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## REPERCUSSIONS OF *CRAWFORD V. WASHINGTON*: A CHILD'S STATEMENT TO A WASHINGTON STATE CHILD PROTECTIVE SERVICES WORKER MAY BE INADMISSIBLE

Heather L. McKimmie

*Abstract:* Before the landmark United States Supreme Court case of *Crawford v. Washington*, Washington State courts often admitted statements of unavailable alleged child abuse victims through the hearsay testimony of Washington State Child Protective Services (CPS) workers. In *Crawford*, the U.S. Supreme Court announced a new "testimonial" standard for the admissibility of out-of-court statements. The Court held that the Confrontation Clause of the Sixth Amendment bars testimonial out-of-court statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. The Court did not clearly define the term testimonial, which left the matter open to interpretation by lower courts. The *Crawford* decision calls into question the continued admissibility of an unavailable child's statement to a CPS worker. This Comment argues that Washington State courts should determine whether a child's statement to a CPS worker is testimonial by analyzing whether the statement is formal and whether the child gave the statement in connection with a government investigation. The language in *Crawford* and case law from other jurisdictions support this fact-specific inquiry. Therefore, statements to CPS workers that Washington State courts most likely would have admitted before *Crawford* may now be testimonial and thus inadmissible at trial unless the defendant had a prior opportunity to cross-examine the child.

Christopher Clark babysat four-year-old D.M. on one occasion.<sup>1</sup> Afterward, D.M.'s behavior changes. She constantly complains of headaches and stomachaches, suffers from nightmares, no longer wants to play with other children, and even says she wants to kill herself. After a time, D.M. tells her mother that Clark played "bad games" with her. D.M.'s mother calls Washington State Child Protective Services (CPS) and the county sheriff's office to file a complaint. A CPS worker who follows the Washington State Guidelines for Child Sexual Abuse Investigation Protocols, which instruct CPS interviewers to take near-verbatim notes,<sup>2</sup> interviews D.M. about the alleged incident. Based on this interview, the State charges Clark with indecent liberties.<sup>3</sup>

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1. This hypothetical is based on *State v. Clark*, 53 Wash. App. 120, 765 P.2d 916 (1988). The facts have been slightly modified.

2. See WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, GUIDELINES FOR CHILD SEXUAL ABUSE INVESTIGATION PROTOCOLS 18 (1999) [hereinafter PROTOCOLS] (citing WASH. REV. CODE § 26.44.035 (1998)).

3. See WASH. REV. CODE § 9A.44.100 (2004) (defining crime of indecent liberties).

The State now wants to offer D.M.'s statement into evidence through the testimony of the CPS worker because D.M. refuses to testify or offer additional statements about the alleged abuse. Because D.M. will not be available for cross-examination in Clark's trial, the judge must decide whether admitting D.M.'s statement to the CPS worker will violate Clark's Sixth Amendment right to "be confronted with the witnesses against him."<sup>4</sup> Prior to *Crawford v. Washington*,<sup>5</sup> Washington State courts likely would have admitted the statement of an unavailable<sup>6</sup> child like D.M. through the testimony of a CPS worker.<sup>7</sup> However, because of the United States Supreme Court's *Crawford* decision, admitting D.M.'s statement to the CPS worker may violate the Confrontation Clause.

Based on a historical and textual analysis of the Confrontation Clause, the *Crawford* Court held that an unavailable declarant's "testimonial" out-of-court statements are not admissible under the Confrontation Clause unless the defendant had a prior opportunity to cross-examine the declarant.<sup>8</sup> The *Crawford* Court did not attempt to set out a comprehensive definition of the word testimonial, but it provided a few examples of testimonial statements, including prior testimony at a preliminary hearing, at a former trial, or before a grand jury.<sup>9</sup> Based on the specific facts in *Crawford*, the Court held that statements elicited in police officer interrogations are also testimonial because they are similar to ex parte examinations by justices of the peace.<sup>10</sup> While a few state courts have addressed whether a child's statement to a social worker is

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4. U.S. CONST. amend. VI. Division I of the Washington State Court of Appeals did not reach this question in *Clark* because it reversed the trial court's decision and remanded the case for a determination of the admissibility of the child's statements. *Clark*, 53 Wash. App. at 127, 765 P.2d at 920.

5. 541 U.S. \_\_\_, 124 S. Ct. 1354 (2004).

6. Whether a child is unavailable for Confrontation Clause purposes is a very complicated legal issue that is beyond the scope of this Comment. For the purposes of this Comment, which addresses what should happen after a court determines that a child is unavailable, assume that the trial court found D.M. to be unavailable.

7. See, e.g., *State v. Biles*, 73 Wash. App. 281, 285, 871 P.2d 159, 162 (1994) (noting trial court admitted child's hearsay statement to CPS worker); *State v. Young*, 62 Wash. App. 895, 903, 802 P.2d 829, 834 (1991) (holding trial court did not abuse discretion by admitting child's hearsay statement to CPS worker); *State v. Jackson*, 42 Wash. App. 393, 396-98, 711 P.2d 1086, 1088-89 (1985) (holding trial court did not abuse discretion by admitting child's hearsay statement to CPS worker, and even if trial court erred in admitting statement, error was harmless).

8. See U.S. CONST. amend. VI; *Crawford*, 124 S. Ct. at 1374.

9. *Crawford*, 124 S. Ct. at 1374.

10. See *id.* at 1364.

testimonial, these courts have not developed a clear rule.<sup>11</sup>

This Comment argues that Washington State courts should perform a factual inquiry into the circumstances surrounding a child’s statement to a CPS worker to determine whether the statement is testimonial. Courts should consider a child’s statement testimonial if it is formal and given in connection with a government investigation.<sup>12</sup> These two factors are drawn from the language of *Crawford* and are supported by case law from other jurisdictions that have addressed whether statements made by allegedly abused children to CPS or other social workers are testimonial under *Crawford*.<sup>13</sup>

Part I of this Comment discusses the investigative role of CPS in Washington State. Part II examines the admissibility of children’s statements to CPS workers before *Crawford*. Part III outlines the historical and textual analysis underlying the testimonial standard announced in *Crawford*. Part IV examines case law from other states that have addressed questions related to whether statements made to CPS workers are testimonial. Part V argues that Washington State courts should determine whether a child’s statement to a CPS worker is testimonial under *Crawford* by assessing whether the statement is formal and whether the child gave the statement in connection with a government investigation. Part V further argues that under this two-part analysis, statements such as D.M.’s statement to the CPS worker would be testimonial and therefore inadmissible in court.

## I. CPS IS A GOVERNMENTAL INVESTIGATORY AGENCY

CPS is a governmental agency dedicated to protecting the children of Washington State.<sup>14</sup> It often works in concert with law enforcement.<sup>15</sup> Recently, Washington State adopted protocols to ensure that CPS workers and law enforcement agents conduct structured and thorough interviews with children.<sup>16</sup> Although CPS workers are not law

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11. See *infra* Part IV.

