Protecting the Most Vulnerable Victims:
Prosecution of Child Sex Offenses in Illinois post Crawford v. Washington

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INTRODUCTION

Lisa’s daughter, three-and-a-half year-old Sarah,¹ is throwing a temper tantrum over taking a bath, and although not unusual for some children, it is for Sarah who usually loves bath time. At first, Lisa is stern with Sarah, insisting it is bath time, but Sarah becomes more and more upset: crying hysterically and begging not to take a bath. Now concerned, Lisa calmly asks Sarah why she doesn’t want to take a bath, and Sarah wails, “It hurt! It hurt!” Despite Lisa’s insistence the bath will not hurt, Sarah is still uncontrollably crying and begging not to go in the bath. Deciding this is more than an average temper tantrum, Lisa takes Sarah out of the bathroom and assures her there will not be a bath in an attempt to comfort her distraught daughter. After Sarah calms down a bit, Lisa asks Sarah why she is suddenly scared of the bath and why it would hurt. At this, Sarah again becomes upset and begins to cry, answering only, “it did ‘fore.” Lisa racks her brain trying to think of any time the water was too hot or Sarah fell

¹. These hypothetical situations are not specifically related or reflective of any individual case. They are reflective of the types of situations encountered while researching this comment.
while in the tub. Unable to think of any such instance, Lisa inquires further; "when before?"

Sarah now simply refuses to answer the question and sobs again. Believing it is best to leave the matter for a later time, Lisa bundles Sarah up and lies next to her in bed until Sarah falls asleep. It is not until the next day when Lisa’s brother-in-law, Michael, comes over to baby-sit that this strange event will be explained. That day, Sarah hides in her room and refuses to come out when her mother attempts to leave for work, crying and pleading for Lisa to stay home.

After calling in sick to work, Lisa talks to Sarah about her very unusual behavior. (In addition to the bath incident and hiding, Sarah, a normally outgoing child, has been intensely shy and sensitive lately.) Lisa discovers, after much reassuring, that everything will be better if Sarah "tells Mommy what she's been so scared of"—that Michael has sexually abused Sarah. Horrified by Sarah’s account of the abuse, Lisa calls her mother, who advises that Sarah should be taken to a doctor immediately and that the police must be called. Both are done.

Mrs. Gelds' first grade class is having a special speaker today, Officer Stewart, who will be speaking on "stranger danger" and "bad touches." At the end of the speech, Officer Stewart reminds the class: "You should always tell a parent, teacher, or police officer so we can make that person stop." "Make that person stop." This sentence strikes seven year-old Ricky much stronger than any of the other children because he wants so badly for someone to make it stop. Immediately after the class, Ricky goes to Officer Stewart and asks, "Did you mean it?" Unsure of exactly to what Ricky is referring, Officer Stewart, confident he meant everything he said that day, replies, "Of course I meant it." Sobbing now, Ricky says, "Please stop it."

After questioning Ricky in private, Officer Stewart discovers that Mr. Richardson, the next door neighbor of Ricky’s family who occasionally baby-sits, has during the last two months, digitally penetrated and licked Ricky’s anus, licked his penis and forced Ricky to perform fellatio. Ricky has been afraid to tell anyone because Mr. Richardson has guns; he has even shown them to Ricky. Mr. Richardson said how angry he would become if Ricky ever told anyone, and Ricky would never see his family again if he told anyone. Even as he speaks to Officer Stewart, Ricky is convinced something bad will happen to him and his family; the threats have had the desired effect. After contacting Ricky’s parents, Officer Stewart subsequently starts an investigation that leads to Mr. Richardson being charged with predatory criminal sexual assault of a child.2

2. 720 ILL. COMP. STAT. 5/12-14.1(a) (2004). ("The accused commits predatory criminal sexual assault of a child if: (1) the accused was 17 years of age or over and commits
In 2004, the Supreme Court issued the decision of *Crawford v. Washington*, excluding what it termed “testimonial” out-of-court statements by non-testifying witnesses.\(^3\) The numerous cases decided based upon *Crawford* in the relatively short time since this decision is indicative of the powerful effect of the decision.\(^4\) Also, this Supreme Court decision not only eliminated the use of some hearsay exceptions that had been based upon the Court’s previous decision of *Ohio v. Roberts*,\(^5\) but the Court specifically left unanswered the intricate and arduous question of what is included under the term “testimonial.”\(^6\)

This comment addresses the monumental decision of *Crawford* and this unanswered question as they relate to the prosecution of pedophilia in Illinois. Based upon the interests of the state to protect the victims of pedophilia and the need to simultaneously protect the rights of the accused, a specific test must be instituted in light of *Crawford*, which provides a working paradigm to define “testimonial” designed for this specific context.

After a look at past and current case history in this area and applicable Illinois statutes, this comment proposes such a test, along with discussion of the procedural effects that may be implied.

I. APPLICABLE STATUTES AND CASES

A. ILLINOIS STATUTES FOR CHILD VICTIMS

Under the Illinois Code of Criminal Procedure, the statute 725 ILCS 5/115-10 creates an exception to the hearsay exclusion during the prosecution of a sexual act against a child who is under thirteen years old at the time of the offense.\(^7\) Out-of-court statements made by the victim, where the child complains of the abuse or describes any “act or matter or detail pertaining to any act which is an element of an offense,” will be allowed if the court determines the testimony to be reliable, and either the child 1) testifies, or 2) is determined to be unavailable\(^8\) to testify.\(^9\) When this

\(^{6}\) Crawford, 541 U.S. at 68.
\(^{8}\) A child may be determined unavailable prior to a trial or during the proceedings. People v. Coleman, 563 N.E.2d 1010, 1020 (Ill. 1990). A child may be declared unavailable
testimony is entered at trial, it is accompanied by an instruction to the jury that they should take into account all relevant factors, including the circumstances of the statement and the age and maturity of the victim. Prior notice must be given to the defense and statements given to government officials are not prohibited from inclusion under this statute. In the hypothetical situations above, with the application of this statute, the statements made by Sarah to her mother, doctor, and government officials would be admissible, provided they were determined to be reliable, as would Ricky’s statements to the officer and other subsequent statements made by him to other interested parties.

In addition to 725 ILCS 5/115-10, the Illinois Code of Criminal Procedure also provides an alternative form of testimony for those child-victims who do testify. The statute 725 ILCS 5/106B-5 allows a minor to testify via closed circuit during the prosecution of the specific offenses criminal sexual assault, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual abuse, or aggravated criminal sexual abuse where the defendant is represented by counsel. Prior to this being allowed, it must be determined by the court that by testifying, the child will suffer emotional distress that will reasonably prevent his or her ability to communicate or the child will “suffer severe adverse effects.” During the closed circuit testimony, the prosecutor, defense attorney, and judge will be able to question the witness. Additionally, an equipment operator and anyone that the court determines will facilitate the well-being of the child, including family, therapists, and court security staff, may be present during the testimony. The defendant will remain in the courtroom and, while not permitted to communicate to the jury, will be able to communicate with those in the room with the victim-witness. However, this provision may not be used to prevent the


13. 725 ILL. COMP. STAT. 5/106B-5(a), (g) (2004).
witness and defendant from being in the same room during identification and may not be used with defendant represented pro se.\textsuperscript{18}

The application of this statute is fairly evident in the prosecution of pedophiles. In the above situations, as Sarah is very young, assuming she was determined competent to testify at all, she may be allowed to testify via closed circuit television if her ability to communicate would be hindered by emotional distress of testifying in the courtroom or she would “suffer severe adverse effects.”\textsuperscript{19} Thus she would be in a separate room with the above people, more than likely including her mother, and would be questioned by both attorneys and possibly by the judge.\textsuperscript{20} The defendant would remain in the courtroom, as would the jury, and would view the testimony and cross examination of Sarah by television.\textsuperscript{21} However, at a point where Sarah was going to make an identification of the defendant as her abuser, she would have to be in the courtroom with the defendant.\textsuperscript{22} The same procedure would be followed for Ricky and he might be able to testify via closed circuit television, despite the fact that he is older than Sarah, considering the repeated threats by his abuser.\textsuperscript{23}

B. ROBERTS VERSUS CRAWFORD

In \textit{Ohio v. Roberts},\textsuperscript{24} the Supreme Court allowed introduction of out-of-court statements of an unavailable witness requiring the testimony had an “indicia of reliability” by either being contained within “a firmly rooted hearsay exception” or having a “showing of particularized guarantees of trustworthiness.”\textsuperscript{25} The Court stated although the Sixth Amendment Confrontation Clause requires the accused be given the opportunity to question witnesses,\textsuperscript{26} this clause has been balanced with accepted hearsay exceptions throughout history.\textsuperscript{27} The Court reasoned, in support of its decision, that the hearsay exceptions and the Confrontation Clause have the same goal of facilitating the truth-seeking purpose of the judicial system.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{18} 725 ILL. COMP. STAT. 5/106B-5(g)-(h) (2004).
\item \textsuperscript{19} 725 ILL. COMP. STAT. 5/106B-5(a) (2004).
\item \textsuperscript{20} 725 ILL. COMP. STAT. 5/106B-5(b), (d) (2004).
\item \textsuperscript{21} See 725 ILL. COMP. STAT. 5/106B-5(d)-(f) (2004).
\item \textsuperscript{22} 725 ILL. COMP. STAT. 5/106B-5(h) (2004).
\item \textsuperscript{23} 725 ILL. COMP. STAT. 5/106B-5 (2004).
\item \textsuperscript{24} Roberts, 448 U.S. 56.
\item \textsuperscript{25} Id. at 66.
\item \textsuperscript{26} “In all criminal prosecutions, the accused shall enjoy the right to...be confronted with the witnesses against him.” U.S. CONST. amend. VI.
\item \textsuperscript{27} Roberts, 448 U.S. at 62-63.
\item \textsuperscript{28} See id. at 66.
\end{itemize}
"Roberts" was the prevailing case when 725 ILCS 5/115-10 was passed in 1983. The influence of "Roberts" is clear in the language of the statute, which requires the testimony to be determined to have "sufficient safeguards of reliability," analogous to the requirement in "Roberts" for there to be "indicia of reliability" through a "showing of particularized guarantees of trustworthiness."

