Out of Harm’s Way:
Hearings that are Safe from the Impact of Crawford v. Washington (Part 1 of 2)

By Allie Phillips1

On March 8, 2004, the United States Supreme Court issued Crawford v. Washington, which changed the landscape of all criminal prosecutions. The Crawford case announced a new rule regarding the admission of hearsay statements from non-testifying witnesses: ‘Testimonial statements are no longer admissible in criminal prosecutions unless the witness takes the stand and is subject to cross-examination.’ The Supreme Court, however, did not provide a definition of what statements are considered testimonial.2

As a result, Crawford created more questions than it answered. For example, does this new rule apply to all phases and hearings of a criminal prosecution? Does it apply to hearings or proceedings that are collateral to a criminal prosecution and are civil in nature? This article will address the hearings and proceedings where Crawford does not apply and analyze 18 months of post-Crawford case law. Please consult your state law and procedures regarding the applicability of the Sixth Amendment and Crawford to each hearing and proceeding listed below. To request an outline of the cases interpreting Crawford, please visit the NCPCA link at www.ndaa-apri.org.

Crawford is a Sixth Amendment Case... Not a Hearsay Case

Many legal professionals are confused regarding the principle on which Crawford is based. Judges and lawyers have mistakenly applied the new rule of Crawford to all hearsay statements admitted in court regardless of whether the witness appears to testify. This is not the rule of Crawford. Courts should only conduct a testimonial –vs– non-testimonial Crawford analysis of out-of-court hearsay statements when the witness has not appeared for testimony and cross-examination and when the witness has not previously testified or been subject to cross-examination. Crawford only comes into play when a witness has not appeared in court and the prosecutor wishes to introduce admissible hearsay in his or her absence. This new rule of Crawford is based on the Sixth Amendment confrontation clause.

The Sixth Amendment provides that “In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.” It is crucial to remember that because Crawford and in new rule are based on the Sixth Amendment right to confront, they only apply (1) when the witness does not appear to testify, and (2) to hearings and proceedings where there is a Sixth Amendment right. Further, because the Sixth Amendment right to confront is a criminal right to those accused of crimes, the new rule of Crawford only applies to criminal prosecutions. The Sixth Amendment right to confront does not extend to civil hearings. Listed below are some post-Crawford opinions that have held that the new rule is not applicable in certain proceedings.

Crawford Does Not Impact Cases Where the Witness Testifies

This is one absolute rule arising from Crawford. If a witness appears in court, testifies and an opportunity to cross examine has been provided to opposing counsel, then the new rule of Crawford does not apply when subsequently introducing admissible hearsay.3 For example, in a child abuse prosecution involving a 12-year-old child victim, if the child victim appears at trial and provides testimony that is subject to cross-examination, the prosecutor may subsequently introduce other admissible hearsay statements (subject to the Rules of Evidence). This does not violate Crawford since the victim appeared in court to testify and be cross-examined. As such, the admissible hearsay statements are not subject to the “testimonial –vs– non-testimonial” analysis since the confrontation rule as announced in Crawford was satisfied when the child victim testified and was subject to cross-examination.

On the other hand, if the child victim does not appear for trial and has not testified in prior hearings, then admissible hearsay statements must go through the Crawford “testimonial –vs– non-testimonial” analysis in order to be admitted. If the statement is non-testimonial, then the Rules of Evidence and hearsay exceptions will govern admitting the statement. If the statement is testimonial, then the statement will not be admitted without the witness testifying. Therefore, when a prosecution witness testifies at trial, all admissible out-of-court hearsay statements (whether testimonial or not) may subsequently be introduced since confrontation under Crawford is satisfied.