12. Cf. *Crawford*, 124 S. Ct. at 1364 (stating “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).

13. See *infra* Part V.

14. See WASH. REV. CODE § 26.44.020(16) (2004).

15. See *infra* Part I.A.

16. See PROTOCOLS, *supra* note 2, at 29.

enforcement agents,<sup>17</sup> they preserve the statements of alleged child abuse victims for use in criminal proceedings.<sup>18</sup>

A. *CPS Is a State Agency that Works with Law Enforcement to Investigate Child Abuse Allegations*

CPS is the unit of the Washington State Department of Social and Health Services (DSHS)<sup>19</sup> responsible for protecting children from abuse and neglect.<sup>20</sup> Anyone who reasonably believes that a child is a victim of abuse or neglect may report the alleged abuse to DSHS or to law enforcement.<sup>21</sup> Once someone has reported an allegation of abuse, CPS or a law enforcement agency must investigate the possible abuse and render a report to CPS.<sup>22</sup>

CPS workers have strong ties to law enforcement. Even though CPS workers are not law enforcement officers, they are expected to work cooperatively with the police.<sup>23</sup> Moreover, the Washington State Patrol designated CPS a “limited purpose law enforcement agency,” which allows CPS to conduct criminal history background checks on alleged perpetrators of child abuse.<sup>24</sup>

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17. See CHILDREN’S ADMINISTRATION, PRACTICES AND PROCEDURES GUIDE § 2331C, at 2-14, available at [http://www1.dshs.wa.gov/ca/pubs/manuals\\_pp.asp](http://www1.dshs.wa.gov/ca/pubs/manuals_pp.asp) (last updated Nov. 9, 2004) [hereinafter PRACTICES AND PROCEDURES].

18. See *id.* § 2331D2d-e, at 2-15.

19. The Washington State Legislature created DSHS in 1989. WASH. REV. CODE § 43.20A.030 (2004). DSHS is comprised of many administrations, including the Children’s Administration. See Washington State Department of Social and Health Services, DSHS Organization Chart, at <http://www1.dshs.wa.gov/geninfo/aboutdshs.html> (Oct. 13, 2004). Within the Children’s Administration, the Division of Child and Family Services provides services that are intended to assure the safety and health of children and families in Washington State. See Washington State Department of Social and Health Services, About Children’s—Summary, at <http://www1.dshs.wa.gov/ca/about/abStructure.asp> (last updated Nov. 9, 2004); Washington State Department of Social and Health Services, Services, at <http://www1.dshs.wa.gov/ca/services/srvSum.asp> (last updated Nov. 9, 2004). CPS is a unit within the Division of Child and Family Services. WASHINGTON STATE OFFICE OF THE FAMILY AND CHILDREN’S OMBUDSMAN, 1998 REVIEW OF THE WENATCHEE CHILD SEXUAL ABUSE INVESTIGATIONS 7 (1998) [hereinafter OMBUDSMAN REVIEW].

20. WASH. REV. CODE § 26.44.020(16) (2004).

21. *Id.* § 26.44.030(3). Washington State law requires certain people, including police officers, teachers, nurses, and child care providers, to report suspected child abuse. *Id.* § 26.44.030(1)(a); see also *id.* § 26.44.030(1)(b) (applying reporting requirement to department of corrections personnel); *id.* § 26.44.030(1)(c) (applying reporting requirement to adults who live with severely abused child).

22. *Id.* § 26.44.050.

23. See PRACTICES AND PROCEDURES, *supra* note 17, § 2331C, at 2-14.

24. CHILDREN’S ADMINISTRATION, OPERATIONS MANUAL § 5521, at 5-13, available at

CPS workers and law enforcement officers often work together to investigate child sexual abuse cases. For example, in *State v. Biles*,<sup>25</sup> both a CPS caseworker and the local police chief interviewed a child who accused her father of sexual abuse.<sup>26</sup> Similarly, in *State v. Clark*,<sup>27</sup> a CPS worker and a detective questioned a mother and her daughter about the daughter’s alleged abuse by her babysitter.<sup>28</sup> In *State v. Jackson*,<sup>29</sup> a police detective, a deputy prosecutor, and a CPS worker conducted a group interview of a young girl who accused her cousin of abusing her.<sup>30</sup> The State prosecutes some cases based on testimony from CPS workers without using the testimony of law enforcement officers.<sup>31</sup>

Washington law regulates the way law enforcement officers and CPS workers conduct child sexual abuse investigations.<sup>32</sup> The legislature enacted these requirements after a highly publicized controversy in Wenatchee, Washington, in which CPS workers and law enforcement officers allegedly used improper child interviewing techniques.<sup>33</sup> First,

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[http://www1.dshs.wa.gov/ca/pubs/manuals\\_ops.asp](http://www1.dshs.wa.gov/ca/pubs/manuals_ops.asp) (last updated Nov. 9, 2004). As a “limited purpose law enforcement agency,” CPS has access to conviction and non-conviction information about alleged child abusers. *Id.*

25. 73 Wash. App. 281, 871 P.2d 159 (1994).

26. *Id.* at 282, 871 P.2d at 160.

27. 53 Wash. App. 120, 765 P.2d 916 (1989).

28. *Id.* at 121, 765 P.2d at 917; *see also* *State v. Henderson*, 48 Wash. App. 543, 545–47, 740 P.2d 329, 331–32 (1987) (stating sheriff and CPS worker interviewed child); *State v. Gitchel*, 41 Wash. App. 820, 824, 706 P.2d 1091, 1094 (1985) (stating CPS social worker and detective interviewed child).

29. 42 Wash. App. 393, 711 P.2d 1086 (1985).

30. *Id.* at 397, 711 P.2d at 1089.

31. *See, e.g.*, *State v. Young*, 62 Wash. App. 895, 897–99, 802 P.2d 829, 832–33 (1991) (stating CPS workers, pediatrician, and director of sexual assault center testified); *State v. Hunt*, 48 Wash. App. 840, 842, 741 P.2d 566, 568 (1987) (stating CPS caseworker and psychologist testified).

32. *See* Child Abuse Investigations, ch. 389, 1999 Wash. Laws 2157 (codified in scattered sections of WASH. REV. CODE §§ 26.44, 43.20A, 43.101, 74.14B).

33. *See* Andrew Schneider & Mike Barber, *Lives Ruined Because Lessons Ignored*, SEATTLE POST-INTELLIGENCER, Feb. 27, 1998, at A1, A11. The CPS workers and law enforcement officers were accused of being poorly trained in child interview techniques, neglecting to take verbatim written notes of questions and answers during the interviews, and shopping for therapists who would try to get the children to say they had been molested. *See id.* These investigations led to the prosecution of thirty-eight people for sexual abuse crimes in 1994 and 1995. OMBUDSMAN REVIEW, *supra* note 19, at i. In 1998, the Washington Office of the Family and Children’s Ombudsman, an independent office established to “protect children and families from potentially harmful acts or omissions by governmental agencies,” reviewed the involvement of CPS caseworkers and law enforcement officials in the Wenatchee investigations. OMBUDSMAN REVIEW, *supra* note 19, at i. The Office found that the police and CPS workers often collaborated and usually interviewed allegedly abused children together. OMBUDSMAN REVIEW, *supra* note 19, at 9.

the legislature required prosecutors, law enforcement agencies, and CPS to develop county protocols defining the agencies' roles in investigating child sexual abuse.<sup>34</sup> The legislature also required several groups, including DSHS and the Washington Association of Sheriffs and Police Chiefs, to design and implement a training program for those involved in interviewing alleged child victims of sexual abuse.<sup>35</sup>

*B. When Following State Protocols, CPS Workers Ask Allegedly Abused Children Structured Questions and Accurately Record the Children's Statements*

The Washington State Guidelines for Child Sexual Abuse Investigation Protocols, which serve as an example to assist counties in developing protocols,<sup>36</sup> stress the importance of structured investigations in child sexual abuse cases.<sup>37</sup> CPS must train its workers to conduct interviews that are objective, thorough, and "guided by research-based practices and standards."<sup>38</sup> The protocols also outline the goals in conducting investigative interviews of children.<sup>39</sup> The main goal is to "obtain a statement from a child . . . that will support accurate and fair decision-making in the criminal justice and child welfare systems."<sup>40</sup> CPS recognizes that the initial interview with a child may be critical to criminal hearings.<sup>41</sup> Therefore, CPS workers must avoid any action that a court could interpret as leading or influencing a child's statement<sup>42</sup> and must record near-verbatim statements made by alleged child abuse victims.<sup>43</sup>

In sum, CPS is a Washington State governmental agency that often works with law enforcement to investigate allegations of child sexual abuse. Following controversial incidents of improper child interviewing

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34. See WASH. REV. CODE § 26.44.180(2) (2004).