"Roberts" and 725 ILCS 5/115-10 controlled the admissibility of statements in the prosecution of pedophilia for approximately twenty years. During this time, numerous cases were tried under this "Roberts-esque" statute that both excluded and allowed out-of-court statements made by the child victims. This procedure has become a well-utilized tool in the prosecution of pedophilia by prosecutors throughout Illinois when necessitated to spare the victim the trauma of testifying.

During the trial in "Crawford," the state was allowed to enter into evidence the tape-recorded statement of the wife taken during an interrogation by the police that contradicted the version of events given by the defendant, who was charged with assault and attempted murder. The wife was prevented from testifying under the state's marital privilege statute, but the state used the hearsay exception for statements against penal interest to enter in the videotaped statement. On appeal, the defendant asserted the admission of the videotaped statement was a violation of his Sixth Amendment right to confront adverse witnesses. The Washington Court of Appeals initially reversed the lower court, determining the statement in question was not sufficiently reliable. The Washington Supreme Court then reinstated the conviction determining the statement was sufficiently trustworthy, as the majority of the wife's statement matched the defendant's account.

With these contradicting determinations of reliability as the background, the Supreme Court took a...
broader look at the validity of inclusion of evidence based upon on the Roberts requirement of an indicia of reliability.\textsuperscript{38} Looking beyond the constitutional text, the Court recounted the historical basis for the Confrontation Clause\textsuperscript{39} as well as the implicated accepted hearsay exceptions.\textsuperscript{40} Through this discussion, the Court pointed to a distinction between testimonial and non-testimonial evidence, determining the framers would not have allowed the admission of testimonial evidence for the truth of the matter asserted without an opportunity for the defendant to cross-examine the witness, as it would violate the Confrontation Clause.\textsuperscript{41} However, as noted above, the Court failed to provide a definition for "testimonial," but stated the statements in the present case elicited during police investigations and statements in preliminary hearings or grand jury proceedings clearly were testimonial in nature.\textsuperscript{42}

The Court again followed this pattern of providing a limited definition in the subsequent case, \textit{Davis v. Washington}.\textsuperscript{43} While noting the decision was not attempting to provide a complete declaration of what is testimonial, the Court held statements made during police interrogation,\textsuperscript{44} which assist police officers in handling an "on-going emergency," are non-testimonial. Those statements made during an interrogation in order "to establish or prove past events potentially relevant to later criminal prosecution" are testimonial.\textsuperscript{45} While this language does provide enlightenment to those situations dealing specifically with police interrogation,\textsuperscript{46} it still leaves the determination of the status of statements made to those other than such officers unclear, as well as what will be considered an "on-going emergency" in relation to a child-witness.\textsuperscript{47}

\textsuperscript{38} \textit{Id.} at 42.\textsuperscript{39} Interestingly at the time of the enactment of the Confrontation Clause, "courts regularly admitted out-of-court statements" by adults and children concerning such abuse and disavowed any argument such statements were "testimonial." Brief for National Association of Counsel for Children as Amicus Curiae Supporting Respondents at 19-23, \textit{Davis v. Washington}, 126 S. Ct. 2266 (2006).\textsuperscript{40} \textit{Crawford}, 541 U.S. at 42-69.\textsuperscript{41} \textit{Id.}\textsuperscript{42} \textit{Id.} at 68.\textsuperscript{43} 126 S. Ct. 2266 (2006).\textsuperscript{44} The court held the 911 operator in the case was an agent of the law enforcement officers. \textit{Id.} at 2274 n.2.\textsuperscript{45} \textit{Id.} at 2273-74.\textsuperscript{46} The court language indicates the court was only contemplating the classification of testimonial statements to the extent necessary to decide the cases currently before the court; not to provide comprehensive definitions. \textit{Id.}\textsuperscript{47} This issue is a corollary to excited utterance, which is discussed \textit{infra}. Further it is interesting to note, while clarifying excluded statements must be "testimonial," the court specifically defines and thus limits testimony as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact" and references a litany of cases which
The Supreme Court through Crawford has ruled that admission of testimonial evidence without opportunity to cross-examine is a violation of the Defendant’s Sixth Amendment Confrontation Clause rights. This holding in Crawford clearly applies to the prosecution of numerous types of criminal acts, including those encompassed under pedophilia. Yet, as noted in the condemnation of the Chief Justice Rehnquist’s concurrence, the proper method for determining what is “testimonial” was purposefully left unanswered leaving prosecutors unaided by the court in determining the use of various forms of testimony.

But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists...is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

This statement still remains at least partially true in the wake of the recent Davis decision. Thus, as predicted, prosecutors in Illinois are left unsure of what statements made by victims will be admissible and consequently the strength of the underlying case. They have the possible statutory tool of 725 ILCS 5/115-10, but no clear indication of how or when this tool may be used. The next section will look at the crime of pedophilia and its prosecution in general, the recent history of pedophilia cases under Crawford as well as propose the use of a specific test which follows the intent of Crawford and the trend currently indicated by Illinois precedent.

II. ILLINOIS, PEDOPHILIA AND CRAWFORD

A. THE CRIME

As stated in Ashcroft v. Free Speech Coalition, “[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of

include, as noted by Justice Thomas’ dissent, cases consisting solely of statements given when the declarant was under oath during a hearing, trial or deposition. Although this is not used to limit the determination concerning police interrogations to those, which are formalized, it does provide a possible avenue for such an argument as clearly demonstrated by Justice Thomas. Id. at 2274-76, 2283.

49. Id. at 75.
50. Id.
51. Davis, 126 S. Ct. 2266.
a decent people."\textsuperscript{52} The criminality of this abhorrent act, commonly referred to as pedophilia, is codified in numerous statutes of the Illinois Criminal Code.\textsuperscript{53} The most common form of pedophilia is between one

\textsuperscript{52} Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002).

Any person commits sexual exploitation of a child if in the presence of a child and with intent or knowledge that a child would view his or her acts, that person:

(1) engages in a sexual act; or

(2) exposes his or her sex organs, anus or breast for the purpose of sexual arousal or gratification of such person or the child.

(a-5) A person commits sexual exploitation of a child who knowingly entices, coerces, or persuades a child to remove the child's clothing for the purpose of sexual arousal or gratification of the person or the child, or both.

(b) Definitions. As used in this Section:

"Sexual act" means masturbation, sexual conduct or sexual penetration as defined in Section 12-12 of this Code.

"Sex offense" means any violation of Article 11 of this Code or a violation of Section 12-13, 12-14, 12-14.1, 12-15, 12-16, or 12-16.2 of this Code.

"Child" means a person under 17 years of age.

720 ILL. COMP. STAT. 5/12-14(b) (2004).

(b) The accused commits aggravated criminal sexual assault if the accused was under 17 years of age and (i) commits an act of sexual penetration with a victim who was under 9 years of age when the act was committed; or (ii) commits an act of sexual penetration with a victim who was at least 9 years of age but under 13 years of age when the act was committed and the accused used force or threat of force to commit the act.


§ 12-14.1. Predatory criminal sexual assault of a child.

(a) The accused commits predatory criminal sexual assault of a child if:

(1) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed; or

(1.1) the accused was 17 years of age or over and, while armed with a firearm, commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed; or

(1.2) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed and, during the commission of the offense, the accused personally discharged a firearm; or

(2) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed and the accused caused great bodily harm to the victim that:

(A) resulted in permanent disability; or

(B) was life threatening; or
adult and one child (dyadic), but it may also include group sex, sex rings, prostitution, and ritual abuse. Despite the belief child sexual

(3) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed and the accused delivered (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance.


§ 12-15. Criminal sexual abuse. (a) The accused commits criminal sexual abuse if he or she: commits an act of sexual conduct by the use of force or threat of force; or

(1) commits an act of sexual conduct and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.

(a) The accused commits criminal sexual abuse if the accused was under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who was at least 9 years of age but under 17 years of age when the act was committed.

(c) The accused commits criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was less than 5 years older than the victim.

720 ILL. COMP. STAT. 5/12-16(b) (2004).

(b) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was under 18 years of age when the act was committed and the accused was a family member.


