



Out of the Shadows

North Carolina Conference of District Attorneys

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THE VOICE

by: Laura Edwards Parker

In this issue of "Out of the Shadows", I'd like to highlight several upcoming trainings available to assist in the investigation and prosecution of child abuse. Specifically, I would recommend the Symposium in Lake Junaluska since it is local and easier to attend. In addition, the Children's Advocacy Centers of NC have gone through the procedure necessary to provide CLE credit to inspire more prosecutors to attend this year. Let's show our support for this important gathering of NC child abuse professionals.

*Equal Justice for Children: Investigation and Prosecution of Child Abuse: May 7-11, 2007 in Sparks, NV. Contact the National Center for Prosecution of Child Abuse at 703-549-4253 or online at www.ndaa-apri.org.

*Investigation and Prosecution of Child Fatalities and Physical Abuse: August 20-24, 2007 in Indianapolis, IN. Contact the National Center for Prosecution of Child Abuse at 703-549-4253 or online at www.ndaa-apri.org.

*Unsafe Havens II: Prosecuting Online Crimes Against Children: August 27-31, 2007 in Columbia, SC. Contact the National Center for Prosecution of Child Abuse at 703-549-4253 or online at www.ndaa-apri.org.

*Thirteenth Annual Symposium on Child Abuse and Neglect: September 11-13, 2007 in Lake Junaluska, NC. Contact Children's Advocacy Centers of NC at 336-886-4589 or online at www.canc.org.

CRAWFORD'S IMPACT ON THE ADMISSIBILITY OF CAC CHILD ABUSE INTERVIEWS IN NORTH CAROLINA

by: Jennifer Brobst, JD, LLM

Crawford v. Washington, 541 US 36 (2004) has permanently changed the national landscape of what is considered best practice in child abuse interviews at Child Advocacy Centers (CACs). Given that many children are reluctant, traumatized, incompetent, or otherwise unavailable to testify, Crawford has had a disproportionate impact on child abuse prosecutions. Adding to the challenge is that many child victim witnesses are interviewed through the use of a CAC. Child abuse CAC interviews always occur after the event, and, depending on the CAC's model approach, the primary purpose may very well be to establish past events relevant to prosecution, triggering the prohibitions of Crawford and subsequent cases including Davis v. Washington, 126 S.Ct. 2266 (2006). The case law on how the courts have approached CAC interviews and Crawford has finally begun to take shape (see State v. Blue, 717 NW2d 558 (North Dakota, 2006) for a national comparison of decisions).

THE TRADITIONAL CAC MODEL & THE CURRENT VARIETY OF APPROACHES

With over 500 nationally accredited or affiliated Child Advocacy Centers (CAC) nationally, and 25 accredited and provisional centers in North Carolina, the CAC model has formed the core of the multidisciplinary approach to child abuse investigations in North Carolina and throughout the nation (see www.nca-online.org (national); www.cacnc.org (NC)). The original "best practices model" included child forensic interviews in which law enforcement and child protective services government agents would be present simultaneously observing the interview through a one-way mirror, and interacting with the interviewer to suggest needed questions where necessary. The clear aim was not only to increase protection for the child through better assessment of the incidence of abuse, but to increase the success of the DSS and criminal investigations and prosecution of the offender.

Today there are several different models of CACs, all of which serve to protect the child by determining if abuse has taken place. Indeed, most CACs in North Carolina and nationally, subscribe to the prosecutorial model, in which the child interview process is deliberately designed to increase successful prosecutions and DSS investigations. Nevertheless, a minority of CACs have a strong medical and/or mental health component, using pediatricians and pediatric sexual assault nurse examiners to interview the child and assess medical and potential mental health trauma.

CRAWFORD'S APPLICATION TO THE CAC INTERVIEW

Hearsay statements in the CAC setting by a child abuse victim witness unavailable at trial will be admissible after Crawford largely based on whether the CAC, its interviewer, and the interview process are (1) closely affiliated with a government agency such as DSS or law enforcement, and (2) have an independent medical or mental health purpose beyond the criminal investigation and prosecution of the alleged offender.

Despite the fact that CACs are not government funded agencies, factors which invoke Crawford are whether: the CAC interview is at the request of a government agent; it is conducted while the government agent is present; the CAC provides a

About the Author

Jennifer Brobst, JD, LLM, is currently the Legal Director for the Center for Child and Family Health-NC, a consortium of Duke University, NCCU, UNC Chapel Hill, and the non-profit CAPSS in Durham, NC. In addition she holds a position as Adjunct Faculty at NC Central University School of Law teaching Evidence, Domestic Violence Law, and Children and the Law. You may contact her by email at: jbrobst@nccu.edu.

