witness" in the formal sense that Crawford sought to exclude.

## VIII. CONCLUSION

Despite the confusion and inconsistencies caused by the *Crawford* decision, Washington has an opportunity to clarify these issues because the United States Supreme Court has failed to comprehensively define a test for determining testimonial statements. Washington should employ a totality of the circumstances test to clearly and fairly comprehend the complexities of each case.

Given the inconsistencies in allowing some statements in child sexual abuse cases in Washington, immediate attention and solutions are necessary. Ever since the McMartin scandal discussed above and other controversies about false accusations of children, the law has responded by refusing to admit otherwise probative evidence in child sexual abuse cases. By addressing the sociological and psychological complexities in these cases in the law, courts can better evaluate the case and better serve the interests of justice and fairness.

Additionally, the *Crawford* framework in Washington needs to be clear for practitioners to understand how the system works in order to advocate

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[247] Maj. Rebecca K. Connally, *"Out of the Mouth[s] of Babes": Can Young Children Even Bear Testimony?*, 2008-MAR ARMY LAW. 1, 4 (Mar. 2008).

for their clients. There must be a workable, yet fair system for judges to apply to the facts, thus supplying them with the necessary tools to balance between the defendant's constitutional rights and the interests of the prosecution, the victim, and the community in each specific case. Without clearing up these issues, litigants will be subject to the ebb and flow of judicial scrutiny of which framework to apply. It will be extremely difficult if not impossible for these attorneys to properly argue issues for a judge whom may take an approach different from what the attorney has researched. Lastly, this system is necessary for judicial economy and fairness: providing each case a fresh look at the facts, and then applying the law. In the current regime, there have been and there will continue to be misapplication and inconsistent rulings. In the end, the people of Washington would collectively be better served because a shift in application of *Crawford* would allow cases like child sexual abuse to be fully remedied by the laws that seek to prevent it.