§ 12-33. Ritualized abuse of a child. (a) A person is guilty of ritualized abuse of a child when he or she commits any of the following acts with, upon, or in the presence of a child as part of a ceremony, rite or any similar observance:

(4) involves the child in a mock, unauthorized or unlawful marriage ceremony with another person or representation of any force or deity, followed by sexual contact with the child;


55. Id. (including various combinations of single and multiple offenders and victims).

56. Sex rings generally are organized by pedophiles (persons whose primary sexual orientation is to children), so that they will have ready access to children for sexual purposes and, in some instances, for profit. Victims are bribed or seduced by the pedophile into becoming part of the ring, although he may also employ existing members of the ring as recruiters. Rings vary in their sophistication from situations involving a single offender, whose only motivation is sexual gratification, to very complex rings involving multiple offenders as well as children, child pornography, and prostitution. Id. at 15.
abuse is underreported, over three-hundred thousand reports of sexual abuse were made a year as of 1996 to The National Center for Child Abuse and Neglect. Of the reported sexual assaults in the U.S., sixty-seven percent of the victims were under the age of eighteen and more than half of those victims were under the age of twelve. Further, children under the age of six were one of every seven sexual assault victims. The majority of the victims, ninety percent, will know their abusers and eighty-four percent will be abused in a residence or home. A vast majority of

57. As best can be determined, ritual sexual abuse is abuse that occurs in the context of a belief system that, among other tenets, involves sex with children. These belief systems are probably quite variable. Some may be highly articulated, others “half-baked.” Some ritual abuse appears to involve a version of satanism that supports sex with children. However, it is often difficult to discern how much of a role ideology plays. That is, the offenders may engage in “ritual” acts because they are sadistic, because they are sexually aroused by them, or because they want to prevent disclosure, not because the acts are supported by an ideology. Because very few of these offenders confess, their motivation is virtually unknown. Often sexual abuse plays a secondary role in the victimization in ritual abuse, physical and psychological abuse dominating. Id. at 15-16.


61. Id.

62. Brief for National Association of Counsel for Children as Amicus Curiae Supporting Respondents, supra note 39, at 6 (citing Michele Elliott et al., Child Sexual Abuse Prevention: What Offenders Tell Us, 19 CHILD ABUSE & NEGLECT 579, 585 (1995) (“[O]nly 10% of childhood rapes were by strangers.”)).

pedophiles are repeat offenders\textsuperscript{64} and often communicate with each other\textsuperscript{65} about their criminal acts including warnings to avoid prosecution.\textsuperscript{66} The victims of child sex abuse suffer both short and long term effects.\textsuperscript{67} Child victims of sexual abuse suffer from numerous forms of emotional trauma and other effects as a result of the trauma including “sexual preoccupation, increased sexual knowledge, sexual aggressiveness and victimization toward peers, promiscuity (and sometimes prostitution), difficulty with arousal and orgasm, vaginismus, as well as negative attitudes toward the child's sexuality and body”\textsuperscript{68} “grief reactions and depression over the loss of the trusted individual, disenchantment and disillusionment, lack of trust in others or impaired judgment, and dependency”;\textsuperscript{69} “sense of disempowerment [resulting] in fear and anxiety (often in the form of nightmares, hypervigilance, clinging, or somatic complaints), decreased self efficacy and coping skills which can result in despair, depression, suicide, learning problems or employment difficulties, a high risk for revictimization, and, in some cases, unusual and dysfunctional needs to control or dominate others”\textsuperscript{70} “stigmatization”;\textsuperscript{71} “[gravitation toward] ‘various stigmatized levels of society’ such as alcohol abuse, criminal behavior, prostitution, and self destructive behavior.”\textsuperscript{72} “These behaviors can result in isolation, guilt, shame, low self-esteem, and feelings of

\begin{footnotesize}
\begin{enumerate}
\item “Nearly 70% of child sex offenders have between 1 and 9 victims.” Darkness to Light, \textit{Statistics Surrounding Child Sexual Abuse}, http://www.darkness2light.org/KnowAbout/statistics_2.asp (last visited Aug. 14, 2006).
\item For a detailed discussion on the use of the Internet by pedophiles to reach victims see \textit{Christa M. Book, Comment, Do You Really Know Who is on the Other Side of Your Computer Screen? Stopping Internet Crimes Against Children}, 14 \textit{Alb. L.J. Sci. & Tech.} 749 (2004).
\item For example, the website for North American Man/Boy Love Association, which states it condemns any forced sexual acts, but pushes for the abolition of age of consent laws to allow “consensual” sexual relationships regardless of age differences, includes a warning of “Entrapment” of enforcement personnel posing as potential victims. North American Man/Boy Love Association, \textit{at http://216.220.97.17/} (last visited Aug. 14, 2006).
\item \textit{Kinnear, supra} note 65, at 35-42.
\item \textit{Jessica Lieboergott Hamblen}, \textit{The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim Witnesses}, 21 \textit{Law & Psychol. Rev.} 139, 156 (1997).
\item \textit{Id.}
\item \textit{Id. at} 156-57.
\item \textit{Id. at} 157.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
rejection.\textsuperscript{73} The trauma of child sex abuse can push victims to commit crimes\textsuperscript{74} and become victims of abuse again later in life.\textsuperscript{75} Even victims who repress the abuse may suffer emotional trauma such as posttraumatic stress disorder.\textsuperscript{76}

The frequency of this devastating crime is astounding. More than 500,000 children are sexually abused each year.\textsuperscript{77} Even this staggering number is an underestimate considering that only 10\% of sexual abuse is ever reported to authorities.\textsuperscript{78} Clearly sexual abuse of children is not a rare or isolated situation or one that will end in the near future. It is a pervasive and at times devastating crime, which demands action by society to protect the innocent victims.\textsuperscript{79} However, the ability to provide justice for victims is often an incredibly difficult task.

B. DIFFICULTY OF PROSECUTION

The prosecution of child sex abuse is an intrinsically difficult task due to the very nature of the crime. The only witness is typically a young victim\textsuperscript{80} who, as a result of the crime, is suffering from emotional distress.\textsuperscript{81} Due to a somewhat common occurrence of delayed reporting, there can be difficulty in obtaining any physical medical evidence.\textsuperscript{82} The crime by nature is one of the most heinous crimes possible\textsuperscript{83} and, at the same time,
the most difficult to prove. The decision in Crawford makes this already arduous task even more challenging by possibly removing a frequently-used tool by the prosecution; 725 ILCS 5/115-10 inclusion of out-of-court statements by the victim.

Victims of pedophilia are often unable to answer questions during direct and cross-examination or are ruled unable to testify by the court. Factors playing a role in the child victim's ability to testify include the victim's age; emotional maturity; availability of a support network; and cognitive, language and developmental skills. The initial hurdle attached to these factors is the determination of the child's ability to be considered competent and available to testify. Since 1989, witnesses, regardless of age, have a presumption of competence to testify; abolishing a mandated competency hearing for witnesses under fourteen. A court, in determining the competence of a child to testify, will look at the child's ability to understand the difference between right and wrong, reality and fantasy, and truth and lie, as well as the mental abilities and intelligence pertaining to the ability to recount past events. Thus, a witness who cannot properly express himself on the matters at issue or cannot understand the duty of telling the truth may be declared incompetent.

84. Rutherford, supra note 82, at 138 (“Cases are regularly dismissed, or simply not prosecuted, due to ‘a lack of medical or physical evidence, lack of eyewitnesises, and . . . young child witnesses whose competence or credibility were questioned or who were too traumatized to testify. . . .’ ”(quoting Josephine A. Bulkley, Claire Sandt & Mark Horwitz, Key Evidentiary Issues in Child Sexual Abuse Cases, in A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE 63, 63 (Josephine Bulkley & Claire Sandt eds., 1994)).


87. Id.

88. See supra note 8.


accomplish these two tasks while satisfying the requirement for availability, which also implicates the Sixth Amendment.\textsuperscript{92} When determining competency of children it is the child’s intelligence, not their age,\textsuperscript{93} which determines their competence to testify.\textsuperscript{94} However, as noted above, the victim’s age can diminish his or her ability to testify due to not only the resulting trauma of the abuse but also their ability to understand the legal system.\textsuperscript{95} In a study of children’s understanding of the courtroom, children age four to seven were less than one percent accurate in understanding the terms court, jury, judge, and witness.\textsuperscript{96} In addition to the challenge of understanding the complex workings of the legal system, there is the nature of the legal system to overcome. There may also be a long period of time, possibly years, between when the child is abused and the actual proceedings.\textsuperscript{97} Presuming a child is able to overcome these obstacles and be considered competent and available to testify by the court, there is still the inherent trauma to the actual giving of testimony.\textsuperscript{98}

Ironically, the crime itself will often result in the children suffering from numerous effects, which may hinder or eliminate the victim’s ability to testify.\textsuperscript{99} Scholars and courts have both acknowledged the implicit


\textsuperscript{93} It is arguable this is merely a theoretical or semantic differentiation and on a practical level in the court room children under a certain age are still considered incompetent. See, e.g., People v. R.F., 825 N.E.2d at 297 (Neville, J., dissenting) (noting the statement by the trial court judge that “I don’t generally feel that a five year old is competent to testify anyway.”).

