



# Hearsay Today, Gone Tomorrow: Child Hearsay After *Crawford v. Washington*

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Has the United States Supreme Court rendered the Kansas child-hearsay exception at K.S.A. 60-460(dd) unconstitutional? Yes—at least in some of its applications. This article is intended as an introduction to the child-hearsay issues to be addressed in Kansas in light of *Crawford v. Washington*.<sup>1,2</sup>

## Introduction

In *Crawford v. Washington*, the United States Supreme Court held that a Washington state trial court violated the defendant's Sixth Amendment confrontation rights by admitting his unavailable wife's out-of-court statements to police officers when he had no opportunity to cross-examine her.<sup>3</sup> While *Crawford* did not involve child hearsay, the *Crawford* majority adopted a new Sixth Amendment

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Confrontation Clause analysis that will limit the admission of a broad range of evidence, including child hearsay in Kansas.

The Kansas Code of Evidence provides that child hearsay is admissible

in a criminal proceeding, a juvenile proceeding, or a child-in-need-of-care proceeding, if the court finds that (1) the child is unavailable to testify; (2) the statement is apparently reliable; and (3) the child was not induced by threats or promises to make the statement falsely.<sup>4,5</sup>

This statute appeared to pass constitutional muster under the Supreme Court's pre-*Crawford* jurisprudence. In *Ohio v. Roberts*, the Court held that the Confrontation Clause allowed admission of an unavailable witness's out-of-court statements if those statements contained "adequate indicia of reliability."<sup>6</sup> Under *Roberts*, reliability could be shown in one of two ways: either the evidence fell within a "firmly rooted hearsay exception" or it demonstrated "particularized guarantees of trustworthiness."<sup>7</sup>

The Kansas Supreme Court held in 1985 that the Kansas child-hearsay statute was constitutional under the second prong of *Roberts*.<sup>8</sup> This holding proved to be consistent with the United States Supreme Court's later opinion in *Idaho v. Wright*, which concluded that under *Roberts*, child hearsay—while not a firmly-rooted hearsay exception—could be admissible consistent with the Confrontation Clause if it was properly shown to bear "particularized guarantees of trustworthiness."<sup>9</sup>

But the United States Supreme Court has now partially overruled *Roberts* and implicitly called *Wright* into question in *Crawford*.<sup>10</sup> *Crawford* holds that the Sixth Amendment's Confrontation Clause imposes an absolute ban on the admission in criminal cases of unconfronted out-of-court "testimonial" statements of unavail-



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able declarants notwithstanding judicial findings of reliability.<sup>11</sup> *Crawford* appears to render the Kansas child-hearsay exception unconstitutional, at least as applied to unconfro-nted testimonial statements.

It is far from clear whether such an interpretation of *Crawford* would affect a large number of cases in Kansas. In the twenty years since the Legislature adopted the child-hearsay exception, only eleven reported criminal appeals include complaints about the admission of child hearsay—a statistic that suggests prosecutors have not relied heavily on the exception, but have instead learned to prepare children for the courtroom experience.<sup>12</sup>

Still, in the few cases involving children who are truly unable to testify at trial, the lengthy penal sentences and grave social stigma faced by citizens accused of child sexual abuse weigh in favor of a careful application of *Crawford* before admitting child hearsay.

### **Might There Be a Child-Hearsay Exception to *Crawford*?**

Might there be a broad exception to the *Crawford* rule created for child hearsay? This argument is unlikely to prevail in the United States Supreme Court. Justice Scalia—who authored the majority opinion in *Crawford*—has elsewhere rejected the idea that child hearsay should be exempted from the usual rules of confrontation, noting that

[t]he ‘special’ reasons that exist for suspending one of the usual guarantees of reliability in the case of children’s testimony are perhaps matched by ‘special’ reasons for being particularly insistent upon it in the case of children’s testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.<sup>13</sup>

But more to the point, *Crawford* makes clear that policy concerns, however weighty, cannot override constitutional imperatives.<sup>14</sup> This is likely why none of the courts to have considered child hearsay in the wake of *Crawford* have even entertained the suggestion that there might be a child-hearsay exception to *Crawford*.<sup>15</sup>

### **When Is a Child’s Statement Testimonial?**

*Crawford* only bans the admission of unconfro-nted “testimonial” statements.<sup>16</sup> How do we determine which statements by children are testimonial?<sup>17</sup> This may be the most difficult post-*Crawford* question. *Crawford* declined to pinpoint all categories of statements that implicate the Confrontation Clause under the Court’s new formulation, instead identifying only a few categories at the outer limits.