35. See WASH. REV. CODE § 43.101.224 (2004).

36. See PROTOCOLS, *supra* note 2, at 3.

37. See PROTOCOLS, *supra* note 2, at 3 (stating goal of protocols is to "[p]rovide a clear framework for planning and conducting an investigation").

38. PROTOCOLS, *supra* note 2, at 29; see also WASH. REV. CODE § 74.14B.010 (2004) (describing training requirements for children's services workers).

39. See PROTOCOLS, *supra* note 2, at 17.

40. PROTOCOLS, *supra* note 2, at 17.

41. PRACTICES AND PROCEDURES, *supra* note 17, § 2331D2d, at 2-15.

42. PRACTICES AND PROCEDURES, *supra* note 17, § 2331D2d, at 2-15.

43. See WASH. REV. CODE § 26.44.035(4) (2004); PRACTICES AND PROCEDURES, *supra* note 17, § 2331D2e, at 2-15.

techniques, the Washington State Legislature required counties to develop and follow protocols for child sexual abuse investigations. State protocols and CPS manuals require CPS workers to conduct structured and thorough interviews of children because CPS recognizes that statements from their interviews may be crucial evidence at trial.

## II. BEFORE *CRAWFORD*, WASHINGTON STATE COURTS ADMITTED CHILD HEARSAY STATEMENTS THROUGH CPS WORKER TESTIMONY

When a child’s hearsay statement is offered in testimony by a CPS worker in a criminal case, a court may not admit the statement at trial unless it fits a valid exception to the hearsay rule<sup>44</sup> and satisfies the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.<sup>45</sup> Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>46</sup> Under the hearsay rule, hearsay is not admissible into evidence unless an exception to the rule applies.<sup>47</sup>

Even if a statement fits a hearsay exception, the Confrontation Clause may require the statement’s exclusion.<sup>48</sup> Before *Crawford*, the U.S. Supreme Court in *Ohio v. Roberts*<sup>49</sup> laid out a “general approach” to the problem of determining whether a hearsay statement violates the Confrontation Clause.<sup>50</sup> The *Roberts* Court held that a court may admit an unavailable declarant’s out-of-court statement as long as the statement bears adequate “indicia of reliability,” which the court can infer if the evidence falls within a “firmly rooted hearsay exception” or has “particularized guarantees of trustworthiness.”<sup>51</sup>

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44. See FED. R. EVID. 802; WASH. R. EVID. 802.

45. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

46. FED. R. EVID. 801(c); WASH. R. EVID. 801(c).

47. FED. R. EVID. 802; WASH. R. EVID. 802. In the context of child sexual abuse cases, Washington prosecutors mainly rely on WASH. R. EVID. 803(a)(4) (excited utterance exception), WASH. R. EVID. 803(a)(2) (exception for statements for purposes of medical diagnosis or treatment), and WASH. REV. CODE § 9A.44.120 (2004) (Washington State child hearsay statute) to introduce child hearsay statements. See 13B SETH A. FINE & DOUGLAS J. ENDE, WASHINGTON PRACTICE § 2413, at 54–58 (2d ed. 1998).

48. See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (stating “historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay”).

49. 448 U.S. 56 (1980).

50. *Id.* at 65.

51. *Id.* at 66.



Under Washington State's child hearsay statute,<sup>52</sup> which the state legislature crafted to satisfy the *Roberts* test,<sup>53</sup> several Washington State courts admitted statements of unavailable children through CPS worker testimony.<sup>54</sup> For instance, in *State v. Young*,<sup>55</sup> the court held that the trial court properly admitted a child's statement to a CPS worker because the statement was reliable.<sup>56</sup> In fact, the court stated that the presence of CPS workers enhanced the reliability of the child's statements because these professionals are trained to objectively assess the merits of a child's allegation of sexual abuse, and their perceptions are not impaired by personal connections to the child.<sup>57</sup>

In sum, a child's statement offered through the testimony of a CPS worker to prove the truth of the matter asserted is hearsay. A hearsay statement is not admissible in a criminal trial if it violates the Confrontation Clause, even if it meets a hearsay exception. Under Washington State's child hearsay statute and the U.S. Supreme Court's ruling in *Roberts*, several Washington State courts admitted hearsay statements made by children to CPS workers.

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52. WASH. REV. CODE § 9A.44.120 (2004).

53. See *State v. Ryan*, 103 Wash. 2d 165, 170, 691 P.2d 197, 202 (1984) (stating "[t]he requirements for admission under RCW 9A.44.120 comport with the general approach utilized to test hearsay against confrontation guarantees").

54. See, e.g., *State v. Henderson*, 48 Wash. App. 543, 551, 740 P.2d 329, 334 (1987) (declining to establish per se rule that child's statement made to police officer or other sexual abuse professional is unreliable); *State v. Jackson*, 42 Wash. App. 393, 393-94, 397-98, 711 P.2d 1086, 1087, 1089 (1985) (holding child's hearsay statements—as testified to by police detective, deputy prosecutor, and CPS worker—reliable for Confrontation Clause purposes); *State v. Gitchel*, 41 Wash. App. 820, 828-29, 706 P.2d 1091, 1096 (1985) (providing guidance to trial court on retrial by noting statements to child's aunt, doctor, and CPS worker bore sufficient indicia of reliability). Because the child hearsay statute does not fall within a firmly rooted hearsay exception, Washington State courts analyzed the evidence admitted under the statute for Confrontation Clause purposes by using the particularized guarantees of trustworthiness prong of the *Roberts* test. See *Ryan*, 103 Wash. 2d at 170, 175, 691 P.2d at 202, 204. Washington State courts applied nine factors, known as the *Ryan* factors, to determine whether a child's hearsay statement was reliable under this prong. See *Ryan*, 103 Wash. 2d at 175-76, 691 P.2d at 205.

55. 62 Wash. App. 895, 802 P.2d 829 (1991).

56. *Id.* at 902-03, 802 P.2d at 834; see also *State v. Madison*, 53 Wash. App. 754, 759, 770 P.2d 662, 665 (1989) (holding trial court did not abuse discretion in admitting child's statements to CPS worker under Washington's child hearsay statute).

57. *Young*, 62 Wash. App. at 901, 802 P.2d at 834.