\textsuperscript{94} There is no rigid formula for establishing the competency of a witness to testify. In determining the competency of a witness to testify a trial court is to consider four criteria: (1) the ability of the witness to receive correct impressions from her senses; (2) the ability to recollect these impressions; (3) the ability to understand questions and express answers; and (4) the ability to appreciate the moral duty to tell the truth.


\textsuperscript{96} Id. at 22.


\textsuperscript{98} JASPER, supra note 79 (secondary victimization, recurrence of the emotional stress resulting from the initial abuse, may be triggered by interaction with the legal system).

\textsuperscript{99} See People v. Simpkins, 697 N.E.2d 302, 310-11 (Ill. App. Ct. 1998). [C]ertain symptoms or behavioral characteristics of child victims of sexual abuse, including (1) abnormal fears; (2) nightmares; (3) acting out sexually with toys or other children; (4) precocious sexual knowledge and the ability to relate explicit sexual behavior; (5) excessive masturbation; (6) regressive behavior, including bed-wetting; (7) being fearful and clinging to certain people; (8) tantrums and sudden mood swings; (9) complaints of pain in the vaginal or anal areas; (10)
emotional burden for anyone to testify about sexual abuse. This burden, which can be, at times, overwhelming for adults, is even more so for children\textsuperscript{100} with limited comprehension not only of what happened to them and why, but also, as stated above, limited comprehension of what is happening in the courtroom and why they must repeatedly retell and relive the abuse they endured.\textsuperscript{101} Further, if the child is able to testify the “success” is likely in turn to traumatize the child.\textsuperscript{102} In a study of over two hundred sexual assault victims, those who testified, especially those for whom testifying happened on multiple occasions, displayed greater behavioral disturbance.\textsuperscript{103}

Additionally, jury members often have preconceived and unrealistic expectations of what type of evidence should be presented.\textsuperscript{104} Jurors often expect medical indicators of the abuse, which as noted above, are unlikely.\textsuperscript{105} Victims are also expected by jurors to show a strong, unusual, emotional reaction when describing the abuse, despite the internal trauma they may be suffering.\textsuperscript{106} Finally, jurors are reluctant to find a pedophile guilty if they believe a child “consented” to the abuse.\textsuperscript{107}

Thus, at the start of a case, the victims already have at least four strikes, against them: 1) there is most likely little evidence to support their claim, 2) their understanding of what has happened to them and what will take place going forward is limited (to say the least), 3) jurors often have

\begin{itemize}
\item self-destructive behavior;
\item problems communicating with others;
\item inability to trust others;
\item failure in school;
\item initial denial of the abuse.
\end{itemize}

\textit{Id.}

\textsuperscript{100} Hamblen, \textit{supra} note 68, at 168 (“testifiers continued to exhibit significantly more overall behavior problems in general, and more internalizing problems specifically, than children who had not testified”); Harbinson, \textit{supra} note 86 (although the traumatic effects of testifying may be long term, prosecutors must also take into account trauma during the actual giving of testimony).

\textsuperscript{101} Beyond their initial disclosure, children often must recount the abuse to police investigators, DCFS or other social agency workers, the state’s attorney, doctors, nurses and if made to testify in open court the defendant, the defense counsel, the judge, possibly a jury, the court clerk, the bailiff and possible others in the gallery of the court room (this may be limited if the judge closes the proceedings).

\textsuperscript{102} Testifying increases the stigma felt by the victims as well as increase a sense of responsibility for the outcome for disclosing the abuse. Rutherford, \textit{supra} note 82, at 146-49.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} Brief for National Association of Counsel for Childhood as Amicus Curiae Supporting Respondents at 10, Davis v. Washington 126 S. Ct. 2226 (2006) (Nos. 05-5224, 05-5705).

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.} at 10-11.

\textsuperscript{107} \textit{Id.} at 11. (finding “consent” with victims as young as eleven, and noting that it is more likely to be found by male jurors)
unrealistic expectations, victims may be forced to testify to their own emotional detriment. It is with this understanding that one must consider the implications of Crawford on the prosecution of pedophilia.

C. TESTIMONIAL OR NON-TESTIMONIAL: THE CASE HISTORY IN ILLINOIS

The determination of out-of-court statements as testimonial or non-testimonial is key to whether statements will be admissible without the testimony of the child and thus is also the key to the level of additional difficulty in the prosecution of pedophilia. As a direct result of the Supreme Court's refusal to provide a definition for the term "testimonial statements," which require the declarant to be present for cross examination, the Illinois courts are creating definitions for the term in an ad hoc procedure based on comments within the decision, general definitions, and well-played lawyering by parties before the court. This has led to confusion as to what is testimonial as well as how it should be determined, resulting in conflicting decisions not only between districts, but contradicting decisions within the same district.

In the early case of In re T.T., the victim, G.F., age seven, alleged that, T.T., her babysitter, had penetrated her vaginally and anally with his penis and fingers. G.F. initially disclosed to her mother, stating T.T., age fourteen, had put his "ding-a-ling" in her "bootie" and threatened to kill her if she told. After receiving a hotline call about the abuse, DCFS investigator Lewis interviewed G.F. and was told the same account. Detective Dwyer investigated the allegation and was told the same account by G.F. G.F. was examined by Dr. Lorand and, upon questioning, related the same account of the abuse. Upon "freezing" on the stand during trial, G.F. was ruled unavailable by the court. On appeal, the out-of-court statements made by G.F., the DCFS investigator, and police detective were deemed testimonial by the court, and thus, admission of the statements was a violation of the Confrontation Clause. In addition, the statements made

108. Id. at 10.
109. Rutherford, supra note 82.
110. See Crawford, 541 U.S. 36; Phillips, supra note 95.
111. Crawford, 541 U.S. at 68.
113. Id. at 793.
114. Id. at 793-94.
115. Id. at 794.
116. Id. at 795.
117. In re T.T., 815 N.E.2d at 796.
118. Id. at 801-03.
to Dr. Lorand in which G.F. named the defendant as the offender were also ruled testimonial.\footnote{119} Although not without opposition,\footnote{120} with the decision of \textit{In re E.H.}, the First District took a much more extreme stance on the constitutionality of out-of-court statements by child victims of pedophilia.\footnote{121} The defendant, E.H., age thirteen, was accused of committing aggravated criminal sexual abuse against two victims, K.R., age five, and B.R., age two.\footnote{122} The victims initially disclosed the abuse to their grandmother over a year after the incident, attributing the delay to a threat by E.H.\footnote{123} During interviews by DCFS and a police investigator, both K.R. and B.R. again described sexual abuse by E.H.\footnote{124} Since K.R. testified at trial, B.R.’s out-of-court statements to her grandmother were those contested as improperly admitted under \textit{Crawford} upon appeal.\footnote{125} The court held that the statements were testimonial and, as such, improperly admitted since there was no opportunity afforded the defendant to cross-examine B.R.\footnote{126} In the supporting analysis, relying heavily on \textit{In re T.T.}, the court determined the statements to be testimonial since “the declarant, B.R., bore accusatory testimony against E.H. which was offered to prove the truth of the matter asserted. . . .”\footnote{127} After resolving the issue on the specific testimony before the court, the decision continued on to the constitutionality of 725 ILCS 5/115-10 and held the statute unconstitutional under \textit{Crawford}.\footnote{128} The sole dissenter, Justice Quinn, criticized the court for improperly focusing on the content of B.R.’s statement to her grandmother instead of focusing on the role of the person to whom it was spoken.\footnote{129} Only days later, the First District took a large step back from the ruling of \textit{In re E.H.} in \textit{People v. R.F.}\footnote{130} The victim, A.F., age three, stated her father had “kissed” her vagina to her mother and grandmother after the mother noted tenderness in the area after a bath.\footnote{131} A.F.’s mother took her to the hospital where A.F. repeated her story. The next day, A.F. informed

\begin{footnotes}
\item 119. \textit{Id.} at 803.
\item 120. \textit{Id.} at 577 (Quinn, J., dissenting).
\item 122. \textit{Id.} at 1030-31.
\item 123. \textit{Id.} at 1031-32.
\item 124. \textit{Id.} at 1031-33.
\item 125. \textit{Id.} at 1033.
\item 126. \textit{In re E.H.}, 823 N.E.2d at 1033-38.
\item 127. \textit{Id.} at 1036.
\item 128. \textit{Id.} at 1038.
\item 129. \textit{Id.} at 1041-46.
\item 131. \textit{Id.} at 290.
\end{footnotes}
Officer Weddington her father had put his tongue on her vagina. Subsequently, the defendant, R.F., confessed to the abuse to Officer Weddington. “Due to her fear and anxiety”, A.F. was ruled unavailable to testify at trial following questioning by the state and defense in chambers. Although A.F.'s statements to Officer Weddington were ruled testimonial, focusing on the government’s involvement, statements to the mother and grandmother about her abuse by her father were ruled non-testimonial. Contradicting In re E.H. the court not only held that statements made to family members or other non-government persons were non-testimonial, but with such non-testimonial evidence the Roberts standard was acceptable and 725 ILCS 5/115-10 was constitutional.