At the no-implication end of the spectrum the Court suggested that “[a]n off-hand, overheard remark... bears little resemblance to the...abuses the Confrontation Clause targeted,” and “a person who makes a casual remark to an acquaintance” does not “bear testimony” in the same sense as a more formal accuser.<sup>18</sup>

At the other end of the spectrum the Court held that testimonial statements implicating the core concerns of the Confrontation Clause include, “at a minimum,” prior in-court testimony and “police interrogations.”<sup>19</sup> As for the latter, *Crawford* explained that “[w]e use the term ‘interrogation’ in its colloquial, rather than any technical legal, sense,” and that testimonial statements would include those “pre-trial statements that declarants would reasonably expect to be used prosecutorially.”<sup>20</sup>

This minimum definition raises many questions. Child hearsay admitted in criminal trials often includes statements to police officers, social workers, medical doctors, teachers, school counselors, and/or family members. Whether these statements are testimonial might be determined by reference to (1) the external conditions under which the statements are elicited, including whether government action is involved;<sup>21</sup> (2) the subjective intent of the questioner in eliciting the statements;<sup>22</sup> (3) the subjective understanding of the declarant while making the statements;<sup>23</sup> (4) the content of the statements;<sup>24</sup> or (5) the totality of all of these circumstances.<sup>25</sup>

A totality-of-the-circumstances test might be the most useful insofar as it might best reveal which statements present a “unique potential for prosecutorial abuse,” and would therefore have posed the greatest con-

cern to the framers of the Sixth Amendment.<sup>26</sup> And while *Crawford* recognized that the “[i]nvolvement of government officers in the production of testimony with an eye toward trial” presents that potential,<sup>27</sup> this recognition should not limit the lower courts in their understanding of this concept, particularly in cases involving allegations of child sexual abuse.

In today’s society, there is not a clear distinction between government officers and private citizens when it comes to the potential for misuse of a child’s statements in cases involving allegations of child sexual abuse. Both professionals and ordinary citizens are encouraged and sometimes obligated through elaborate statutory and administrative schemes to work closely with government officers in uncovering, investigating, and prosecuting child sexual abuse, and the flow of information between the government and private parties in this context is constant. Offender registration and notification laws, victim/witness advocates in district attorney offices, reporting obligations of health-care providers, and police/school-board protocols for handling suspected abuse are all new concepts unfamiliar to the framers who drafted the Confrontation Clause. And the misuse of children as tools in domestic disputes was likely foreign to the framers as well.<sup>28</sup>

But as Justice Scalia pointed out in *Crawford*, the fact that these are new phenomena “merely change[s] our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference.”<sup>29</sup> And the reasonable inference to be made is that the framers intended to prohibit the admission of any unconfro-nted statements that pose a risk of prosecutorial misuse.

Only a totality-of-the-circumstances test will guard against the prosecutorial misuse of statements that might not fit a narrower definition of testimonial. For instance, if the definition is limited to those statements a child would reasonably expect to be used prosecutorially, then the prosecution would be allowed to present unconfro-nted statements elicited by a wily questioner who intends to prosecute the defendant, but simply hides that intent from the un-

suspecting but impressionable child. By excluding the subjective intent of the questioner from the testimonial calculus, this definition leaves prosecutors with little motivation to promote influence-free interviews of children.

Conversely, if the definition is limited to those statements the questioner elicits with an eye towards prosecution, then the prosecution would be able to present unopposed statements made by a child who intends to get the defendant into trouble by telling a story about him to an unsuspecting but protective adult. By excluding the subjective intent of the child declarant from the testimonial calculus, this definition leaves prosecutors with less motivation “to acclimate the child witness[es] to the courtroom setting, prepare them for the trial and make them available for the rigors and trauma of cross-examination.”<sup>30</sup>

Given the gaps in these narrow, single-circumstance definitions, it seems that the framers’ intent—to curb prosecutorial abuses—would be best served by a totality-of-the-circumstances test for determining whether a statement is testimonial and therefore subject to confrontation.

