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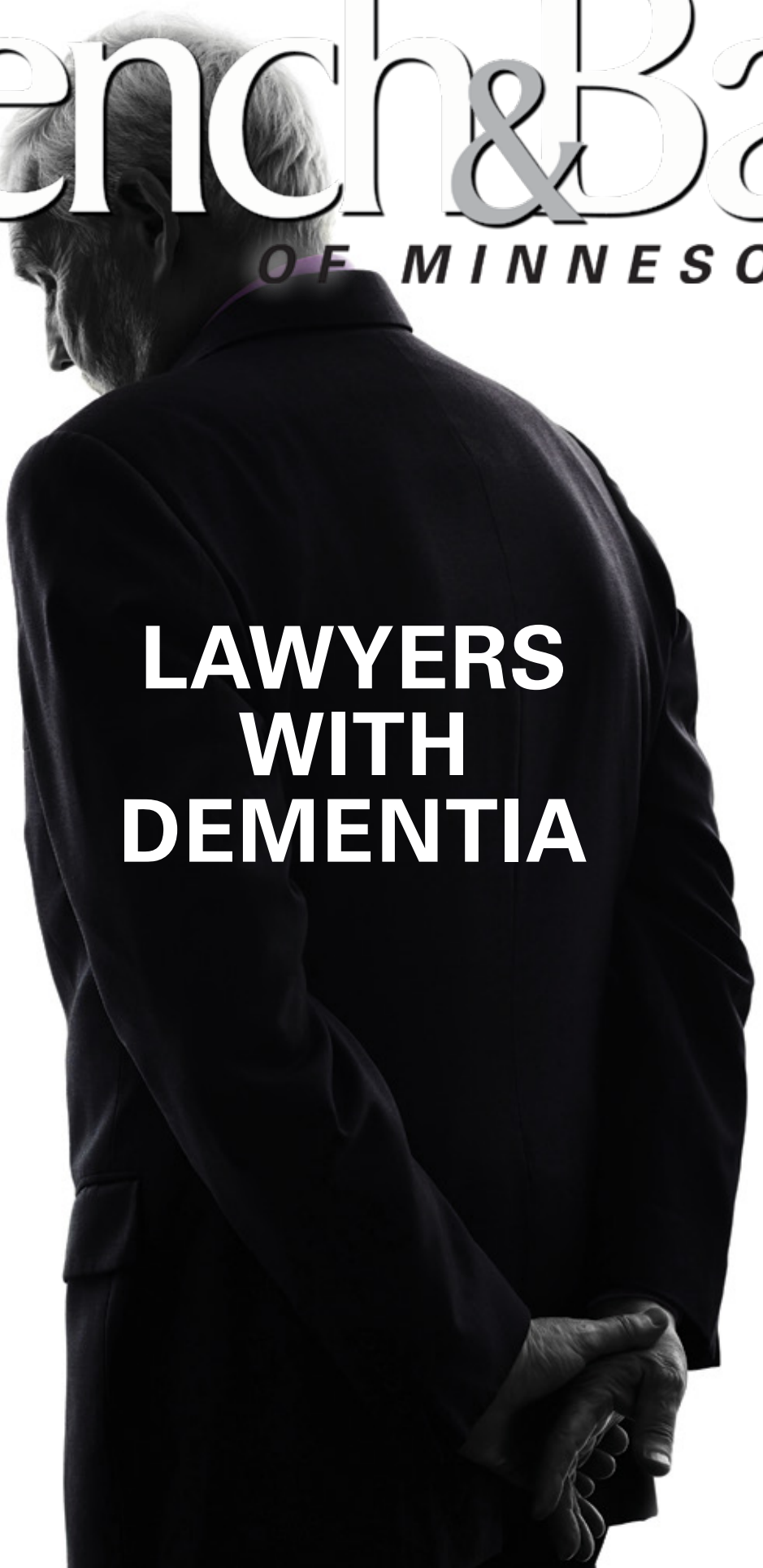