The First District reaffirmed the ruling of People v. R.F. that 725 ILCS 5/115-10 was constitutional in People v. Cannon. In this case, the seven year-old victim, S.P., was able to testify against her uncle, the defendant, convicted of predatory criminal sexual assault, sexual exploitation of a child, and unlawful restraint. Since S.P. was able to testify, albeit with some difficulty, her statements to her mother, an investigator, and physician recounting the abuse were all admissible. The court focused on the aspect of 725 ILCS 5/115-10 allowing out-of-court statements when the victim testifies, ruling this part of the statute constitutional and rejecting the holding of In re E.H., noting the statute need not been ruled on as a whole.

In the Second Circuit case, In re Rolandis G., the seven-year-old victim, V.J., alleged the defendant, convicted of aggravated criminal sexual assault, forced him to perform fellatio. The mother of V.J. noted strange behavior by her child, and when she confronted V.J., he stated the defendant had forced him to “suck his dick.” Similar accounts were given by V.J. to Officer Cure and a child abuse investigator. During trial, V.J. testified, but refused to answer questions about the abuse. Although

132. Id. at 290-91.
133. Id. at 291-92.
134. Id. at 291.
135. See id. at 292-97.
138. Id. at 313-15.
139. See id. at 315-20.
140. Id. at 315-18.
142. Id. at 185-86.
143. Id.
144. Id. The testimony given to the child abuse investigator was testified to in court by an officer who observed the interview through a two-way mirror. Id.
145. Id.
the trial court held V.J. was "available" for testimony, the Second District overturned this ruling following the *People v. Coleman* decision that held if a child victim "freezes" while testifying, they are to be considered unavailable. The appellate court further held the statements by V.J. to his mother were not testimonial but rather were more similar to a "casual remark to an acquaintance" since she presumably had no reason to suspect the abuse and was not pursuing any such allegation. However, following the First District decision of *In re T.T.*, the statements to both the officer and child abuse investigator were determined to be testimonial on appeal and as such, under *Crawford*, should have been excluded.

The Fourth District has repeatedly supported the continuing validity of 725 ILCS 5/115-10 when the child-victim testifies at trial. The court established this ruling in *People v. Miles*, decided only days after *In re T.T.* The court applied *Crawford* when determining the Confrontation Clause was not violated when the child victim testified at trial. The court noted that although the *Roberts* reliability test was no longer applicable to avoid violations of the Confrontation Clause when the witness did not testify, it was still applicable when the witness did testify. The court reaffirmed this stance in *People v. Sharp* and the more recent case *People v. Reed*. In both *Sharp* and *Reed*, the victims were able to sufficiently testify against defendants convicted of predatory criminal sexual assault of a child. Citing *People v. Miles*, and thereby strengthening the decision supporting the constitutionality of 725 ILCS 5/115-10, the court ruled all challenged testimony admissible.

However, the decision by the Fourth District to support this limited constitutionality has not been unchallenged. In his concurrence in *Miles*, Justice Cook stated 725 ILCS 5/115-10 was no longer valid, and it was up to the legislature to enact new valid legislation. Justice Cook has

146. 563 N.E.2d 1010 (Ill. 1990).
147. See Rolandis, 817 N.E.2d at 189-90.
148. Id. at 189.
149. Id. at 187-90.
151. Id. at 44-45.
152. Id.
155. Reed, 838 N.E.2d at 331-335; Sharp, 825 N.E.2d at 706-09, 711-14.
156. Reed, 838 N.E.2d at 332-335; Sharp, 825 N.E.2d at 710-11. The court further noted that the Crawford Court held that "when the declarant appears for cross-examination at trial, the [c]onfrontation [c]lause places no constraints at all on the use of his prior testimonial statements." People v. Miles, 815 N.E.2d 37, 44 (Ill. App. Ct. 2004) (quoting *Crawford*, 541 U.S. at 59 n.9).
maintained this conviction that the statute is unconstitutional, requiring action by the legislature in both *Sharp*\(^{158}\) and *Reed*\(^{159}\) the more recent rulings on the issue by the District. In *Sharp*, Justice Cook condemned the majority's acceptance of the victim's limited testimony as sufficient to satisfy the Confrontation Clause and thereby avoid subjection to *Crawford*\(^{160}\). Further, the frequent inability of child victims to testify is considered by Justice Cook to be support for declaring the statute as unconstitutional\(^{161}\). In *Reed*, Justice Cook asserted, despite the fact 725 ILCS 5/115-10 encompasses situations, as in the present case, where the victim testifies, this was not the purpose of the statute and thereby it was not constitutional. The Justice asserted the court wrongly assumed the statute would have been passed without the ability to permit hearsay evidence without the testimony of the child victim and thus wrongly held the statute to be constitutional\(^{162}\). While admitting the statute does include the use of out-of-court statements even when the child does testify, Justice Cook contends the use of this language was an "end-run" on the defense, asserting exclusion of out-of-court statements when the child victim does testify, which could not justify the prolongation of an unconstitutional statute\(^{163}\).

In sum, the interpretation of *Crawford* has varied drastically from the call for declaration of 725 ILCS 5/115-10 as wholly unconstitutional\(^{164}\) to the more narrow and current majority reading preserving the application of the hearsay exception to non-testimonial statements\(^{165}\). Similarly, the determination of what is testimonial has evolved through the case history from one which includes inculpatory statements made even to family members as testimonial\(^{166}\) to the more narrow definition not including statements made to family members, but including those to government employees\(^{167}\).

161. *Id.* at 719 (Cook, J., dissenting) ("It is a stretch to justify a statute where witnesses are routinely not available for cross-examination on the basis of the isolated cases cited by the majority.").
163. *Id.*
165. *See Miles*, 815 N.E.2d 37.
166. *In re E.H.*, 823 N.E.2d at 1035-38.
D. A STANDARD TEST APPLICABLE FOR CHILD SEXUAL ABUSE VICTIM STATEMENTS

With this brief history of post-Crawford jurisprudence to rely on, questions still remain: what is testimonial evidence in light of Crawford; how should it be determined; and how can the court balance the rights of the accused and victims in pursuit of the truth and subsequently justice? The latter of these questions is not a new query for the courts, but it may be where the reasoning for the proper test can be found. Throughout history, rights granted to the public as well as to an accused have been balanced against interests of the state as well as the pursuit of justice. The Confrontation Clause is no different than any of the other rights constitutionally protected; if a strong enough compelling state interest can be provided, the right can be justifiably infringed upon by legislation. The state interest asserted in child sex abuse cases has repeatedly been to protect the safety, health, and welfare of children. This has also been repeatedly considered a strong interest by the courts. Further, as stated by Justice O'Connor in the majority opinion of Maryland v. Craig, the specific goal of protecting victims of child sex abuse has been accepted as compelling by the Supreme Court on numerous occasions. The test proposed below is based on seeking the balance between these competing rights while facilitating access to the truth, and in doing so provide guidance on what will be admissible to those on both sides of a proceeding.

As noted by numerous scholars post-Crawford, the key to the admissibility of evidence is now the ability to successfully argue statements are or are not non-testimonial. The Supreme Court, by failing to define

168. "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." Mattox v. United States, 156 U.S. 237, 243 (1895) (allowing permissible inclusion of testimony from first trial of subsequently deceased witness).

169. See, e.g., Delaware v. Van Arsdall, 475 U.S. 673 (1986) (explaining that cross examination by a defendant may be limited in order to prevent confusion of the issue, undue prejudice or misleading of the jury).

170. See, e.g., Jacobellis v. Ohio, 378 U.S. 184 (1964) (finding the right of state to prevent distribution of material harmful to children).


172. See Phillips, supra note 95; Danielle Dupre, Crawford v. Washington: Reclaiming the Original Meaning of the Confrontation Clause, 21 TouRO L. Rev. 231
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testimonial,173 created the battleground for admissibility of out-of-court statements. Ironically, in the attempt to re-establish the strength of the Confrontation Clause by removing the use of unsure terms, “indicia of reliability” set forth in Roberts,174 the court set forth the deliberately undefined term “testimonial,”175 arguably adding another battle and not ending the war. Even with the recent subsequent decision of Davis, the term “testimonial,” as acknowledged by the court, is still not fully defined.176 Under Crawford, the initial focus of possible admission of hearsay evidence has shifted to defining the term testimonial, and therefore, the test, which is applied to proposed admissions, will directly impact not only the admission but probable success of the resulting trial.177

As stated before, the prosecution of sex crimes against children is inherently difficult due to the common lack of evidence beyond that of the statements by child victim who will most likely be contradicted by the defendant’s account.178 The prosecutors of these cases are additionally handicapped, as predicted by Justice Rehnquist in Crawford,179 by uncertainty of what evidence they not only will be able to present in court but how the manner of investigation utilized by those involved will impact the admissibility. It is also important to keep in mind the prosecutor must balance the desire to successfully convict the abuser with their and the parents’ (or other family members’) desire to protect their child who is already deeply scarred by the abuse, whose trauma has been exacerbated by repeatedly telling strangers about the abuse,180 and may be even more so by possibly being forced to testify.181 In order to alleviate difficulty and confusion surrounding the admissibility of the child victim’s out-of-court statements, a clear test must be set forth for determination of what statements will be considered testimonial evidence.