### When Does a Defendant Forfeit Confrontation Rights by Wrongdoing?

“Forfeiture by wrongdoing” is the rule of equity holding that if the defendant caused a declarant’s unavailability, then the defendant may no longer claim a right to confront that declarant.<sup>31</sup> The *Crawford* majority noted that it still accepts the forfeiture rule as consistent with the Confrontation Clause.<sup>32</sup> Where child sexual-abuse cases are concerned, the American Prosecutors Research Institute has argued that, in most if not all cases, a defendant’s alleged abuse of the child itself renders the child psychologically unavailable to testify.<sup>33</sup> If the Kansas courts entertain such a proposal, they should do so with caution, making decisions on a case-by-case basis and only after pretrial evidentiary hearings, keeping in mind the following constraints.

First, the state must bear the burden of proving, by at least a preponderance of evidence, that the defendant

caused the child’s unavailability.<sup>34</sup> This is a heavier burden than the state has under K.S.A. 60-460(dd), which requires only the child’s unavailability, regardless of causation.<sup>35</sup>

Second, the court must determine whether the child’s alleged unavailability arises from a fear of retribution from the defendant after trial or merely from a fear of the discomforts of facing the defendant in the courtroom. If the child’s reluctance to testify is caused by his or her fear of in-court confrontation alone, then the child should not be deemed unavailable. As Justice Scalia has argued in another context:

[t]o say that a defendant loses his right to confront a witness when [confrontation] would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.<sup>36</sup>

Third, evidence that the child made statements to others *after* the defendant allegedly committed the acts that the state claims silenced the child should weigh against a finding of causation, as such evidence demonstrates the child’s ability to bear witness notwithstanding the defendant’s alleged acts.

And finally, even if the court concludes that the defendant has forfeited his or her right to confrontation, the child’s hearsay may still not be admitted consistent with due process absent a finding that the hearsay is reliable.<sup>37</sup>

### Conclusion

The United States Supreme Court radically changed the analysis of out-of-court statements in *Crawford v. Washington*. This change raises many questions about the admission of child hearsay in cases involving allegations of child sexual abuse. By approaching these questions with a broad understanding of how children’s statements are produced and misused, and recognizing the core concerns of the Confrontation Clause, courts and counsel alike can protect an accused’s rights without sacrificing convictions of the guilty. ♦

### Endnotes

- <sup>1</sup> 541 U.S. 36, 124 S.Ct. 1354 (2004).
- <sup>2</sup> Many of the cases cited herein are not yet final but are offered to give the reader a sense of the judicial trends regarding child hearsay in light of *Crawford*. To aid the reader in understanding the progression of thought since *Crawford*, the authors have included more specific dates than ordinarily are included in citations.
- <sup>3</sup> *Crawford*, 124 S.Ct. at 1374.
- <sup>4</sup> K.S.A. 60-460(dd).
- <sup>5</sup> Child hearsay has also until now been admissible under similar circumstances in federal courts, under the federal residual hearsay rule, Rule 807 (formerly Rule 803(24)). See *United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993) (approving admission of child hearsay under residual hearsay exception). The federal rule suffers the same defects as the state rule in light of *Crawford*.
- <sup>6</sup> 448 U.S. 56, 66 (1980).
- <sup>7</sup> *Id.*
- <sup>8</sup> See *State v. Myatt*, 237 Kan. 17, 24-25 (1985) (holding that “[i]t is apparent to this court the legislature intended to incorporate the *Roberts* standard for admissibility into [K.S.A. 60-460(dd)],” insofar as the requirement that child hearsay be “apparently reliable” obligates the judge to find particularized guarantees of trustworthiness prior to admitting the hearsay).
- <sup>9</sup> 497 U.S. 805, 819 (1990).
- <sup>10</sup> 541 U.S. 36, 124 S.Ct. 1354 (2004).
- <sup>11</sup> *Id.*, 124 S.Ct. at 1370.
- <sup>12</sup> See Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 519-20 (2004) (former prosecutor supporting response to *Crawford* that would result in more in-court confrontation: “[m]y perception is that prosecutors in many jurisdictions have learned that children can in fact be enabled to testify and be available for cross-examination, which broadly permits introduction of their out-of-court statements under the Confrontation Clause”).
- <sup>13</sup> *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting) (citing multiple studies and discussing at length “[t]he injustice [children’s] erroneous testimony can produce”).
- <sup>14</sup> See *Crawford*, 124 S.Ct. at 1373 (“The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.”); see also *Craig*, *supra* note 13, at 861 (Scalia, J., dissenting) (decrying the “subordination of explicit constitutional text to currently favored public policy” and emphasizing

