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The Supreme Court, Hearsay, and Crawford: Implications for Child Interviewers

Thomas D. Lyon, JD, PhD

We are entering the golden age of child interviewing. After years of research emphasizing how children's statements may be corrupted by coercive questioning practices, a number of researchers have shifted their focus toward finding means of increasing the accuracy and completeness of children's reports. Interviewers can now refer to a body of research identifying good interview practice (Lamb, Hershkowitz, Orbach, & Esplin, 2008).

However, recent changes in Constitutional law have posed challenges to the admissibility of forensic interviews at trial. In *Crawford v. Washington* (2004), the United States Supreme Court profoundly changed how hearsay statements are analyzed under the Confrontation Clause. If a hearsay statement is "testimonial" (hearsay that is akin to testimony), then the statement cannot be admitted against a criminal defendant unless the defendant had the opportunity to cross-examine the hearsay declarant. Any non-cross-examined testimonial hearsay is inadmissible, no matter how reliable. The decision has resulted in reversals of convictions in a number of cases in which essential evidence against the defendant was hearsay statements by a child who failed to testify at trial. As a result of *Crawford* and its progeny, many child interviewers are asking whether and how they should modify their interviewing approaches to reduce the likelihood that the interview will be found inadmissible at trial.

The purpose of this article is to explain the implications of *Crawford* for child interviewing. The bottom line is that interviewers should remain committed to best practice; that is, they should continue to pursue approaches that increase the accuracy and completeness of children's reports. It would be a mistake, for example, to stop videotaping interviews in the hopes that this would render interviews non-testimonial. As for prosecutors, *Crawford* suggests that greater efforts should be made to enable children to testify at trial. In this article, I will briefly review the research on best practices in interviewing, discuss *Crawford* and the limits it places on testimonial hearsay, and explain how interviewers and prosecutors should best respond.

Best Practices in Interviewing: Calling for a Narrative

The most extensively researched interview approach focuses on the need for increasing the use of open-ended questions and reducing reliance on closed-ended questions (such as yes-no and forced-choice questions). The interviewer initially asks the child questions about nonsubstantive issues, using invitations (Tell me about things you like to do; Tell me what happened on your last birthday) and open-ended follow up questions (Tell me more about [action mentioned by child]; What happened next?) (Sternberg et al., 1997). Once the child is comfortable and talking, the allegation is introduced in a nonleading fashion (Tell me why you came to talk to me), with only a gradual move toward more direct questions should the child fail to disclose (I heard you talked to a policeman. Tell me what you talked about). When the child first discloses, the

interviewer asks the child to "Tell me everything that happened," and elicits further details as much as possible without closed-ended inquiries. The resulting interviews are both more productive and less suggestive (Lamb et al., 2008).

Research has also revealed the value of interview instructions at the outset of the interview, which include instructing the child on the acceptability of answering "I don't know" and correcting or questioning the interviewer. A structured approach facilitates the use of instructions that are carefully phrased to be comprehensible to even the youngest child and include the appropriate feedback so that they increase accuracy rather than encourage response biases (Lyon, 2005). A promise to tell the truth has been found to increase nonmaltreated children's willingness to disclose a minor transgression (Talwar, Lee, Bala, & Lindsay, 2002, 2004), and we have recently found that the promise increases maltreated children's honesty under a variety of conditions, including situations in which they have been coached either to falsely deny or falsely assert that events occurred (Lyon & Dorado, 2008; Lyon, Malloy, Quas, & Talwar, 2008).

Unfortunately, interviewers are quick to learn but slow to change. For training to be effective, it is not enough to increase interviewer knowledge (Aldridge & Cameron, 1999; Cederborg, Orbach, Sternberg, & Lamb, 2000; Stevenson, Leung, & Cheung, 1992; Warren et al., 1999). Effective training requires explicit guidance, review of interviews, and refresher sessions over time (Lamb et al., 2008).

Videotaping (or some form of taping) is an integral part of effective interviewer training and ongoing peer review. Videotaping has other benefits as well. Videotaping enables one to capture the full details of children's reports, something even verbatim note taking cannot match (Berliner & Lieb, 2001; Lamb, Orbach, Sternberg, Hershkowitz, & Horowitz, 2000). Videotaping vividly documents the child's disclosure, typically months or years before testimony.

