Legal Letters by Andrew Agatston – The Legal List 12/21/12

A Direct Crawford Attack on the Forensic Interview

Case: State v. Cameron, Supreme Court of Connecticut, SC 18829, (Decided November 20, 2012)

Facts: During 2006 and 2007, when the victim was 2 1/2 to 3 years old, she spontaneously reported to her mother that the Defendant (her father) "kisses me in the butt." Her allegations were reported to the department of children and families.

DCF referred the victim to a children's advocacy center where she was interviewed by an MDT. The CAC director conducted a forensic interview of the child, while other team members including a psychologist employed at the CAC and the investigating detective observed the interview behind one-way glass.

During the forensic interview, the victim described numerous instances of abuse, and also demonstrated abuse by use of anatomically detailed dolls.

Following the forensic interview, the victim made similar statements during her therapy sessions, including spontaneous reports of abuse.

By the time the case proceeded to trial, the victim was 6 years old. She testified that she remembered the forensic interview taking place, but not its content. She testified she did not remember anything from when she was 3 years old. She testified that the defendant was a "nice daddy" and has never been a "bad daddy." The defendant chose not to cross-examine the victim.

Following the victim's testimony, the trial court ruled that her disclosures during her forensic interview were admissible under Crawford. In ruling the forensic interview admissible under

Crawford, the trial court rejected the Defendant's claim that the forensic interview was "testimonial" or "made in preparation for a legal proceeding."

Note: Have your legal counsel of your choice review the appellate decisions in your state's jurisdiction. The above paragraph, as we have seen from prior Legal Letters, is opposite to the rules in many other states, including Georgia's where I practice.

Further, the Connecticut trial court determined that the victim was "available" for purposes of cross-examination under Crawford, despite her lack of memory in court of the forensic interview. The jury found the Defendant guilty of two counts of risk of injury to a child. The Defendant appealed, directly attacking the forensic interview, arguing that it should not have been introduced into evidence.

Result: Conviction affirmed.

Discussion: There are two areas of analysis to cover. First, we know the hearsay harm of playing a forensic interview DVD to the jury. The child is not there testifying and subject to cross-examination while her statements are being played to the jury. Thus, there needs to be a legal hook -- an evidentiary exception to the general bar against hearsay -- to allow the playing of the DVD. In this case, it was the Connecticut "tender years" exception to the hearsay rule.

So one part of the Connecticut Supreme Court's analysis was to determine whether the forensic interview was admissible under the tender years exception, which had to be sifted through Crawford's ban of "testimonial hearsay." That's a lot of heavy lifting! The second part of the Court's analysis was whether the Defendant's constitutional rights under Crawford were violated because the victim was "unavailable" for cross-examination because she had a lack of memory of certain matters at trial, three years after she was abused.

1. "Unavailability." The Connecticut Supreme Court took the second matter first. Before examining, let's go through the Rules of the Road regarding hearsay in criminal trials and its interaction with Crawford. These are rules that CACs and their MDTs need to understand.

First, as it relates to any trial -- civil or criminal -- hearsay statements are inadmissible unless they fall into a recognized exception to the hearsay rule.

As it relates to criminal trials, an admission of a hearsay statement against the Defendant's interests, even one that falls into a recognized exception to the hearsay rule, is further limited due to the Defendant's confrontation rights under the sixth amendment. That was the crux of the Crawford v. Washington analysis. Therefore, we have the Crawford rule, as explained by the Connecticut Supreme Court in today's case: Under Crawford, "hearsay statements of an unavailable witness that are testimonial in nature may be admitted in accordance with the confrontation clause only if the defendant previously has had the opportunity to cross examine the unavailable witness.

"Nontestimonial statements, however, are not subject to the confrontation clause and may be admitted under state rules of evidence. . . Thus, the threshold inquiries that determine the nature of the claim are whether the statement was hearsay, and if so, whether the statement was testimonial in nature."