### III. *CRAWFORD V. WASHINGTON* CHANGED THE FACE OF CONFRONTATION CLAUSE LAW

On March 8, 2004, the U.S. Supreme Court issued its opinion in *Crawford v. Washington*, which overhauled Confrontation Clause jurisprudence.<sup>58</sup> Based on an examination of the Confrontation Clause’s history and text, the *Crawford* Court adopted the testimonial standard to evaluate whether hearsay statements of unavailable declarants are admissible under the Confrontation Clause.<sup>59</sup> Under this standard, the Confrontation Clause bars the admission of testimonial out-of-court statements unless the declarant is unavailable for trial and the defendant had a prior opportunity to cross-examine the declarant.<sup>60</sup> The Court declined to clearly define the term testimonial,<sup>61</sup> but held that the term applies to prior testimony at a preliminary hearing, at a former trial, or before a grand jury, as well as to statements taken by police officers during an interrogation.<sup>62</sup> The *Crawford* Court compared police officer interrogations to examinations by justices of the peace and concluded that witness statements taken during a police interrogation are testimonial.<sup>63</sup>

#### A. *Crawford Involved the Admission of a Statement Given to Police*

During Michael Crawford’s trial for assault and attempted murder,<sup>64</sup> prosecutors sought to admit his wife’s statements to the police.<sup>65</sup> Crawford stabbed Kenneth Lee after Lee allegedly attempted to rape Crawford’s wife.<sup>66</sup> Sylvia Crawford witnessed her husband stab Lee, and

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58. See, e.g., *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 757 (Cal. Ct. App. 2004) (stating *Crawford* overruled *Roberts*); Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 452 (stating “*Crawford* reflects a paradigm shift in the doctrine of the Confrontation Clause”). Chief Justice Rehnquist’s concurrence also noted that *Crawford* overruled *Roberts*. *Crawford v. Washington*, 541 U.S. \_\_\_, 124 S. Ct. 1354, 1374 (2004) (Rehnquist, C.J., concurring). When nontestimonial statements are at issue, however, lower courts have held that the *Roberts* test still applies. See *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004).

59. See *Crawford*, 124 S. Ct. at 1374.

60. See *id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1364.

64. *Id.* at 1357.

65. *Id.* at 1358.

66. *Id.* at 1357.

the police interrogated her twice after her husband's arrest.<sup>67</sup> During these interviews, she gave tape-recorded statements describing the incident.<sup>68</sup> Sylvia Crawford did not testify at trial because Washington State's spousal privilege bars spouses from testifying for or against each other without the other spouse's consent.<sup>69</sup> However, this privilege does not bar a spouse's out-of-court statement if it fits a hearsay exception.<sup>70</sup> The State argued that Sylvia Crawford's statements fit the hearsay exception for statements against penal interest and were therefore admissible.<sup>71</sup>

Crawford argued that admitting his wife's tape-recorded statements to the police would violate his Confrontation Clause right because he could not cross-examine his wife.<sup>72</sup> Because the statement-against-penal-interest exception is not "firmly rooted,"<sup>73</sup> the trial court examined Mrs. Crawford's statements under the particularized guarantees of trustworthiness prong of the *Roberts* test and held that the statements were trustworthy and therefore admissible.<sup>74</sup> The jury convicted Crawford of assault,<sup>75</sup> but the Washington State Court of Appeals reversed, offering several reasons why the tape-recorded statements were not trustworthy.<sup>76</sup> The Supreme Court of Washington reinstated Crawford's conviction, holding that the statements were trustworthy because Crawford's and his wife's statements overlapped.<sup>77</sup> The U.S. Supreme Court granted certiorari to determine whether the

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67. *Id.*

68. *Id.*

69. *Id.* (citing WASH. REV. CODE § 5.60.060(1) (1994)).

70. *Id.* at 1358.

71. *See* WASH. R. EVID. 804(b)(3). The prosecutors argued that Mrs. Crawford's statements were against her penal interest because she facilitated the assault when she led Mr. Crawford to Lee's apartment. *Crawford*, 124 S. Ct. at 1358.

72. *See Crawford*, 124 S. Ct. at 1358.

73. *See id.*; *see also* Lilly v. Virginia, 527 U.S. 116, 134 (1999) (noting "accomplices' confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence").

74. *See Crawford*, 124 S. Ct. at 1358. The Supreme Court noted that the trial court found several reasons why the statement was trustworthy: "Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or 'justified reprisal'; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a 'neutral' law enforcement officer." *Id.*

75. *Id.*

76. *Id.* ("The statement contradicted one she had previously given; it was made in response to specific questions; and at one point she admitted she had shut her eyes during the stabbing.")

77. *See id.*

State’s use of the tape-recorded statements violated Crawford’s Confrontation Clause right.<sup>78</sup> The U.S. Supreme Court also accepted Crawford’s invitation to reconsider the “original meaning” of the Confrontation Clause.<sup>79</sup>

*B. The Crawford Court Evaluated the Original Meaning of the Confrontation Clause and Announced the Testimonial Standard*

Based on the history of the Confrontation Clause,<sup>80</sup> the *Crawford* Court determined that the Framers adopted the Clause to eliminate the use of ex parte examinations as evidence against a criminal defendant.<sup>81</sup> Next, the Court examined the text of the Confrontation Clause and held that testimonial out-of-court statements are barred under the Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.<sup>82</sup> Finally, the Court reasoned by analogy and held that statements elicited in police officer interrogations were testimonial because they were comparable to ex parte examinations by justices of the peace.<sup>83</sup>

*1. The Framers Adopted the Confrontation Clause to Eradicate Certain Aspects of the Civil Law System, Including Private Examination of Witnesses by Government Officers*

Writing for a seven-person majority, Justice Scalia noted that the Court could not resolve *Crawford* by looking only to the U.S. Constitution’s text.<sup>84</sup> Therefore, he examined the historical underpinnings of the Confrontation Clause<sup>85</sup> and compared the English common law tradition to the continental civil law tradition.<sup>86</sup> The common law tradition valued live witness testimony subject to adversarial testing,<sup>87</sup> while civil law approved of private examination of

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78. *Id.* at 1359.

79. *See id.*

80. *Id.* at 1359–63.

81. *Id.* at 1363.

82. *See id.* at 1374.

83. *See id.* at 1364.

84. *Id.* at 1359.

85. *Id.* at 1359–63.

86. *Id.* at 1359.

87. *Id.*

witnesses by judicial officers.<sup>88</sup> These judicial officers or justices of the peace were not like today's U.S. judges; they performed functions similar to investigators and prosecutors.<sup>89</sup> A justice of the peace could interview an accuser privately and read the resulting statement aloud in court in lieu of the accuser's live testimony.<sup>90</sup>

The *Crawford* Court determined that the main evil the Framers sought to eradicate by adopting the Confrontation Clause was the civil-law tradition of using these *ex parte* examinations as evidence against the accused.<sup>91</sup> Before the Framers adopted the Confrontation Clause, colonial courts engaged in practices that were akin to the civil law tradition.<sup>92</sup> For example, a decade before the American Revolution, admiralty courts that presided over Stamp Act offenses took testimony by private judicial examination.<sup>93</sup> The Framers viewed these judicial examinations with contempt because they knew that "judges, like other government officers, could not always be trusted to safeguard the rights of the people . . ."<sup>94</sup> With this much power in the hand of justices, many colonies reacted by passing declarations of rights that included provisions guaranteeing confrontation rights.<sup>95</sup> Additionally, around the time of the adoption of the Confrontation Clause in 1791, U.S. courts held that depositions of a witness against an accused could be read at trial only if the accused had an opportunity to cross-examine the witness.<sup>96</sup> These sentiments eventually led the Framers to adopt the

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88. *Id.* This is known as *ex parte* examination. "Ex parte" means "[d]one or made at the instance and for the benefit of one party only, and without notice to or argument by, any person adversely interested." BLACK'S LAW DICTIONARY 616 (8th ed. 2004).