- that “[t]he purpose of enshrining this protection [of confrontation] in the Constitution was to ensure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his or her accusers in court”).
- <sup>15</sup> See, e.g., *Herrera-Vega v. State*, 2004WL 2363583 (Fla. Ct. App. Oct. 22, 2004) (assuming application of *Crawford* to unconfronted testimonial child hearsay); *State v. Harr*, 2004 WL 2429818 (Ohio Ct. App. Oct. 8, 2004) (same); *People v. Miles*, 815 N.E.2d 37 (Ill. Ct. App. Aug. 24, 2004) (same); *In re T.T.*, 815 N.E.2d 789 (Ill. Ct. App. Aug. 20, 2004) (same), *appeal pending*; *State v. Vaughn*, 682 N.W.2d 284 (Neb. July 9, 2004) (same); *People v. Vigil*, 2004 WL 1352647 (Colo. Ct. App. June 17, 2004) (same), *cert. granted* (Colo. Dec. 20, 2004); *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. June 14, 2004) (same) *reh. den.* (Ind. Ct. App. Aug. 9, 2004), *transfer granted* (Ind. Dec. 9, 2004); *Snowden v. State*, 846 A.2d 36 (Md. Ct. App. April 5, 2004) (same), *cert. granted* (Md. June 18, 2004); see also *Wedgeworth v. Kansas*, No. 03-10242 (U.S. Oct. 4, 2004) (granting petition for *certiorari* and remanding child-hearsay issues for reconsideration in light of *Crawford*).
- <sup>16</sup> *Crawford*, 124 S.Ct. at 1370 (declining to resolve applicability of Confrontation Clause to non-testimonial statements).
- <sup>17</sup> Non-testimonial statements are still subject to the requirements of K.S.A. 60-460(dd) and, until the United States Supreme Court says otherwise, the Sixth Amendment test contained in *Ohio v. Roberts*. See *State v. Manuel*, 685 N.W.2d 525 (Wis. Ct. App. May 27, 2004) (“[b]ecause the *Crawford* majority did not expressly overrule *Roberts* . . . we proceed, in an abundance of caution, to analyze Manuel’s confrontation clause claim under the *Roberts* analysis”), *rev. granted* 689 N.W.2d 55 (Wis. Sept. 16, 2004); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. May 26, 2004) (applying *Roberts* to determine whether admission of non-testimonial hearsay violated Sixth Amendment), *cert. petition filed* No. 04-7278 (U.S. Oct. 29, 2004).
- <sup>18</sup> *Crawford*, 124 S.Ct. at 1364.
- <sup>19</sup> *Id.* at 1374.
- <sup>20</sup> *Id.* at 1365 n.4, 1364.
- <sup>21</sup> Compare *T.T.*, 815 N.E.2d at 800 (concluding that “*Crawford* indicates that governmental involvement in some fashion is necessary to render the statement testimonial in nature”) with *Harr*, 2004 WL 2429818 at \*9 (calling child’s statements to mother testimonial where they were given “after the child was confronted by her mother for disobeying . . . and only after [her mother] interrogated the child with leading questions”).
- <sup>22</sup> See *Snowden*, 846 A.2d at 47 (children’s statements to social worker were testimonial where “[t]he children were interviewed for the expressed purpose of developing their testimony”).
- <sup>23</sup> Compare *Vaughn*, 682 N.W.2d at 289-91 (where child’s only purpose in making statements to doctor accusing defendant was to obtain medical treatment, statements were not testimonial) with *T.T.*, 815 N.E.2d at 808 (fact that child “may not have fully appreciated the fact that she was bearing witness” was “not particularly significant” in analyzing whether statements were testimonial) (Frossard, P.J., concurring).
- See also *Vigil*, 2004 WL 1352647 at \*2-3 (rejecting state’s argument “that the statement could not be considered testimonial . . . because a seven-year-old child would not reasonably expect his statements to be used prosecutorially,” and analyzing whether statements were testimonial from perspective of “an objective person in the child’s position”).