Of course, not all questions regarding best practice have been resolved. There is uncertainty over the best approach to interviewing children who have never disclosed, are reluctant to disclose, or have recanted their allegations (Faller, 2007; Lamb, et al., 2008). Research has only just begun on methods for overcoming reluctance to disclose, with evidence that some forms of reassurance may be effective (Lyon, et al., 2008). There is currently considerable debate over the utility of body diagrams in questioning children about sexual abuse. The use of diagrams has been found to increase the number of details provided in sexual abuse interviews (Aldridge, et al., 2004), but inaccurate reports of genital touch also increase (Brown, Pipe, Lewis, Lamb, & Orbach, 2007). Suffice it to say that there is general agreement that a sound approach is to attempt to elicit a narrative before questioning children with drawings.

The Potential Effects of *Crawford* on Forensic Interviewing

In *Crawford v. Washington*, the U.S. Supreme Court held that criminal defendants have a constitutional right against the admission of uncross-examined testimonial hearsay. The principle is that testimonial hearsay should not be admitted against a criminal defendant unless that defendant had an opportunity at some point to cross-examine the hearsay declarant. In a child abuse case, this means that if a child fails to testify at trial, and has not testified at a preliminary hearing, then her hearsay statements may be constitutionally barred from admissibility if they were testimonial hearsay.

There is language in *Crawford* that is sure to give child interviewers pause. In attempting to define what hearsay is *testimonial*, the Supreme Court considered it significant whether the statement was recorded and was elicited through structured questioning. Indeed, some lower courts have pointed to this language in holding that forensic interviews were testimonial. For example, a federal Court in Minnesota recently held that a defendant's rights under *Crawford* were violated by the admission at trial of the uncross-examined statements of a young child accusing the defendant of sexual assault (*Bobadilla v. Carlson*, D. Minn. 2008). The decision is particularly noteworthy because to hold for the defendant, the Court had to hold that the Minnesota Supreme Court's opinion in the case was an "unreasonable application of clearly established law." The Court reasoned as follows:

There was nothing spontaneous or informal about the interview. Rather, [the interviewer], who had been trained in a "forensic" method of interviewing children, subjected [the child] to a highly structured series of questions. [The interviewer] followed the "CornerHouse protocol, which...consists of establishing rapport with the child, ascertaining the child's terms for parts of the anatomy, ascertaining whether abuse occurred, and closing with a 'safety message.'" *Crawford* specifically identified "structured police questioning" as a hallmark of a police interrogation. (*Bobadilla v. Carlson*, 2008 at 9 [citations omitted])

The court's logic would apply not only to the CornerHouse protocol but also to any other routine aspect of forensic interviewing. To avoid the label of *testimonial*, one might conclude that interviewers should return to the day in which they concocted questions on the fly without training or advance preparation. Similarly, one might avoid videotaping interviews—because this constitutes documentation—or avoid eliciting a promise to tell the truth—because this looks too much like testimony. However, child interviewers should be careful not to overreact to cases like *Bobadilla*. To do so would not only violate principles of good practice but would also misread the likely legal effects of a return to informality.

First, it is important to remember that *Crawford* applies only to criminal cases. The right to cross-examine testimonial hearsay is based on the Confrontation Clause, which does not apply in civil and dependency court proceedings. Most substantiated child abuse cases never find their way into criminal court, largely because of the greater burden of proof in criminal proceedings. Second, if the

child testifies at the preliminary hearing or the criminal trial and is willing to answer questions on cross-examination, then there are no constitutional limits to testimonial hearsay.

Third, the bulk of the opinion in *Bobadilla* emphasizes an approach adopted by most lower courts interpreting *Crawford*: Hearsay statements by children are testimonial if they are given to the police or agents of the police. In *Bobadilla*, for example, the social worker who questioned the child responded to a request to do so by a police detective who attended the interview.