89. *See Crawford*, 124 S. Ct. at 1365.

90. *See id.* at 1360 (describing Sir Walter Raleigh's trial).

91. *Id.* at 1363.

92. *See id.* at 1362.

93. *Id.*

94. *Id.* at 1373.

95. *See id.* at 1362.

96. *Id.* at 1363 (citing *State v. Webb*, 2 N.C. 103 (1 Hayw. 1794)). Similarly, by 1791 in England, even though statutes authorized the examination of witnesses by justices of the peace, *see, e.g., An Act Appointing an Order to Justices of Peace for the Bailement of Prisoners*, 1554, 1 & 2 Phil. & M., c. 13 (Eng.) (stating when person apprehended for felony is bailed, justice shall first take examination in writing), several English courts had held that prisoners in felony cases must have an opportunity to cross-examine the witnesses against them. *See The King v. Dingler*, 168 Eng. Rep. 383, 383-84 (K.B. 1791) (holding deposition taken by justice of peace from prisoner's wife could not be read at trial because prisoner was not present to cross-examine her); *The King v. Woodcock*, 168 Eng. Rep. 352, 353-54 (K.B. 1789) (holding that, although deposition taken by justice of peace from prisoner's wife would normally be inadmissible because prisoner had no opportunity to cross-examine her, it could be admitted as dying declaration); *The King v. Radbourne*, 168 Eng. Rep. 330,

Confrontation Clause.<sup>97</sup>

## 2. *The Crawford Court Adopted the Testimonial Standard*

After reviewing the history behind the Confrontation Clause, the Court examined its text and announced the testimonial standard.<sup>98</sup> The *Crawford* Court noted that the Confrontation Clause applies to “witnesses” against the accused.<sup>99</sup> Witnesses are those who “bear testimony,”<sup>100</sup> and “testimony” is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>101</sup> Before *Crawford*, several academics and members of the U.S. Supreme Court argued for the adoption of a testimonial standard and offered definitions of what it would include.<sup>102</sup> The Court did not adopt any of these definitions or articulate a clear definition of what would be considered testimonial,<sup>103</sup> but stated that, regardless of the definition of “testimonial,” prior testimony at a preliminary hearing, at a former trial, or before a grand jury, as well as statements taken by police officers during an interrogation, qualify as testimonial statements.<sup>104</sup>

## 3. *Comparing Interrogations by Police Officers to Examinations by Justices of the Peace, the Crawford Court Held that Witness Statements Taken During an Interrogation Are Testimonial*

The *Crawford* Court held that a statement taken by a police officer during an interrogation is testimonial because it is strikingly similar to an examination conducted by a justice of the peace in England.<sup>105</sup> In its

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332–33 (K.B. 1787) (holding victim’s deposition could be read at trial because prisoner was present during taking of deposition and therefore had opportunity to cross-examine victim).

97. See *Crawford*, 124 S. Ct. at 1363.

98. See *id.* at 1364.

99. *Id.*

100. *Id.* (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

101. *Id.*

102. See *id.* For example, the Court cited this formulation offered in the National Association of Criminal Defense Lawyers’ amicus brief: “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.” *Id.* (quoting Brief of Amici Curiae National Association of Criminal Defense Lawyers et al. at 3, *Crawford v. Washington*, 541 U.S. \_\_\_, 124 S. Ct. 1354 (2004) (No. 02-9410)).

103. See *id.* at 1374.

104. *Id.*

105. See *id.* at 1364.

comparison, the Court noted the formal nature of both police interrogations and justice of the peace examinations.<sup>106</sup> The *Crawford* Court also described the danger inherent when government employees, such as police officers and justices of the peace, elicit testimonial evidence for trial.<sup>107</sup>

The *Crawford* Court noted that “[a]n accuser who makes a *formal statement* to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>108</sup> The *Crawford* Court did not define what constitutes a “formal” statement, but the Court noted in dicta that English statutes required justices of the peace to examine suspects and witnesses in formal proceedings and to certify the results of the examinations to the court.<sup>109</sup> The *Crawford* Court determined that statements given in police interrogations are testimonial because they “bear a striking resemblance” to these justice-of-the-peace examinations.<sup>110</sup> The Court did not define “interrogation,” but noted that it includes recorded statements knowingly given in response to structured police questioning.<sup>111</sup>

The *Crawford* opinion also stressed that the government employs both police officers and justices of the peace.<sup>112</sup> This consideration of government involvement in the elicitation of testimonial statements is rooted in the Framers’ purpose behind adopting the Confrontation Clause—to safeguard people against governmental abuse by those who wield prosecutorial power.<sup>113</sup> Today, investigative functions are conducted mainly by the police,<sup>114</sup> but before professional police forces existed, other government officials, like justices of the peace and coroners, performed investigations and took witness statements.<sup>115</sup> The distinction between the titles of police officer, coroner, and justice of the

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106. *See id.* at 1364–65 & n.4.

107. *See id.* at 1365.

108. *Id.* at 1364 (emphasis added).

109. *Id.* at 1360.

110. *Id.* at 1364; *cf.* *United States v. Saner*, 313 F. Supp. 2d 896, 901 (S.D. Ind. 2004) (noting prosecutors are more analogous to justices of peace in England than to police officers).

111. *Crawford*, 124 S. Ct. at 1365 n.4; *see also Saner*, 313 F. Supp. 2d at 901 (determining that because of *Crawford*’s broad use of term “interrogation,” courts should not interpret “interrogation” in Confrontation Clause context by same strict standards used in *Miranda* context).

112. *See Crawford*, 124 S. Ct. at 1365.

113. *See id.* at 1367 n.7, 1373.

114. *Id.* at 1365.

115. *See id.* at 1361 n.2, 1365.

peace is not dispositive; because all three officers are employed by the government and are involved in the production of testimonial evidence, they present the same risk of bias against the defendant, regardless of title.<sup>116</sup>

In sum, *Crawford* held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the declarant is unavailable for trial and the defendant had a prior opportunity to cross-examine the declarant. Based on the history of the Confrontation Clause, the Court concluded that that the Framers adopted the Clause to eliminate the use of ex parte examinations as evidence against an accused. The Court adopted the testimonial standard by examining the text of the Confrontation Clause and holding that a statement made during an interrogation by a police officer is testimonial. The Court reached this conclusion by comparing police officer interrogations to examinations conducted by justices of the peace in England.

#### IV. OTHER STATE COURTS HAVE ADDRESSED WHETHER STATEMENTS ELICITED BY CPS WORKERS ARE TESTIMONIAL UNDER *CRAWFORD*

Since the *Crawford* decision, several state courts have considered questions related to whether the statement of a child to a CPS worker is testimonial.<sup>117</sup> These courts have performed fact-specific inquiries and have focused on different parts of the *Crawford* opinion.<sup>118</sup> For example, in *People v. Geno*,<sup>119</sup> the court asked whether the child gave the statement to a government employee,<sup>120</sup> while in *Snowden v. State*<sup>121</sup> and *State v. Courtney*,<sup>122</sup> the courts focused on the interviewers' intent to develop testimony for trial.<sup>123</sup> Unlike these three cases, the court in *People v. Sisavath*<sup>124</sup> considered whether an objective witness would

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116. *See id.* at 1365.