Recall that the Defendant argued that the victim was "functionally unavailable" because she could not remember what she said during the forensic interview. Thus, she could not be cross examined in a manner that upheld the Defendant's constitutional confrontation rights, according to the Defendant.

The Connecticut Supreme Court rejected the argument. Its rule is clear and persuasive: "Crawford makes clear . . . that when the (victim) appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements . . .

It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the (victim) testifies to the same matters in court. The (confrontation) clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."

2. Is the forensic interview admissible under the state's "tender years" evidence exception?

Once the Supreme Court determined that the Defendant's confrontation rights were not violated, it had to determine whether the forensic interview was admissible under Connecticut's rules of evidence, specifically the "tender years exception. But interestingly, it didn't decide!

The Defendant on appeal wanted the Connecticut Supreme Court to decide that the forensic interview was testimonial in nature, and therefore it would be barred and inadmissible under the state's "tender years" exception, which prohibits statements "made in preparation of a legal proceeding."

As such, the Defendant wanted the state's Supreme Court to side with what seems to be the majority opinion in states across the U.S. For example, today's opinion cited the appellate decision in Texas, Coronado v. State, 251 S.W.3d 315 (2011), that stated: "Virtually all courts that have reviewed the admissibility of forensic child-interview statements or videotapes . . . have found them to be 'testimonial' and inadmissible unless the child testifies at trial or the defendant had a prior opportunity for cross-examination."

In today's opinion, the Connecticut wrote, "[W]e leave this significant constitutional issue for another day." Instead, it found that the forensic interview was properly introduced for another reason: It was admissible as a prior inconsistent statement by the victim!

For the remainder of this Legal Letter, instead of analyzing the elements of a prior inconsistent statement (the competent and qualified lawyer of your organization's choice will be glad to research it for you), I want to discuss one of the directions where I think we're heading with

Crawford and child hearsay, including child hearsay contained in forensic interview tapes. The rules in many states are unsettled -- a great example is today's case from Connecticut -- and we as Legal Eagles are going to have to remain vigilant in being Crawford-ready.

First, recognize and understand the term testimonial as used repeatedly in today's Legal Letter and what the Confrontation Clause requires of it. The U.S. Supreme Court says statements are testimonial when "the primary purpose on the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [Davis v. Washington, 547 U.S. 813 (2006)] The Confrontation Clause prohibits the "admission of testimonial statements of a witness unless the witness is unavailable to testify at trial and the defendant was afforded a prior opportunity for cross-examination."

A second point involves a legal matter that I believe is in a complete state of flux, or at least confusion. It relates to whose belief matters regarding whether the statement is being made for a later criminal prosecution (testimonial) or for some other purpose (non-testimonial). The Crawford opinion itself stated that the test was whether the statement is made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

But is this "objective witness" the questioner, such as the police, or a teacher, or a mother, or a doctor, or a forensic interviewer? Or is the "objective witness" the child who makes the statement?

A 5-year-old child who discloses abuse to a doctor who is part of a MDT likely has no concept about criminal prosecutions. The doctor does. But I'm reading more cases where courts decide that the "objective witness" is the questioner, which leads to the child's statements being seen as testimonial, thus triggering Crawford.

This matters because it directly triggers the "testimonial statement" Crawford rules: No introduction of the child's statements (1) unless the child is unavailable to testify at trial and (2) the defendant was given a prior opportunity to cross-examine the child's statements.

The impact of the trending cases, including the cases of the U.S. Supreme Court, has some legal scholars concluding that courts will increasingly find a child's out-of-court statements to be testimonial, and not admissible unless the child testifies. See, e.g., Deborah Paruch, "Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children's Hearsay Statements Before and After Michigan v. Bryant," Touro Law Review: Vol. 28: No. 1, Article 6. This law review article was cited in a footnote in today's Connecticut opinion.

Crawford in 2013. Much more to come.

Best regards.

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