When children give statements to social workers or other professionals investigating the safety of the child's home or the child's physical and psychological health, then the courts are divided regarding whether the statements are testimonial (see, for example, the Connecticut Supreme Court's discussion in *State v. Arroyo*, (Conn. 2007)). A number of different factors are potentially relevant. Was the interview conducted shortly after the initial suspicion of abuse? How did the interviewer explain the purpose of the interview to the child? What did the child (or a typical child of the same age) believe is the purpose of the interview? What form of cooperation existed between the interviewer and law enforcement (assuming it was established that the interviewer had not been merely an agent of the police)?

As the purpose of the interview moves from prosecution on one end of the spectrum to protection on the other, it is less likely to be classified as *testimonial*. If the interview is conducted shortly after the initial suspicions, the courts are more likely going to view the goal as protection rather than prosecution. Analogously, even statements made to law enforcement have been found by the Supreme Court to qualify as non-testimonial if they were made during an emergency (*Davis v. Washington*, 2006). If the interviewer instructs the child that the purpose of the interview is to ensure that the child is safe and cared for, and the child (or a child of the same age) appears to share the interviewer's goals, then the interview is more likely to be non-testimonial.

Hence, the child's statements are more likely to be considered non-testimonial if the interviewer is independent of law enforcement, instructs the child that the interviewer's job is to keep the child safe (and the child shares these views), and the interviewer conducts the interview shortly after the initial suspicions of abuse arise.

A happy coincidence is that legal doctrine defining what constitutes a *non-testimonial interview* accords in many ways with best practices. When interviews are conducted shortly after the initial allegation, the child's memory is more likely to be fresh, and the child's report is less likely to be tainted by external influences, whether they be deliberate attempts to distort the child's report or inadvertent suggestive influences created by repeated questioning. Given the realities of intervention, in which social services efforts to protect children are far more common than prosecutorial efforts to prosecute perpetrators, a move toward emphasizing the protective goals of child interviewing is beneficial. Undue focus on what law enforcement perceives as essential details for prosecution often results in age-inappropriate questioning of children regarding the dates and numbers of abuse (Lyon & Saywitz, 2006). Moreover,

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district attorneys will often insist on inquiries into the child's testimonial competency (discussed next), which has little relation to accuracy (Lyon et al., 2008) and which young children are likely to fail despite their honesty. To the extent that interviewers are free to focus on the child's report of the perpetrator's actions and the child's reactions, they are likely to elicit what is ultimately a more accurate and credible report of abuse.

Some difficulties remain. Cynical characterization of forensic interviews as nonprosecutorial in order to avoid the *testimonial* label are likely to be viewed with suspicion by the courts. However, creation of a wall between law enforcement and other agencies who work with abused children may be more convincing to the courts but may undermine the worthy goals of agency cooperation in order to reduce multiple interviewing and ensure that information does not fall between the cracks. Again, the best approach is to do what seems best for children's welfare without regard to the courts' latest definition of *testimonial* and to let attorneys make their best arguments.

The Real Effects of *Crawford* and the Need for Prosecutorial Adjustment

My emphasis on how *Crawford* need not effect changes in interviewing practice is not meant to understate the effects of *Crawford* on the prosecution of crimes in which children are witnesses. When children make statements to the police (or their agents) in nonemergency situations, and those in which the child's safety is not at stake, these statements will be deemed testimonial. It is easy to identify cases in which convictions were reversed because the child witnesses failed to qualify to take the oath or were too afraid to testify, rendering their testimonial hearsay inadmissible under *Crawford*. For example,

- In *State v. Henderson* (Kan. 2007), a 3-year-old girl with gonorrhea disclosed in a videotaped interview with a social worker and a police detective that the defendant "touched my body and it was hurting," adding "with the ding ding," the defendant's term for his penis. The defendant acknowledged being tested and treated several times for sexually transmitted diseases, and the mother reported that the defendant was the only man who had unsupervised contact with the victim. When the child could not qualify as competent to testify, the trial court admitted the videotaped interview after assessing its reliability. The conviction was reversed on the ground that the videotaped interview constituted testimonial hearsay.
- In *State v. Siler* (Ohio 2007), a 3-year-old boy saw his father beat and then hang his mother in their garage. In response to questioning by a detective, the child stated that his mother was "sleeping standing" in the garage. The child told how "Daddy, Mommy fighting" in the garage had scared him. He described how "the yellow thing" had held his mother upright in the garage and responded that "Daddy" had put the yellow thing on her. The "yellow thing" was a cord around the mother's neck. Despite this vivid account of the murder and other corroborating evidence of threats the father made against the mother as well as past incidents of domestic violence, the conviction was reversed because the child's out-of-court statements were testimonial.