117. *See generally* *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004); *Snowden v. State*, 846 A.2d 36 (Md. Ct. Spec. App. 2004); *People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004); *State v. Courtney*, 682 N.W.2d 185 (Minn. Ct. App. 2004).

118. *See Sisavath*, 13 Cal. Rptr. 3d at 758; *Snowden*, 846 A.2d at 47; *Geno*, 683 N.W.2d at 692; *Courtney*, 682 N.W.2d at 196.

119. 683 N.W.2d 687 (Mich. Ct. App. 2004).

120. *See id.* at 692.

121. 846 A.2d 36 (Md. Ct. Spec. App. 2004).

122. 682 N.W.2d 185 (Minn. Ct. App. 2004).

123. *See Snowden*, 846 A.2d at 47; *Courtney*, 682 N.W.2d at 196.

124. 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004).



reasonably believe that the child's statement would be available for use at a later trial.<sup>125</sup>

A. *The People v. Geno Court Focused on Whether the Child Gave the Statement to a Government Employee*

In *People v. Geno*, the father of an allegedly abused child called the state's Child Protective Services, which arranged for the child to be interviewed at the Children's Assessment Center.<sup>126</sup> At the interview, the interviewer noticed blood in the child's underpants and asked the child if she "had an owie."<sup>127</sup> The child answered that she did have an owie and said that the defendant hurt her "here," pointing to her vaginal area.<sup>128</sup> Even though the Court of Appeals of Michigan did not have to decide the question,<sup>129</sup> the court noted that the child's statement to the interviewer was not testimonial under *Crawford*.<sup>130</sup> In reaching this decision, the court relied on the fact that the interviewer was not a government employee and that the child's answer to whether she had an "owie" was not sufficiently similar to ex parte in-court testimony.<sup>131</sup>

B. *Other State Courts Have Held that Child Statements Were Testimonial Where Government Employees Elicited the Statements to Develop a Case Against the Defendants*

In *Snowden v. State*, the Court of Special Appeals of Maryland held that children's statements to a CPS worker were testimonial because the CPS worker interviewed the children to gather testimony for trial.<sup>132</sup> The CPS worker in *Snowden* was a licensed social worker employed by the

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125. *Id.* at 758.

126. *People v. Geno*, 683 N.W.2d 687, 689 (Mich. Ct. App. 2004). The Children's Assessment Center is a private, non-profit agency founded in 1992. Children's Assessment Center, History of CAC, at [http://www.cac-kent.org/general\\_information.html](http://www.cac-kent.org/general_information.html) (last visited Feb. 4, 2005). The agency's personnel include CPS workers, law enforcement officers, counselors, and medical providers. *See id.*

127. *Geno*, 683 N.W.2d at 689.

128. *Id.*

129. *See id.* at 692. The court did not decide the question because the defendant failed to establish that *Crawford* would apply retroactively to him. *Id.*

130. *Id.*

131. *See id.*; cf. *United States v. Savoca*, 335 F. Supp. 2d 385, 392-93 (S.D.N.Y. 2004) (noting all *Crawford*'s definitions of testimonial contain "official" element because each statement was made to authority figure in authoritarian environment).

132. *See Snowden v. State*, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004).

county government.<sup>133</sup> To reach the conclusion that the statement was testimonial, the appellate court relied on the trial court’s determination that the CPS worker interviewed the children “for the expressed purpose of developing their testimony” under a Maryland statute that provides for the testimony of social workers in lieu of children in sexual abuse cases.<sup>134</sup>

Similarly, in *State v. Courtney*, the Court of Appeals of Minnesota also held that a child’s statement was testimonial because the child protection worker interviewed the child in preparation for the case against the defendant.<sup>135</sup> While investigating a domestic violence incident involving the defendant and his former girlfriend, a police officer arranged for a child protection worker from the county human services department to interview the girlfriend’s six-year-old daughter.<sup>136</sup> As the child protection worker interviewed the child, the investigating officer watched the interview via satellite television and interrupted the interview to ask a question.<sup>137</sup> The district court admitted a videotape of this interview into evidence over the objection of defense counsel.<sup>138</sup> On appeal, the defendant argued that the district court abused its discretion by admitting the child’s hearsay statement.<sup>139</sup> The Court of Appeals of Minnesota held that the child’s statement was testimonial because the circumstances of the interview showed that it was conducted to build a case against the defendant.<sup>140</sup>

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133. *Id.* at 39.

134. *Id.* at 47. According to this statute, statements made to physicians, psychologists, nurses, social workers, or various school employees in the course of their professional duties may be admissible in lieu of a child’s testimony in sexual abuse cases. *See id.* at 39–42 (citing MD. CODE ANN., CRIM. PROC. § 11-304 (2002)).

135. *State v. Courtney*, 682 N.W.2d 185, 196 (Minn. Ct. App. 2004).

136. *Id.* at 189–90.

137. *Id.* at 196. The officer directed the child protection worker to ask the child to draw the guns she saw the defendant allegedly use to threaten her mother. *Id.*

138. *Id.* at 191.

139. *Id.* at 189.

140. *Id.* at 196 (stating also that statement should not have been admitted because child was unavailable for trial and defendant did not have opportunity to cross-examine her); *cf.* *United States v. Mikos*, No. 02 CR 137-1, 2004 WL 1631675, at \*6 (N.D. Ill. July 16, 2004) (holding statements made by adult murder victim to United States Department of Health and Human Services Agents prior to her death were testimonial because agents interviewed victim “to gather information for potential use against [the defendant] at trial”).

C. *The People v. Sisavath Court Focused on Whether an Objective Witness Would Reasonably Believe the Child's Statement Would Be Available for Use at Trial*

Contrary to the state courts discussed above, the court in *People v. Sisavath* stated that the government's intent in conducting an interview of a child, the location of the interview, and the identity of the interviewer's employer were irrelevant to a testimonial determination.<sup>141</sup> Instead, the *Sisavath* court relied on language in *Crawford* implying that statements are testimonial if circumstances would lead an "objective witness reasonably to believe that the statement would be available for use at a later trial."<sup>142</sup> In *Sisavath*, the child made a statement to a trained interviewer at Fresno County's Multidisciplinary Interview Center (MDIC) in the presence of an investigator from the district attorney's office.<sup>143</sup> The court rejected the prosecution's assertion that the statement was not testimonial because the interviewer was not a government employee and the MDIC was a neutral location.<sup>144</sup> The *Sisavath* court held that it would be reasonable for an objective observer to expect that the child's statements would be used in a prosecution because the interview took place after the state filed the complaint and information, the prosecuting district attorney and an interviewer from the district attorney's office were present at the interview, and a forensic interview specialist<sup>145</sup> conducted the interview.<sup>146</sup>

In sum, several state courts have ruled on questions related to whether the statement of an unavailable child is testimonial under *Crawford*, but

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141. *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 (Cal. Ct. App. 2004).

142. *Id.* at 757 (quoting *Crawford v. Washington*, 541 U.S. \_\_\_, 124 S. Ct. 1354, 1364 (2004)).