As more attorneys practice into later life, the profession faces a growing challenge

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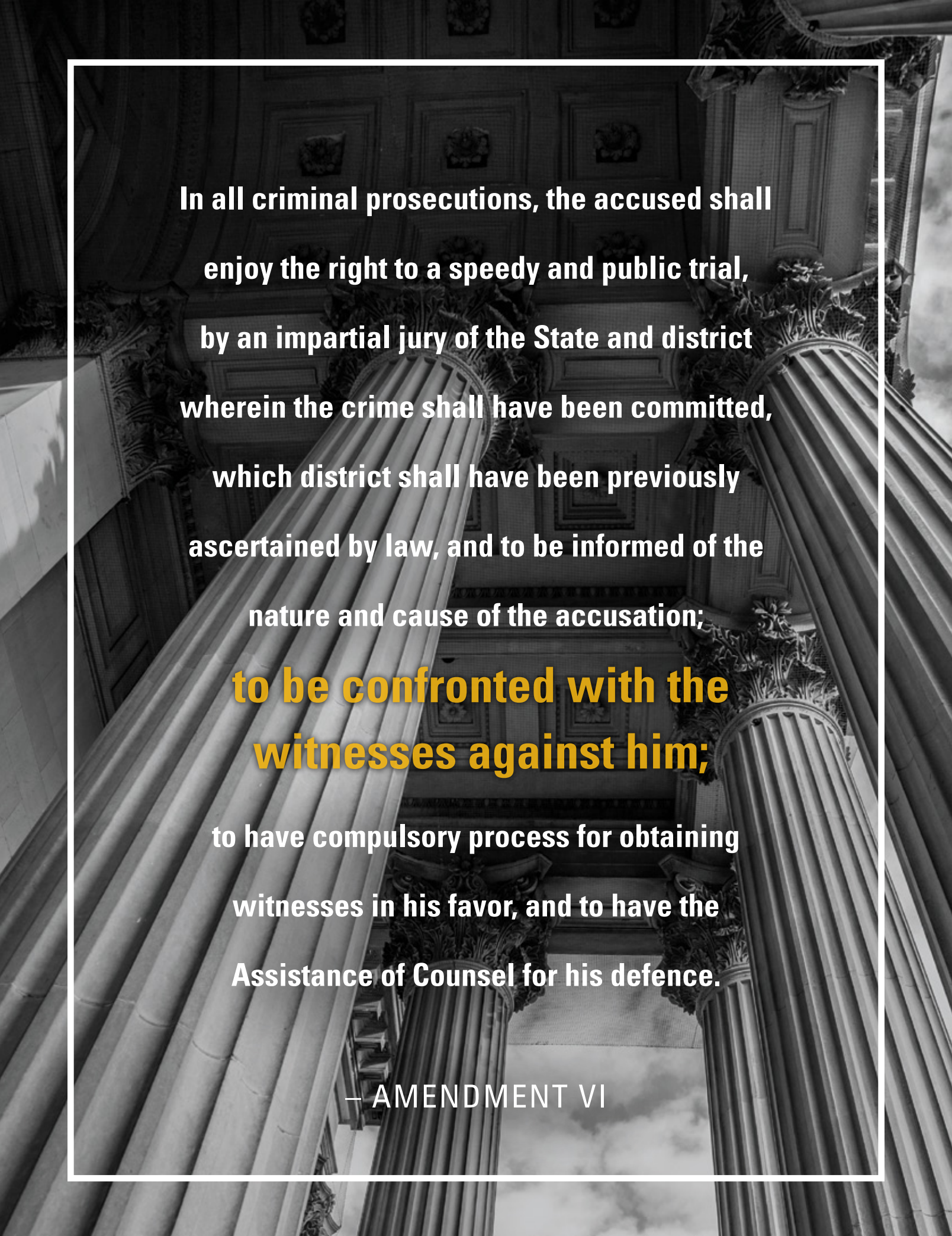