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copy of the recorded interview to the government agent without the necessity of a release from the child's guardian or by statutory authority; the interviewer is not a licensed service provider; and if the interview is conducted long after the abuse took place solely in preparation for an investigation or trial. In contrast, interviews from medical and mental health CAC models may surmount Crawford objections, given that they require independent diagnosis and treatment objectives beyond the prosecutorial approach. In addition (Cont. on page 2)

they are conducted by licensed professionals whose primary objective is the health and wellbeing of the child, confirmed by their diagnoses of developmental disabilities, medical treatment needs, and mental health DSM IV diagnoses. In a recent study of 473 children undergoing a medical evaluation after an alleged sexual assault, identifying "important unmet health care needs are at least as common as forensic findings" (160(1) Arch. Pediatr. Adolesc. Med. P. 70 (2006)). Keep in mind having a medical or mental health component is not enough to avoid Crawford if this is not the primary purpose of the interview (see, e.g., US v. Bordeaux, 400 F.3d 548, 556 (8th Cir., 2005)). These interviewers are also less closely affiliated with their multidisciplinary team members, in that DSS and law enforcement may not be present during the interview and releases may be required from families based on HIPAA and North Carolina privileges and licensure in order for government agents to obtain the CAC interviews and medical records. Finally, keep in mind the additional benefits that interviews by medical and mental health staff are also frequently admissible under the medical diagnosis hearsay exception (see State v. Burgess, 639 S.E.2d 68 (NC Ct.App., 2007); State v. Brigman, 632 S.E.2d 498 (NC Ct.App., 2006)), and the interviewers may be qualified as experts at trial.

CRAWFORD'S IMPACT ON SPECIFIC CHILD INTERVIEW TECHNIQUES

(1) *Establishing child's competence* (truth/lie, consequences for lies) - may appear testimonial because it looks like an "oath"; however medical diagnosis exception requires this to establish reliability of child's hearsay statement [i.e., truth important to obtain proper medical/mental health care - see State v. Hinnant, 351 NC 277 (2000)].

(2) *Observations by law enforcement and CPS* - clear violation of Crawford if they are present during the interview or conduct the interview [see State v. Anderson, 2007 WL 329419 (unpublished, NC App 2007) - "nontestimonial" child abuse interview by medical child abuse evaluation expert without law enforcement present; State v. Blue, 717 NW2d 558 (North Dakota, 2006) - "testimonial" CAC interview made "in concert" with law enforcement present].

(3) *Child's statements about outcome* - if the child states that the accused should or might "go to jail" then it may appear testimonial, as the child has an "eye towards trial" so caution should be exercised in questioning the child about court-related results unless clearly for clinical purposes [see People v. Vigil, 104 P.3d 258 (Colo.Ct.App. 2004), *aff'd in Part, rev'd in part* by 127 P.3d 916 (Colo. Jan 23, 2006)].

FORFEITURE BY WRONGDOING - CAC INTERVIEWS

One underutilized method of avoiding Crawford's limitations to the admissibility of interview statements from unavailable child witnesses is the doctrine of forfeiture by wrongdoing (Crawford, 541 US at 62). This requires a greater effort by law enforcement and multidisciplinary teams to investigate the source of a child victim witness's reluctance to testify, and to understand that the law permits recognition of a wide variety of levels of intimidation and manipulation used by child abuse offenders (for a national comparison of the range of subtle abusive tactics justifying the forfeiture doctrine, see, State v. Mechling, 633 S.E.2d 311, 324 (W.Va. 2006)). Prosecutors must be well versed in arguing the law related to forfeiture, in which only a preponderance of the evidence is required to establish wrongdoing and hearsay evidence is permitted (see Davis). If additional investigation revealed intimidation of the child, not only could the child's hearsay statement be admitted over a Crawford objection, but additional criminal charges could be levied against the defendant, including intimidation of a witness under N.C.G.S. § 14-226 (see, e.g., In re RDR, 623 S.E.2d 341 (N.C. App. 2006)), or the common law crime "obstruction of justice" (see In re Kivett, 309 N.C. 635 (1983), headnote [9]).

CONCLUSION

North Carolina prosecutors should by no means give up on the child abuse multidisciplinary team concept based on Crawford's limitations on child abuse interviews. Rather, prosecutors have a vital role in educating their communities on what the law will and will not permit in admitting interview statements of children unavailable in court, encouraging modifications where necessary of the child interview process, and ensuring support of children whose live testimony is essential in court.

Call for Papers!

The NC Conference of District Attorneys is establishing a "brief bank" of motions, orders, notices, and memorandum of law relating to the prosecution of *child abuse and neglect* in NC for prosecutors across the state to share and access. If you would like to submit any such papers to aid and assist other prosecutors across the state, please email your submissions to Laura Parker at larua.e.parker@nccourts.org or send it on diskette or CD-Rom (Save as Microsoft Word or Excel file) to: Laura Parker, NC Conference of District Attorneys, PO Box 25546, Raleigh, NC 27611.

Submissions will be posted on the NC Child Abuse Prosecutors Alliance forum described in the column above and kept on file at the Conference.