143. *Sisavath*, 13 Cal. Rptr. 3d at 756. One of the purposes of conducting an MDIC interview is to provide an investigative tool for criminal prosecutions. *See People v. Warner*, 14 Cal. Rptr. 3d 419, 429 (Cal. Ct. App. 2004).

144. *Sisavath*, 13 Cal. Rptr. 3d at 758. The court also rejected arguments that the interview might have been intended for a therapeutic purpose and that the interview did not fit into a testimonial category enumerated by the *Crawford* court (prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and statements made during a police interrogation). *Id.*

145. For a description of how forensic interviewers generally prepare for interviews by gathering information about alleged child abuse incidents and structuring their questioning around different hypotheses about the meaning and sources of abuse allegations, see DEBRA A. POOLE & MICHAEL E. LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE FOR HELPING PROFESSIONALS 109 (1998).

146. *Sisavath*, 13 Cal. Rptr. 3d at 758. The court also noted that the Supreme Court likely meant the "objective witness" to be an objective observer of the interview, not an objective witness in the same category of persons as the actual witness, which in this case was a four-year-old child. *See id.* at 758 n.3.

they have not developed a clear rule. These courts have performed fact-specific inquiries and have focused on different parts of the *Crawford* opinion. These state courts have looked to whether the child gave the statement to a government employee, the interviewers’ intent to develop testimony for trial, and whether an objective witness would reasonably believe that the child’s statement would be available for use at a later trial.

V. TESTIMONIAL STATEMENTS ARE FORMAL AND MADE IN CONNECTION WITH A GOVERNMENT INVESTIGATION

Washington State courts should determine whether a child’s statement to a CPS worker is testimonial under *Crawford* by analyzing whether the statement is formal and whether the child gave the statement in connection with a government investigation.<sup>147</sup> Using these two factors, Washington State courts should no longer admit statements of unavailable children like D.M. because these statements are testimonial.<sup>148</sup>

A. *Washington State Courts Should Determine Whether a Child’s Statements Are Testimonial by Considering Two Factors*

Based on the language of *Crawford* and case law from other states,<sup>149</sup> Washington State courts should use two factors to analyze whether a child’s statement to a CPS worker is testimonial. First, the court should assess the formality of the child’s statement by looking at whether the interviewer asked structured questions and whether the interviewer preserved the statement for use at a future court proceeding.<sup>150</sup> Second, the court should determine whether the child made the statement in connection with a government investigation by analyzing whether the interviewer was a government employee or agent and whether the questioning occurred after the government received an allegation of abuse.<sup>151</sup>

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147. See *infra* Part V.A.

148. See *infra* Part V.B.

149. See *Crawford v. Washington*, 541 U.S. \_\_\_, 124 S. Ct. 1354, 1357, 1359, 1361, 1364–65, 1367, 1373–74 (2004); *Sisavath*, 13 Cal. Rptr. 3d at 756–58; *Snowden v. State*, 846 A.2d 36, 39, 47 (Md. Ct. Spec. App. 2004); *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004); *State v. Courtney*, 682 N.W.2d 185, 190–92, 196 (Minn. Ct. App. 2004).

150. See *infra* Part V.A.1.

151. See *infra* Part V.A.2.

1. *Washington State Courts Should First Assess the Formality of the Child's Statement*

To determine whether a child's statement to a CPS worker is testimonial, courts should first analyze whether the statement is formal.<sup>152</sup> The *Crawford* Court stated in dicta that an accuser's *formal* statement, as opposed to a casual remark, is testimonial.<sup>153</sup> A child's statement is formal if the child gives the statement in response to the interviewer's structured questioning and the interviewer preserves the statement for future use at a court proceeding.<sup>154</sup>

In order for a statement to be formal, the child must give the statement in response to structured questioning. The *Crawford* Court noted in dicta that testimonial statements given in judicial proceedings—such as preliminary hearings, grand jury proceedings, or trials—are elicited through prepared examinations.<sup>155</sup> Additionally, Mrs. Crawford gave her testimonial formal statement in response to police interrogation, which the *Crawford* Court defined as structured questioning.<sup>156</sup> Accordingly, to determine whether a child's statement to a CPS worker is testimonial, a court should first decide whether the child gave the statement in response to structured questioning.

The structured questioning requirement is supported by other state courts that have addressed this question.<sup>157</sup> For example, the court in *People v. Geno* held that a child's statement in response to the interviewer's question of whether the child had an "owie" was not testimonial.<sup>158</sup> The loose nature of the question was one reason why the child's statement was not testimonial.<sup>159</sup>

The second requirement for formality is the interviewer's preservation

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152. See *Crawford*, 124 S. Ct. at 1364.

153. *Id.*

154. See *infra* notes 155–63 and accompanying text.

155. See *Crawford*, 124 S. Ct. at 1364–65, 1374.

156. See *id.* at 1365 n.4.

157. See *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004); cf. *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 757 (Cal. Ct. App. 2004) (noting person conducting child's interview was forensic interview specialist). Forensic interviewers generally prepare for their interviews by gathering information about the alleged incident and structuring their questioning around different hypotheses about the meaning and sources of abuse allegations. See POOLE & LAMB, *supra* note 145, at 109.

158. *Geno*, 683 N.W.2d at 692.

159. See *id.*

of a child’s statement for possible use in a future judicial proceeding.<sup>160</sup> Prior to 1791, English justices of the peace recorded statements of witnesses, sometimes for the purpose of reading these statements in lieu of live testimony.<sup>161</sup> As the *Crawford* Court noted, one of the modern equivalents of this practice is the tape-recording of a statement to police interrogators.<sup>162</sup> In holding the statements of children testimonial, both the *Sisavath* and *Courtney* courts noted that the interviews were preserved on videotape.<sup>163</sup>

2. *Washington State Courts Should Then Determine Whether the Child Gave the Statement in Connection with a Government Investigation*

The second factor Washington State courts should consider when determining whether a child’s statement to a CPS worker is testimonial is whether the interviewer elicited the child’s statement in connection with a government investigation. This factor has two elements. First, the interviewer must be a government employee or agent.<sup>164</sup> Second, the child must give the statement after the government receives an allegation of abuse.<sup>165</sup>

A government employee or agent must elicit a child’s statement in order for the statement to be testimonial.<sup>166</sup> As the *Crawford* Court noted, the rationale behind this requirement of government involvement is the Framers’ belief, as evidenced by the Confrontation Clause, that government officers could not always be trusted to protect the rights of the people.<sup>167</sup> The danger of abuse is especially prevalent when government officers are involved in the production of testimony to be used at trial.<sup>168</sup> In determining whether a child’s statement to a social worker is testimonial, state courts examine whether the interviewer is a

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160. See *Crawford*, 124 S. Ct. at 1359, 1361, 1365 & n.4; *Sisavath*, 13 Cal. Rptr. 3d at 756; *State v. Courtney*, 682 N.W.2d 185, 196 (Minn. Ct. App. 2004).

161. *Crawford*, 124 S. Ct. at 1359, 1361.

162. See *id.* at 1365 & n.4.

163. See *Sisavath*, 13 Cal. Rptr. 3d at 756; *Courtney*, 682 N.W.2d at 196.

164. See *infra* notes 166–72 and accompanying text.

165. See *infra* notes 173–77 and accompanying text.

166. See *Crawford*, 124 S. Ct. at 1364 (“An accuser who makes a formal statement to government officers bears testimony.”).