The test this comment advocates follows not only the guidelines set forth in Crawford but the pattern of subsequent decisions in Illinois and the overarching public policy interests connected to these types of cases. The test begins by looking at to whom the child made the out-of-court statements. Looking at Crawford, this is clearly the best place to begin the

173. Crawford, 541 U.S. at 68.
175. Crawford, 541 U.S. at 68.
176. Davis, 126 S. Ct. at 2274.
177. See Crawford, 541 U.S. at 68.
178. Brannon, supra note 80, at 443.
179. Crawford, 541 U.S. at 75-76.
180. Brannon, supra note 80, at 441-42.
analysis. The court in Crawford was dealing with a statement taken by the police at the police station and was able to easily determine this as testimonial regardless of a lack of definition or applicable determination test. 182 Throughout the discussion in achieving this result, the court frequently focused on the person to whom the statement was made as a factor in the determination of a statement as testimonial, referencing the historical, current, and possible future abuse by government actors to acquire or present out-of-court statements. 183 This focus on the receiver of out-of-court statements is found throughout decisions in Illinois post-Crawford including those dealing with sexual abuse against children. For example, in the First District in Illinois v. R.F., the majority held:

Thus, Crawford applies only to statements made to governmental officials; Crawford does not apply to statements made to nongovernmental personnel, such as family members or physicians. When an out-of-court statement is made to nongovernmental personnel, and, thus, is non-testimonial, the "indicia of reliability" framework of Ohio v. Roberts, and the hearsay exception set forth in section 115-10, continue to apply. 184

While the Fourth District in Sharp did not address the definition of testimonial because the victim was able to testify, in his concurrence, Justice Turner stated the questioning by the mother to determine if her child had been abused was “not prompted by police officers or any other governmental authority, and...thus non-testimonial in nature.” 185 Following the intent of the Crawford and R.F. precedent, therefore, the first half of the test is to determine to whom the statement was made, and, if to “nongovernmental personnel,” it is non-testimonial. For example, all statements made by Sarah to her mother in the hypothetical situation would be non-testimonial. This, of course, does not necessitate the statements will be admitted, as this would only allow the 725 ILCS 5/115-10 hearing to

182. Crawford, 541 U.S. at 51-52.
183. See, e.g., Crawford, 541 U.S. 36. “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.” Id. at 51; “The involvement of government officers in the production of testimonial evidence...” Id. at 53; “Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse...” Id. at 56 n.7; “factors that make the statements testimonial...made to police while in custody” Id. at 65.
186. Id.
occur, during which the reliability of the statement would be determined satisfying the due process rights of the defendant.

Statements to governmental personnel would alternatively have the presumption of being testimonial. However, the analysis would then shift to looking at the purpose behind the statement made to the governmental employee. Specifically, the court would then consider whether the statement was made with reasonable expectation to be used in prosecution.\textsuperscript{187} While it is clear that all persons connected to government are not necessarily involved in or trying to further the prosecution of the accused,\textsuperscript{188} the second prong will place the burden on the prosecution to prove the statement was not made specifically to inculpate the defendant in a future criminal proceeding. The court should view the statement from two perspectives.\textsuperscript{189} First, the point of view of the child:\textsuperscript{190} could the child have reasonably understood the statement would be used to prosecute the defendant? If it is reasonable to believe that the child believed or understood, when making the statement, that it would be used to punish defendant, then the statement is testimonial and excludable under \textit{Crawford} without the child’s testimony.\textsuperscript{191} This may tie logically as well to the court’s earlier determination of whether the child is competent to testify; if a child is not competent to testify at trial, then reasonably the child did not contemplate or understand the possibility of the use of the statement in such a proceeding.\textsuperscript{192} For example, it might be shown in the hypothetical situation above that Ricky intended to have the police officer place Mr. Richardson in jail when he disclosed the abuse. On the other hand, if the question is answered negatively, the court then applies the second perspective, that of the interviewer:\textsuperscript{193} were there specific prodding, suggestions, or undue influence on the part of the interviewer to solicit accusatory statements against the defendant in preparation for prosecution? This second prong follows the type of reasoning set forth in the recent

\textsuperscript{187} See \textit{Crawford}, 541 U.S. at 51 (citing Brief for Petitioner at 23).
\textsuperscript{188} Given that child abuse has both criminal and social welfare implications, DCFS and the State’s Attorney may naturally share some involvement in a particular case. However, that criminal prosecution may result from that involvement is insufficient to impute knowledge between the agencies. See, e.g., \textit{In re C.J.}, 652 N.E.2d 315, 318 (Ill. 1995) (quoting People v. Robinson, 623 N.E.2d 352, 358 (Ill. 1993)) (“If this court were to conclude that the knowledge of every State employee who is involved in a criminal case is imputed to the prosecution, the control over criminal cases would be placed in the hands, and at the mercy, of every employee who touches the case.”).
\textsuperscript{189} Phillips, \textit{supra} note 95, at 20.
\textsuperscript{190} Id.
\textsuperscript{191} \textit{See Crawford}, 541 U.S. 36.
\textsuperscript{192} Staab, \textit{supra} note 90, at 521-22.
\textsuperscript{193} Phillips, \textit{supra} note 95, at 24.
Davis holding focusing on the purpose of the police interrogation.\footnote{194} Again, if it appears the interviewer was focusing on gathering statements for successful prosecution rather than for the successful treatment of the child, the statement will be testimonial.\footnote{195}

Like the state’s ability to assert a compelling interest to support the constitutionality of legislation, the constitutional crossroads and overlap of hearsay and the Confrontation Clause is repeatedly traversed territory for the courts. Courts have frequently been called upon to balance the search for truth with the admission of hearsay and the accused’s right to confront a witness.\footnote{196} These established hearsay rules that have not been ruled against through Crawford as of yet, in addition to providing possible other avenues for introduction of out-of-court statements, support the use of the proposed test. The validity of this two-prong test for determination of whether a statement is testimonial derives support from the underlying reasoning of hearsay exceptions. The hearsay exceptions are based upon the same common ideal that the motive for fabrication is lacking, and thus in the interest of justice the statements should be allowed in, leaving the final determination of credibility to the jury. The advocated test of this comment follows this same logic as well as the idea that if there is no motive to make or induce statements for the benefit of prosecution, compounded with the age of the victim, the statements may be considered non-testimonial.

The first hearsay exception lending support is testimony for medical diagnosis,\footnote{197} which in Illinois has been specifically extended by statute to a physician treating victims of sex offenses.\footnote{198} This exception has already

\footnote{194. \textit{Davis}, 126 S. Ct. at 2273-74.}
\footnote{195. \textit{See}, e.g., Colorado v. Vigil, 104 P.3d 258, 262-63 (Colo. Ct. App. 2004), aff’d in part, rev’d in part, 127 P.3d 916 (Colo. 2006). During the interview, the police officer asked the child what should happen to defendant, and the child replied that defendant should go to jail. \textit{Id.} The officer then told the child that he would need to talk to “a friend” of hers who worked for the district attorney and who was going to try to put defendant “in jail for a long long time.” \textit{Id.}}
\footnote{196. \textit{See e.g.}, United States v. Inadi, 475 U.S. 387 (1986); California v. Green, 399 U.S. 149 (1970).}
\footnote{197. \textit{Fed. R. Evid. 803(4)} (“The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”).}
\footnote{198. \textit{See 725 ILL. COMP. STAT. 5/115-13} (2004): \textit{In a prosecution for violation of Section 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the "Criminal Code of 1961"}, statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof}
been accepted post-*Crawford* in Illinois.\(^\text{199}\) The underlying reasoning for this hearsay exception is that in order to receive the best medical treatment possible, the patient will be honest with the treating medical personnel. In conjunction to further support the proposed test, any non-governmental medical personnel would have no motivation to diagnose or provoke a false accusation of child sex abuse, and any belief of such an act could easily be addressed by the defendant on cross-examination of the physician. The same philosophy of extending proper treatment to a patient is also present with those mental and physical health professionals connected to a government agency. When investigating an allegation of sexual abuse of a child, the purpose of forensic interviews with children, despite belief to the contrary, is to facilitate the treatment of the child victim as directed by the "child first doctrine” which dictates the child is the first priority of investigators and is thus placed above the interests of all other interested parties including prosecutors, police, courts, family and even the "child's story."\(^\text{200}\) Furthermore, "interviewers are specifically taught not to focus only on the possibility a child was abused by a given person. . . [and] to explore ‘alternative hypotheses’ including an innocent explanation for a child’s account of genital touching, or to identify a perpetrator other than one named by the child.”\(^\text{201}\) The Illinois Supreme Court has also ruled that although such interviewers maybe connected to the state, they are not necessarily an extension of the prosecution.\(^\text{202}\) Therefore, to rule statements as testimonial solely because they are given to a government employee goes against not only the precedent of Illinois but the underlying concern in

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insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

In addition, expert testimony on post-traumatic stress syndrome, a possible emotion trauma caused by sexual abuse, is admissible. See 725 ILL. COMP. STAT. 5/115-7.2 (2004):

In a prosecution for an illegal sexual act perpetrated upon a victim, including but not limited to prosecutions for violations of Sections 12-13 through 12-16 of the Criminal Code of 1961, or ritualized abuse of a child under Section 12-33 of the Criminal Code of 1961, testimony by an expert, qualified by the court relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence.

199. People v. West, 823 N.E.2d 82 (Ill. App. Ct. 2005) (holding that statements made by aggravated criminal sexual assault victim to emergency room physician were admissible).