- <sup>24</sup> Compare *T.T.*, 682 N.W.2d at 803-04 (holding that child’s statements to doctor were testimonial insofar as they “concerned fault or identity,” but that statements were not testimonial where they described “how she was penetrated, the pain, and the offender’s use of a lubricant” and “d[id] not accuse or identify the perpetrator of the assault”) with *United States v. Cromer*, 389 F.3d 662, 673-74 (6th Cir. Nov. 30, 2004) (adopting definition of testimonial that includes, usually, “[a] statement made by a person claiming to be the victim of a crime and describing the crime . . . whether made to the authorities or not”) (emphasis added).
- <sup>25</sup> See *T.T.*, 682 N.W.2d at 808 (“The question of whether a statement made by a child is testimonial in nature cannot be answered in a vacuum, but requires examination of the totality of the circumstances surrounding the statement.”) (Frossard, P.J., concurring).
- <sup>26</sup> *Crawford*, 124 S.Ct. at 1367 n.7.
- <sup>27</sup> *Id.*
- <sup>28</sup> See Note, *Developments in the Law: Legal Responses to Domestic Violence, VI. Battered Women and Child Custody Decisionmaking*, 106 HARVARD L. REV. 1597, 1618 (1993) (describing the levying of false claims of child sexual abuse in divorce cases as a recent phenomenon that arose only after an increase in public awareness about child sexual abuse).
- <sup>29</sup> *Crawford*, 124 S.Ct. at 1365 n.3.
- <sup>30</sup> *T.T.*, 682 N.W.2d at 802-03.
- <sup>31</sup> See *State v. Meeks*, 277 Kan. 609, 614-15 (2004).
- <sup>32</sup> *Crawford*, 124 S.Ct. at 1370.
- <sup>33</sup> See Victor I. Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of Crawford v. Washington*, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE (vol. 16, no. 12) (2004).
- <sup>34</sup> See *Meeks*, 277 Kan. at 615.
- <sup>35</sup> This hearing will present its own complex confrontation and evidentiary issues, such as whether the state must call the child to the stand to demonstrate the child’s alleged unavailability, whether the defendant may be present when this occurs, whether defense counsel may question the child about either the child’s availability or the child’s statements, what sorts of expert testimony will be admissible on the question of availability, and so forth. See *Hammon*, 809 N.E.2d at 951 n.3 (noting that proving causation “undoubtedly will be difficult in many domestic violence cases,” and asking “will only physical ‘wrongdoing’ . . . by a defendant suffice, or can psychological pressure on a victim not to cooperate be enough, and if so, how is such pressure to be measured?”).
- <sup>36</sup> *Craig*, 497 U.S. at 867 (Scalia, J., dissenting).
- <sup>37</sup> See *State v. Gettings*, 244 Kan. 236, 241-42 (1989) (finding that defendant forfeited right to confront witness whose unavailability was procured by defendant’s wrongdoing, and then considering whether witness’s hearsay was reliable enough to justify admission); *People v. Giles*, 19 Cal. Rptr. 3d 843, 850-51 (Cal. Ct. App. Oct. 25, 2004) (noting that “[i]t may . . . be unjust to use the forfeiture doctrine to admit a hearsay statement that does not contain sufficient indicia of trustworthiness. A defendant may reasonably be deemed to have forfeited the right to challenge reliable and trustworthy hearsay if his intentional and wrongful conduct makes the declarant unavailable; it is not so clear that he forfeits his right to challenge all hearsay statements against him, no matter how unreliable”), *mod. on other grounds on reh.*, 2004 WL 2650628 (Cal. Ct. App. Nov. 22, 2004).