- In *State v. Pitt* (Or. App. 2006, 2007) the 4-year-old victim, while living with her mother and the defendant, began to resist being alone with the defendant and disclosed sexual abuse to her mother. She made consistent statements to a physician (who also found physical evidence of abuse), a psychologist, and a child advocacy center interviewer in a videotaped interview. The child also disclosed having seen the defendant sexually abuse the child's 5-year-old cousin, who confirmed abuse of both girls in a videotaped interview. The state presented both girls at trial, but they appeared too upset and frightened to answer questions and were declared unavailable. The videotaped interviews of both children were admitted, but the conviction was reversed because the videotapes were testimonial and deemed to violate confrontation.

- In *Bell v. State*, 928 So. 2d 951 (Miss. Ct. App. 2006), the victim's daughters (ages 4 and 5) were the only witnesses to their mother's murder. The younger daughter told police officers that her father (Bell) "asked [her mother] for money" and that her mother "emptied her purse out on the floor." She then told the officers that "Bell pushed [her mother] down over a table, broke the table . . . broke a mirror in [the] bathroom . . . [and] used a small knife to put 'blood on [her mother's] back.'" The child's statements were corroborated by the physical evidence—police found an overturned coffee table, a purse with its contents emptied, a broken mirror in the bathroom, and multiple knife wounds in the mother's body. Both girls were found unavailable after they were unable to endure a mock pretrial practice session. The conviction was reversed because the statement was testimonial. (These and similar cases were discussed in an amicus brief filed by APSAC and the National Association of Counsel for Children in *Giles v. California* (2008), available at <http://works.bepress.com/thomaslyon/55/>).

The reversals based on *Crawford* are not predicated on assumptions about children's inaccuracies. Indeed, the hearsay in these cases was often admitted under special hearsay exceptions for children's statements that require the court to assess the reliability of the hearsay before admitting it into evidence. The legal principle in applying *Crawford* is that the defendant must be given the opportunity to cross-examine the child who makes the hearsay statement. Hence, in order to introduce testimonial hearsay, it is essential for the prosecution to make the child available for cross-examination. It is not necessary that the child testify to the event; she may have forgotten. Her willingness to answer questions is what satisfies the defendant's confrontation rights.

Once the child testifies, there are no constitutional limitations on the admissibility of the child's hearsay. Interviews are likely to be admissible under various hearsay exceptions, the rules for which vary from state to state, but they include recorded recollections, prior inconsistent statements (particularly if the child recants), prior consistent statements (particularly if the defense argues that subsequent police and prosecutorial questioning altered the child's story), and special exceptions for children's abuse reports.

The key in complying with *Crawford* is for prosecutors to maximize children's abilities to testify at either the preliminary hearing or at trial. The simplest and easiest step is to adopt sensitive methods

for assessing young children's testimonial competency. Far too often, children are kept off the stand not because of their incompetency but because of the limited competency of their interrogator. Children should not be asked whether they know the meaning of *truth* and *lie* or asked to define the terms. They should not be asked whether they have ever told a lie. They should not be asked hypothetical questions about the consequences of lying, particularly hypothetical questions in which they are the speaker (What would happen if you told a lie?). Many children will perform poorly at these questions despite being quite capable of identifying statements as true or false and recognizing that lie-tellers are punished (Lyon, 2000; Lyon & Saywitz, 1999). A simplified competency task is available without charge (Lyon & Saywitz, 2000, see <http://works.bepress.com/thomaslyon/9/>).