167. *Id.* at 1373.

168. See *id.* at 1367 n.7.

government officer.<sup>169</sup> For example, the *Geno* court noted that the child's statement to the interviewer was not testimonial in part because the interviewer was not a government employee.<sup>170</sup>

If the interviewer is not a government employee, but a strong government influence is present during the interview, a child's statement may still be testimonial.<sup>171</sup> In *Sisavath*, a California court held that a statement given to a non-governmental employee was testimonial in part because of the presence of the district attorney and an interviewer from the district attorney's office.<sup>172</sup> Thus, a child's statement may also be testimonial where the interviewer is not a government employee but pervasive government influence is present.

In order for a statement to be testimonial, a child must also give the statement after the government receives an allegation of abuse because of the special dangers present when government officers are involved in the production of statements "with an eye toward trial."<sup>173</sup> The police officers in *Crawford* were already gathering evidence for prosecution when they questioned Mrs. Crawford after her husband's arrest.<sup>174</sup> State courts have also noted the timing of the questioning and its relationship to a pending prosecution.<sup>175</sup> For example, in *Sisavath*, the interviewer questioned the child after the state initiated prosecution and the prosecutor and the prosecutor's investigator attended the interview.<sup>176</sup> The court found that these circumstances made it reasonable for one to expect that the interview would be available for use at trial.<sup>177</sup>

In sum, Washington State courts should evaluate whether a child's

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169. See *Snowden v. State*, 846 A.2d 36, 39 (Md. Ct. Spec. App. 2004) (noting interviewer was licensed social worker for Montgomery County Department of Health and Human Services); *State v. Courtney*, 682 N.W.2d 185, 190–91 (Minn. Ct. App. 2004) (noting child was interviewed by child protection worker from Winona County Human Services Department).

170. *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004).

171. See *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 757 (Cal. Ct. App. 2004).

172. *Id.*

173. *Crawford*, 124 S. Ct. at 1367 n.7.

174. See *id.* at 1357.

175. See *State v. Courtney*, 682 N.W.2d 185, 190–92 (Minn. Ct. App. 2004) (noting, where child gave statement regarding altercation between mother and mother's boyfriend, that interview of child occurred after police had already been called and mother had filed order for protection against boyfriend); cf. *Snowden v. State*, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004) (holding that because Maryland statute authorized substitution of CPS worker's testimony for child's, CPS workers were necessarily questioning children for express purpose of developing child's testimony).

176. *Sisavath*, 13 Cal. Rptr. 3d at 758.

177. *Id.*

statement to a CPS worker is testimonial under *Crawford* by determining whether the statement is formal and whether the child gave the statement in connection with a government investigation. A statement is formal if a child gives it in response to structured questioning and the interviewer preserves it for future use at a court proceeding. A statement is given in connection with a government investigation if a government employee or agent elicits the statement after someone reports an allegation of abuse to the government.

*B. Under Crawford, D.M.’s Statement Is Testimonial*

Applying these factors to the D.M. hypothetical, D.M.’s statement is testimonial because her statement was formal and she gave it in connection with a government investigation. Specifically, D.M.’s statement was formal because she gave it in response to a CPS worker’s structured questioning, and the CPS worker preserved this statement for possible use at a future court proceeding by taking near-verbatim notes.<sup>178</sup> D.M. gave her statement in connection with a government investigation because the CPS worker was a government employee and D.M. gave her statement after her mother reported the alleged abuse to the local sheriff’s office and to CPS.<sup>179</sup>

D.M. gave her statement in response to the CPS worker’s structured questioning. CPS workers must adhere to the Washington State Guidelines for Child Sexual Abuse Investigation Protocols.<sup>180</sup> CPS interviews are structured and thorough,<sup>181</sup> like police interrogations.<sup>182</sup> Because the CPS worker who interviewed D.M. followed the Washington Protocols, D.M. gave her statement in response to structured questioning.

The CPS worker also preserved D.M.’s statements for use at a possible future court proceeding. Because CPS workers recognize that the statements they take from children may be critical at trial,<sup>183</sup> they take near-verbatim statements from allegedly abused children.<sup>184</sup>

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178. See *infra* notes 180–84 and accompanying text.

179. See *infra* notes 185–88 and accompanying text.

180. See PROTOCOLS, *supra* note 2, at 1.

181. See PROTOCOLS, *supra* note 2, at 29.

182. See *Crawford v. Washington*, 541 U.S. \_\_\_, 124 S. Ct. 1354, 1365 n.4 (2004).

183. See PRACTICES AND PROCEDURES, *supra* note 17, § 2331D2d, at 2-15.

184. See WASH. REV. CODE § 26.44.035(4) (2004); PRACTICES AND PROCEDURES, *supra* note 17, § 2331D2e, at 2-15.



Therefore, D.M.'s statements are formal because D.M. gave her statements in response to structured questioning and the CPS worker preserved these statements for use at a future court proceeding.

Like the police officers and coroners discussed in *Crawford*,<sup>185</sup> the CPS worker who elicited D.M.'s statement is a government employee.<sup>186</sup> D.M. also made her statements after her mother filed an allegation of abuse with the government; therefore, the government conducted the interview with an eye toward trial. In *Crawford*, police questioned Crawford's wife twice after they arrested her husband,<sup>187</sup> and when the interviewer questioned the child in *Sisavath*, the prosecutor had already initiated the prosecution against the defendant.<sup>188</sup> Similarly, in the D.M. hypothetical, the CPS worker interviewed D.M. after her mother reported the alleged abuse to the sheriff's office and CPS.

In sum, Washington State courts should determine whether a statement is testimonial by analyzing whether the statement was formal and whether the child gave the statement in connection with a government investigation. Applying these two factors to the facts from the D.M. hypothetical, D.M.'s statement was formal because the CPS worker asked structured questions and the CPS worker preserved D.M.'s statement by taking near-verbatim notes. D.M. gave her statement in connection with a government investigation because CPS workers are government employees and the CPS worker interviewed D.M. after her mother reported an allegation of abuse to CPS and the local sheriff's office. Because D.M.'s statement is testimonial and D.M. is not available for cross-examination, a Washington State court should not admit her statement to the CPS worker at trial.

## VI. CONCLUSION

After *Crawford v. Washington*, an unavailable child's statement to a CPS worker may no longer be admissible. The *Crawford* Court held that the Confrontation Clause bars testimonial out-of-court statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Washington State courts should analyze whether a child's statement to a CPS worker is testimonial by determining whether the statement was formal and whether the child

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185. See *supra* notes 115–16 and accompanying text.

186. See WASH. REV. CODE § 43.20A.030 (2004).

187. *Crawford*, 124 S. Ct. at 1357.

188. *Sisavath*, 13 Cal. Rptr. 3d 753, 758 (Cal. Ct. App. 2004).

gave the statement in connection with a government investigation. These factors are based on language in *Crawford* and are supported by case law from other jurisdictions that have addressed questions similar to whether statements of allegedly abused children to CPS or other social workers are testimonial under *Crawford*. Applying these factors, statements made by children like D.M. to CPS workers, which Washington State courts likely would have admitted before *Crawford*, are now most likely testimonial. Therefore, if the child is unavailable, the child’s statements should not be admissible at trial unless the defendant had an opportunity to cross-examine the child.