Crawford Does Not Impact Civil Proceedings

The Sixth Amendment right to confront is not a right that attaches to civil proceedings.4 Although some civil proceedings incorporate a confrontation right on due process grounds,5 the Sixth Amendment is only a right for those accused of criminal conduct. The new rule announced in Crawford was solely based on Sixth Amendment confrontation rights of those accused of crimes. Therefore, Crawford will not apply to a proceeding arising out of a criminal case that is civil in nature, including many civil child neglect proceedings6 (such as terminating parental rights) and sex offender hearings.7

In re Children of L.D., 2005 Minn. App. LEXIS 222
held that civil child abuse/neglect termination proceedings are civil in nature, and not quasi-criminal, thus not affording the Sixth Amendment protections as outlined in Crawford. People v. Maxwell (In re C.M.), 815 N.E.2d 49 (Ill. App. Ct. 2004), also held that Crawford and the right to confrontation do not apply in civil proceedings under the Juvenile Act. And the cases of In re D.R., 616 S.E.2d 300 (N.C. Ct. App. 2005) and In re April C., 131 Cal.App. 4th 599, 31 Cal. Rptr. 3d 804 (Cal. App. 2nd Dist. 2005) held that the Sixth Amendment and the new rule of Crawford do not apply in civil child neglect proceedings. However, Crawford may apply in states that label child neglect or deprivation cases as quasi-criminal rather than civil in nature. In State v. Frazier (In re PE), 2005 OK CIV APPEAL 50 (Ok. Ct. App. 2005), a mother and father were accused of abuse and failure to protect their child in a deprivation of child action. The court addressed whether a forensic interview of a non-testifying child could be admitted at trial. Although the court did not conduct a full Crawford analysis of the child’s forensic interview, it did not admit the tape of the interview and simply referenced the proceeding as being quasi-criminal. Similarly in A.G.G. v. Commonwealth, 2005 Ky. App. LEXIS 163 (Ky. Ct. App. 2005), the court found “jsn termination of parental rights proceedings, fundamental fairness includes the right to confrontation.”

**Crawford Does Not Impact Testimony by Closed-Circuit TV**

Testimony of children via closed-circuit television (CCTV) does not violate the Sixth Amendment right to confront or Crawford, because this testimony actually occurs during trial but is simply located outside of the courtroom and outside the direct view of the defendant. Maryland v. Craig, 497 U.S. 836 (1990), which allowed for closed-circuit testimony for traumatized children, is in compliance with the new rule announced in Crawford. However, attorneys should be warned against utilizing closed-circuit television testimony for adult witnesses. This issue was addressed in United States v. Yates, 18 Fla. L. Weekly Fed. C 50 (11th Cir. Ala. 2004), which involved two adult victims of identity fraud who lived in Australia and were outside the subpoena power of the prosecutor’s office. The victims testified via live two-way video teleconferencing. The appeals court overturned the conviction and held that the testimony violated Crawford and the Confrontation Clause. The court distinguished the testimony from Maryland v. Craig, requiring face-to-face testimony from the victims since no public policy outweighed the right of confrontation (whereas in Maryland v. Craig the public policy of avoiding trauma to the child allowed for CCTV testimony).

Please refer to Part Two of this article for continued discussion of proceedings where Crawford does not apply.

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3. In determining whether a statement is testimonial or non-testimonial, courts are consistently applying the Crawford two-pronged analysis to otherwise admissible hearsay statements: (1) Was the statement made to a governmental agent (or in response to questioning from a governmental agent)? (2) Would the declarant expect his/her statement to later be used at trial? For a more complete analysis of the Crawford test, please see A Flurry of Court Interpretations: Revisiting the Stem after Crawford v. Washington, by Allie Phillips, in THE PROSECUTOR, Volume 38, Number 6 (November-December 2004) and APRI UPDATE NEWSLETTER, Volume 17, Numbers 5&6 (October 2004) and Child Forensic Interviews after Crawford v. Washington: ‘Testimonial or Not?, by Allie Phillips, in THE PROSECUTOR, Volume 39, Number 4 (July-August 2005).

4. The Crawford decision only spoke of providing the opposing party an “opportunity” to cross-examine. If the opposing party does not take this opportunity, or only conducts a minimal or partial cross-examination, they later cannot complain that they were denied a full cross-examination. This issue may only appear when the witness is unavailable for a later trial or hearing and the transcript of the prior testimony is admissible under Crawford so long as the opportunity to cross-examine was previously afforded. Some states expand the “opportunity” rule and require a meaningful or full and fair opportunity to cross-examine: Please consult your state procedures on the rules regarding cross-examination.


7. See, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (The Due Process Clause of the Fourteenth Amendment allows, in some civil proceedings, the right to confront adverse witnesses. This Due Process right to confront does not rise to the level of the Sixth Amendment right to confront.)