Even children who have not learned labels for true and false statements are capable of rejecting false statements, and some courts have held that this demonstrates an incipient understanding rendering the child competent to testify (Lyon, Carrick, & Quas, 2008). There are complications here; for example, courts differ regarding the necessity of competency inquiries and the oath itself. One interesting question is whether the defendant should waive the competency inquiry in order to obtain his right to cross-examine the child. Otherwise, the defendant can both vigorously fight to keep a child off the stand and complain of his inability to cross-examine the child on the stand.

For children who are simply too scared to testify, the solutions are more difficult. Of course, prosecutors have options for reducing the child's fears of the courtroom, including preparation (Sas et al., 1991; Saywitz & Nathanson, 1993), support persons, and special accommodations. If the child remains incapable of testifying, and her fears can be attributed to the actions of the defendant, then it may be possible to argue that the defendant forfeited his right to confront the child in court, eliminating constitutional objections to the child's hearsay. This doctrine is called "forfeiture by wrongdoing" and was the subject of the Supreme Court's recent opinion in *Giles v. California* (2008).

At first glance, the Court in *Giles* appears to define *forfeiture* very narrowly, expressing the view that it should apply only if the defendant's actions were in some way intended to keep the hearsay declarant off the stand. However, this is only a plurality opinion, and one can combine the concurring and dissenting opinions and find a majority of the court endorsing forfeiture in cases of repeated domestic violence, based on the assumption that this reflects the use of violence to control and silence the victim. In many cases involving child witnesses, there is evidence of repeated violence or abuse, and the dynamics of child abuse often mirror that of domestic violence, in which the perpetrator both nurtures and exploits the victim's dependency.

The difficulty with the forfeiture argument subsequent to *Giles* is that in that case, it was clear that the defendant's actions caused the witness' unavailability, because he murdered her. In APSAC's amicus brief in *Giles*, we argued that forfeiture should apply in child witness cases when the defendant could reasonably anticipate that the child would be too young or too intimidated to testify at trial. The defendant may not have *caused* the unavailability in many

child witness cases, but fairness dictates that defendants should be equally responsible for *exploiting* unavailability. In a future case, the Court may recognize the dynamics of child abuse—particularly in trusting relationships—in which perpetrators take advantage of children's vulnerabilities, sometimes quite strategically, sometimes opportunistically (Elliott, Browne, & Kilcoyne, 1995; Lang & Frenzel, 1988).

The evidence for forfeiture can often be found in interviews with the child. Asking a child what led her to disclose (or what kept her from disclosing) can reveal attempts to silence or inducements to lie. These questions, however, are not merely devices to aid prosecution. Asking a child about prior disclosures uncovers other potential witnesses, and helps to explain delays and inconsistencies that might undermine the child's credibility. The existence of pressures on the child to recant affects social workers' judgments regarding a family's ability to protect a child against further abuse. Researchers have found that the same methods used to productively elicit abuse reports (including open-ended questions) are useful in uncovering children's reasons for when and how they disclosed (Hershkowitz, Lanes, & Lamb, 2007). Again, good interviewing practice is consistent with legal doctrine.

Conclusion

Although *Crawford* was a major change in constitutional analysis of hearsay admissibility, it should not have major effects on the content of child interviews. In particular, interviewers should not sacrifice best practice, including videotaping and carefully structured questioning, in the face of fears that they render interviews testimonial.

The major issue confronting agencies that serve children is the extent to which law enforcement exercises control over interviews conducted by social services, medical personnel, child advocacy centers, and other professionals. As law enforcement involvement increases, the likelihood that the interview will be deemed testimonial also increases. This may or may not matter much to policy makers, who should keep in mind that testimonial hearsay is only an issue in criminal trials in which the child fails to testify. Ultimately, local governments may decide that coordination of law enforcement effort with other agencies serving children is a more important consideration. The bottom line is that focusing on children's immediate safety is always critical, and that whatever the purpose of an interview, expecting young children to provide dates and numbers (sometimes thought essential for criminal counts) is unrealistic.

Crawford means more to prosecutors, who should take additional steps to make testimony more age-appropriate and child-friendly. It should be relatively easy to improve the competency questions asked of children willing to testify; overcoming some children's unwillingness to take the stand is a more serious challenge. Ultimately, best practice and the best interests of children provide the clearest guidance in an era of legal uncertainty.

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