201. *Id.* at 4.

Thus, the second prong of the proposed test with consideration of the two different possible perspectives of the interviewer and the child-victim is valid and necessary.

Another incredibly compelling, and possibly the most intrinsic, support of the application of the more narrow test and allowance for more inclusion of child victim statements is that of forfeiture by wrongdoing. Forfeiture by wrongdoing states if a declarant is unable to testify due to the accused’s actions the hearsay statements by the unavailable declarant are admissible. The underlying theory for this exception is that of equity; this basic concept of fairness dictating it unjust that one should benefit from one’s wrong action. As enunciated by Judge Joan Comparet-Cassani, quoting United States v. Thevis:

The law simply cannot countenance a defendant deriving benefits from silencing the chief witness against him. To permit such subversion of a criminal prosecution ‘would be contrary to public policy, common sense, and the underlying purpose of the Confrontation Clause,’ and make a mockery of the system of justice that the right was designed to protect." Therefore, in that instance the equitable doctrine of forfeiture penalizes the accused and declares that "he cannot insist on his privilege" under the Confrontation Clause.

The action taken by the accused resulting in forfeiture need not be an affirmative physical act against the witness, but merely must be “a wrongful procurement” which prevents the witness from testifying; including failure to do an action. Correspondingly, non-criminal acts can constitute the action necessary to invoke the forfeiture by wrongdoing exception.

203. See FED. R. EVID. 804(b)(6) (“Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”).
206. United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982).
207. Comparet-Cassani, supra note 205, at 1197.
208. Reynolds, 98 U.S. at 158 (holding that a defendant’s failure to provide the whereabouts of a witness to facilitate the service of a trial subpoena was determined to be “wrongful procurement” constituting forfeiture by wrongdoing.)
209. Comparet-Cassani, supra note 205, at 1204, 1208 (stating that the actions included within forfeiture include “chicanery, intimidation, threats, persuasion, dominance, or control by the defendant.”).
addition, the criminal act for which the defendant is charged may also be the action creating the forfeiture. This hearsay exception was specifically upheld in the Crawford decision as a waiver of a defendant's assertion of a violation of the Confrontation Clause. The Court reiterated this holding in Crawford in Davis when it noted,

[When defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.]

This Federal Rules of Evidence exception, though previously not discussed or adopted by Illinois precedent, was recently determined under public policy considerations and accepted across numerous jurisdictions as the rule appropriate for inclusion in Illinois law by the First District.

The frequency of the appropriate application for forfeiture by wrongdoing in pedophilia cases is almost staggering. According to a national study of nearly 1,000 criminal cases, in over twenty-five percent of the cases the victims were threatened by their abusers. The very nature

210. Martin, supra note 91, at 141-42.
211. Crawford, 541 U.S. at 62 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds. . . .").
212. Id.
213. Davis, 126 S. Ct. at 2280. The Court also stated failure to have this exception would provide a "windfall" to the defendant. Id.
214. FED. R. EVID. 804(b)(6).
215. People v. Stechly, No. 97544, is currently pending before the Illinois Supreme Court and deals with the interaction of Crawford and forfeiture by wrongdoing.
217. Brief for National Association of Counsel for Children as Amicus Curiae Supporting Respondents, supra note 39, at 7. In a Canadian study of 500 cases approximately 50% of the victims were threatened.

[W]arnings ranged from pleas that the abuser would get into trouble if the child told (or that the abuser would be sent away and the child would never see them again - a powerful message to a young child whose abuser is also a "beloved" parent), to threats that the child would be blamed for the abuse (especially troubling were children who were told that the defendant's intimate - the child's mother - would blame the child for "having sex" with the defendant and would thus turn against him or her), to ominous warnings that the defendant would hurt or kill the child (or someone he or she loved) if they revealed the abuse.
of the crime, sexual abuse of a child, is secretive,\textsuperscript{218} induces trauma for
witnesses, and frequently is accompanied by threats; which as indicated
above can trigger the forfeiture exception. Threats by the offender may
explicitly threaten or implicitly\textsuperscript{219} instill fear in the child victim that telling
others will have severe, if not deadly, repercussions, or convince the child it
is his fault the abuse has happened,\textsuperscript{220} as seen in \textit{In re T.T.},\textsuperscript{221} \textit{In re E.H.},\textsuperscript{222}
Mr. Richardson’s threats to Ricky in the presented hypothetical, and in
several other cases.\textsuperscript{223} In addition, facing these abusers and reliving the
resulting trauma is repeatedly reported as the child’s greatest fear.\textsuperscript{224} This
fear may have a direct correlation on the child’s ability to testify about the
abuse.\textsuperscript{225} While the recent decision of \textit{People v. Melchor} requires the intent
of the actions of the accused be shown to prevent the declarant from
testifying,\textsuperscript{226} this condition arguably is met for the pedophile who is
attempting to prevent just such an occurrence by his actions.\textsuperscript{227} As it is the
accused’s actions that have led to the difficulty in the child being able or
willing to testify, either through infliction of emotional distress, fear, or
decit, it falls under the logic of this accepted exception that the statements
made by the child should be admissible.\textsuperscript{228} Thus, the second prong of the
proposed test with consideration of the child’s perspective, as well as the

\textit{Id.} at 7-8 (citing Barbara Smith & Sharon G. Elstein, \textit{The Prosecution of Child Sexual and
Physical Abuse Cases: Final Report}, at 93, 122 (1993)).

218. Martin, supra note 91. Pedophiles often tell victims to keep the abuse a secret,
in an apparent attempt to prevent the child from telling anyone that may use the child to
present testimony.

219. The implicit nature of a threat should not disqualify it from possible forfeiture
by wrongdoing. “As one Court has said, ‘[i]t is not so much the severity of the behavior, but
rather the intent underlying it and its effectiveness, that constitutes a waiver.’ ” Comparet-
549, 554 (5th Cir. 2001)).

220. Martin, supra note 91, at 141-42 (noting that pedophiles frequently tell victims
to remain silent, threaten the victim or victim’s loved ones, or attempt to convince others to
prevent the child from testifying); Darkness to Light, \textit{Step3: Talk about it},


223. Martin, supra note 91, at 134.

224. Brannon, supra note 80, at 442.

225. Rutherford, supra note 82, at 147 (based on a study of 218 child sexual assault
victims).


227. \textit{Id.}

228. \textit{Melchor}, 841 N.E.2d at 430 (citing State v. Henry, 820 A.2d 1076, 1086 (Conn.
App. Ct. 2003)) (“‘[I]f a witness' silence is procured by the defendant himself, whether by
\textit{chicanery} [citation], by \textit{threats} [citations], or by actual violence or murder [citation], the
defendant cannot assert his Confrontation Clause rights to prevent prior testimony from
being admitted against him.’”) (emphasis added).
first prong looking to the person to whom the disclosure is made, is supported and appropriate.

The final supportive hearsay exception is that of excited utterance; a statement made while still under the stress of a traumatic or startling event.\(^{229}\) The basis behind this exception is that the opportunity to fabricate or the motivation to do so is removed, thus creating the level of reliability from which this exception is derived. An unprovoked account by a child of sexual abuse should be given this same presumption. There are three main factors to satisfy for a statement to be a spontaneous declaration: 1) the event must be “sufficiently startling,”\(^{230}\) 2) short period of time between the event and the statement indicated no time to lie, and 3) connection between the event and the statement.\(^{231}\) The biggest typical problem for the use of this exception would be the requirement that the statement is made in close time proximity to the abuse. However, in Crawford, the Court retained its earlier decision White v. Illinois in which the child reported abuse forty-five minutes after it took place under this exception as valid precedent.\(^{232}\)

Further, Illinois appellate courts have already extended the time lapse permissible in the situation with a young child well beyond that time frame.\(^{233}\) In addition, the actual language as used in the Federal Rules of Evidence refers to a statement “made while the declarant was under the stress of excitement caused by the event” and does not place a specific time requirement or limitation.\(^{234}\) This justification could be applied to those children who are still suffering acutely from the trauma of the abuse or have had a triggering event. Further, it has been ruled that the time period between the startling event and the statement is not determinative of admissibility and the court must look at the totality of circumstances to determine opportunity for fabrication.\(^{235}\) Illinois courts have followed the lead of Wisconsin courts in considering the extreme emotional stress placed

\(^{229}\) FED. R. EVID. 803(2) (“A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”).


\(^{232}\) Martin, supra note 91, at 137-38.


\(^{234}\) FED. R. EVID. 803(2).

on a child sexually abused and the unlikelihood of fabrication. In doing so, three specific reasons have been given:

(1) the child is apt to repress the incident; (2) it is often unlikely the child will discuss such a stressful incident with anyone but [family closest to the child]; and (3) the characteristics of young children work to produce declarations free of conscious fabrication for a longer period after the incident than adults.

When determining whether the statements were still within the time boundaries of a spontaneous declaration, the child’s lack of sufficient knowledge to fabricate the abuse is also taken into consideration. Thus, delay of the statement would not necessarily preclude admission of the statements, but bears on the credibility of the statements. For instance, in the earlier stated hypothetical of Sarah, her statements to her mother would be admissible, but the one day delay would be considered by the jury for credibility purposes. The reasoning behind the application of this hearsay exception to child-victim declarant’s statements indicates the same methodology and reasoning which is embodied in the proposed two prong test and thus the test should be accepted.

E. SUPPORT USE OF CLOSED-CIRCUIT TESTIMONY

The need for child victims to testify will most likely become more necessary with the lowered ability of prosecutors to use 725 ILCS 5/115-10 to introduce out-of-court statements by non-testifying victims. Even with a narrow definition of testimonial evidence, since there will still be the initial testimonial hurdle, it is reasonable to believe there will be more times when the only way a successful prosecution can be achieved will be with the testimony of a child. In light of Crawford’s implication on the prosecution of sexual abuse of children, the use of closed circuit television testimony by children allowed under 725 ILCS 5/106B-5 and Maryland v. Craig.

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236. Id.
237. Id.
238. Id.
239. Id.
241. Staab, supra note 90, at 524-25 (arguing that because excited utterance statements are made without time to fabricate, they are logically not made in contemplation of use at trial).
should be used more frequently in Illinois to continue successful prosecution of pedophiles.

The ability to use closed circuit testimony for child victims of sex abuse has been an uphill battle. Twice, the enacted legislation to provide such an opportunity was declared unconstitutional based on the Illinois Constitution's Confrontation Clause, which was initially read to require face-to-face confrontation with the accused.\(^{243}\) It was not until an amendment to the constitution was passed, carving out an exception for children, that legislation was successfully upheld under the Illinois constitution; thus, the use of this form of testimony has only been in use for slightly over ten years in Illinois.\(^{244}\) The use of cameras is supported by the likelihood that it will increase the reliability of the testimony given by the child in court.\(^{245}\) It is often the presence of the defendant that unduly traumatizes a child victim and unfairly causes their testimony to appear less reliable.\(^{246}\) This, coupled with the purpose of the Confrontation Clause, as aptly noted by Justice O'Connor in Craig, "[t]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony],’\(^{247}\) clearly supports the use of closed circuit testimony for child victims on a more frequent basis and not merely in emergency situations. Those in opposition may argue that, in Crawford, the Court seemed to be re-establishing the strength of the Confrontation Clause, and thus, any argument to lessen this strength goes against the principle handed down through Crawford. However, Crawford's language also specifically holds out non-testimonial evidence as not implicated and fails to define "testimonial."\(^{248}\) If the Court had wished to push the Confrontation Clause's strength to such an outer limit, it could, and most likely would, have set a broad definition or eliminated the distinction all together. Rather, the Court not only failed to do this, but also continued to support methods by which hearsay may still be entered into evidence regardless of the


\(^{244}\) ILL. CONST. art. 1, § 8 (amended in 1994 to eliminate "face to face" language).

\(^{245}\) Craig, 497 U.S. at 857 ("Indeed where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact disserv[e the Confrontation Clause's truth-seeking goal.").

\(^{246}\) "As a result of the trauma induced by having to face the accused, the child witness may display observable signs of nervousness, fear and anxiety during testimony." Brannon, supra note 80, at 442-43.

\(^{247}\) Craig, 497 U.S. at 846 (citing Dutton v. Evans, 400 U.S. 74, 89 (1970)).

\(^{248}\) Crawford, 541 U.S. at 68.
testimonial nature such as a dying declaration or forfeiture by
wrongdoing. \(^{249}\)

A counter argument that there is no reason for children to have a
different version of the Confrontation Clause applied to their cases, as the
defendants will clearly face harsh punishment, may also be presented.
However, there have been numerous laws, which established that children
in fact do not only deserve, but necessitate, a different standard. \(^{250}\)

**CONCLUSION**

Intrinsic to any prosecution is a delicate balance between the
protection of the rights of the victim and the accused while maintaining a
pursuit of justice through seeking out the truth. This balance is especially
precarious in the prosecution of sexual abuse against children. The crime,
which in its very nature is cloaked in secrecy \(^{251}\) and preys upon the
weakest, most vulnerable members of society, provides little evidence after
the offense.

Previously the court, in order to ascertain the truth while protecting the
child victims of sexual abuse, allowed sexually abused childrens' out-of-
court statements to others into court without subjecting the already
traumatized victims to the re-traumatizing event of testifying. \(^{252}\) To counter
the possibility of misuse of this option and overuse, the legislature
incorporated a hearing to determine the reliability of the testimony and
ability of the witness to testify. \(^{253}\) Thereby the court must strike the balance
needed in the pursuit of justice. Now the court is limiting the application of
this previously accepted exception. \(^{254}\)

When determining the appropriate test under *Crawford* it is key to
keep in mind that the underlying purpose and interests initially supporting
the passage and implementation of 725 ILCS 5/115-10 have not changed or
dissipated. The protection of our children, especially those who have

\(^{249}\) *Id.* at 55, 62.

\(^{250}\) States set curfew laws, require attainment of various ages for various privileges,
limit the number of hours and times of day a child can work, restrict the forms of
entertainment which may be presented to children without an adult present, allow children to
testify with the use of anatomical dolls, etc.

\(^{251}\) Only 10% of sexual abuse is reported to authorities. Brief for National
Association of Counsel for Children as Amicus Curiae Supporting Respondents, *supra* note
39, at 5.


\(^{253}\) *Id.*

\(^{254}\) *See, e.g.*, *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004); *In re E.H.*, 823 N.E.2d
1029 (Ill. App. Ct. 2005); *cert. granted*, 833 N.E.2d 2 (2005); *People v. R.F.*, 825 N.E.2d
287 (Ill. App. Ct. 2005); *People v. Cannon*, 832 N.E.2d 312 (Ill. App. Ct. 2005); *In re
already been victimized in, quite possibly, the most horrifying manner, is one of the most compelling state interests. Further, it has been one the Supreme Court has already used to counterbalance the right of the accused under the Sixth Amendment’s Confrontation Clause.255

Particularly pertinent to the application of a narrower test to the prosecution of pedophiles are, not only the nature of the crime, but also the nature of the victims. As stated, there are numerous hurdles to a child being able to testify at court at any age including their own abilities, fears, and resulting emotional trauma. In addition, some of the most common victims of criminal sexual abuse are the very young because of their vulnerability. Horribly, these same victims are often determined by the court to be unable to testify due to their young age256 and resulting inability to pass the competency requirements.257 Thus, if the test asserted in In re E.H., which excluded statements that inculpate the defendant,258 or, if a very broadly-tailored definition of “testimonial” is regularly applied, the court is, in essence, declaring “open season” to pedophiles. These individuals are typically repeat offenders259 that prey on very young child victims who are already less likely to have their abusers successfully prosecuted than older victims.260 Admissible statements under E.H. would be limited to those that do not name the defendant as the abuser and clearly leave the door open for reasonable doubt. A broad definition of “testimonial” would include statements made to anyone not a family member or friend, thereby eliminating the testimony of persons most likely to possess expertise on the sex abuse as well as persons with a more objective perspective than those closely attached to the victim. This information could and most likely would be quickly disseminated among the pedophile community261 and thus make the younger children, already considered ideal victims because of their lack of knowledge and generally trusting nature, even more appealing because the prosecution against the abuser is handicapped by his very selection in victims.

255. See supra note 171.
256. R.F., 825 N.E.2d at 297 (Neville, J., dissenting) (noting the statement by the trial court judge that “I don’t generally feel that a five year old is competent to testify anyway.”).
259. See supra note 64.
260. “An offender was arrested in just 19% of the sexual assaults of children under the age of 6, compared to 33% of victims ages 6 through 11, and 32% of victims ages 12-17.” American Prosecutor’s Research Institute, Statistics, http://www.ndaa-apri.org/pdf/ncpca_statistics.pdf (last visited Aug. 14, 2006).
261. KINNEAR, supra note 65.
Dissenting opinions often become the holdings of the majority, as in the current case in point in the First District.\textsuperscript{262} There is still opposition so strong as to call for the entire use of 725 ILCS 5/115-10 to be declared unconstitutional,\textsuperscript{263} and this position, or one of the other damaging positions as to the application of 725 ILCS 5/1150-10 under \textit{Crawford}, may easily regain majority support. This position will relegate the prosecution of pedophilia to complete dependency on the ability of young, traumatized victims to testify against the attacker — an attacker who frequently is a friend or family member, possibly even a parent.\textsuperscript{264} Currently the courts are leaning towards a narrow definition of the term “testimonial” in this area in Illinois. The courts have tapered back those statements included in the definition and been consistent in upholding this position. This makes now the prime opportunity for the Illinois Supreme Court to issue a decision supporting this position and lay forth a clear test applicable in a case-by-case basis for the lower courts to follow; thereby filling in the gap of guidance left by the \textit{Crawford} decision.

\textbf{JENNIFER A. LINDT}\textsuperscript{*}


\textsuperscript{264} \textit{SYNDER \& SICKMUND}, supra note 63.

\textsuperscript{*} I would like to dedicate this article to my parents, Jim and Fran, who with great love taught me the importance of education. I would also like to thank my family, especially my brothers Jim, Jeff, and Joe, for all their love and support, including encouraging me to pursue law school. I would like to specially thank my brother Joe for all of his help and my sister-in-law Cathy, without whom I could not have written this article.