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

– AMENDMENT VI

CHILD SEX ABUSE AND THE SIXTH AMENDMENT

Minnesota courts are eroding confrontation clause protections in cases involving child witnesses

By Matthew Mankey and Stacy L. Bettison

In child sex abuse cases, Minnesota courts are slowly eroding the basic right of the Sixth Amendment's Confrontation Clause: that the "accused shall enjoy the right… to be confronted with the witnesses against him."[1] The United States Supreme Court laid down the law in *Crawford v. Washington*: Testimonial statements of witnesses absent from trial are admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.[2]

Since then, in a series of cases with inconsistent analyses, Minnesota courts have held that statements made by a child in a forensic video interview are nontestimonial and therefore admissible when the declarant is unavailable.[3] These forensic video interviews are commonly conducted by CornerHouse or Minnesota Children's Resource Center (MCRC).

These holdings undermine protections dating back to Roman times.[4] Minnesota courts have failed to acknowledge the state's burden of proving that a particular statement is nontestimonial and therefore does not violate a defendant's Sixth Amendment rights.[5] Two factors are critical. First, were the statements made to address an ongoing emergency? If not, the statements are testimonial and inadmissible. Second, was the primary purpose for eliciting the statements to establish or prove past events potentially relevant to later criminal prosecution?[6] If yes, the statements are testimonial and inadmissible. Anything less than an authentic analysis considering these two factors and requiring the state to meet its burden tramples on the due process rights of the accused.

Admittedly, alleged child sex abusers enjoy little public sympathy. Defense counsel who represent such defendants are no stranger to the "How-can-you-represent-them" question. Yet the confrontation clause's protections are no less important or applicable to these defendants. Our civilized society has a compelling interest in caring for our youngest and most vulnerable citizens, yet we must do so in a manner that adheres to the fundamental structure of our civil liberties. The current state of case law protects the former at great expense to the latter.

This article will examine the nature and purpose of forensic interviews, provide examples of specific areas of concern, and review relevant federal and state case law. The authors' intent is to provide a useful outline of relevant issues and draw attention to what's become a fundamental problem for the accused.

Nature and purpose of forensic interviews

Minnesota courts have stated that the primary purpose of a forensic interview is to ascertain the health and well-being of a child (rendering those statements nontestimonial). It is this blanket rule that requires an honest look at what forensic interviews are and what they are designed to achieve.

"Forensic" is defined as "belonging to, used in, or suitable to courts of judicature or to public discussion and debate."[7] According to National Children's Advocacy Center, a forensic interview is "provided to children who may have experienced abuse or who have witnessed a crime or other violent act."[8]

While physical abuse of a child can be assessed by physical injuries, physical evidence of sexual abuse is rare. Physical indicators are found in 10 percent of girls and rarely in boys, which means sexual abuse is determined by a child's statements and behavior.[9]

Cornerhouse or MCRC is often the first stop after an initial report of sexual abuse reaches law enforcement or other mandated reporter. Whether the first report is at a clinic for a well-child visit, the child's school, or reported directly to law enforcement, the next step is to refer the child to Cornerhouse or MCRC for a forensic interview.

Cornerhouse and MCRC's own public descriptions of how and why they conduct forensic interviews belie the Minnesota courts' blanket rule that statements in a forensic interview are nontestimonial. For instance, Cornerhouse advises caregivers to tell the child they are "coming to Cornerhouse to talk about *what happened*."[10] Cornerhouse further explains that its interviews are conducted by trained professionals "*with the goal of eliciting detailed information that assist child abuse investigations*."[11] Cornerhouse does not provide medical evaluations.

MCRC, perhaps being strategic about how it frames the process given confrontation clause concerns, describes its forensic interviews on its website "like a

doctor's appointment."[12] MCRC, housed in Children's Hospitals & Clinics, explains that "during the appointment, your child may be physically examined as well as interviewed by a nurse, nurse practitioner or physician about suspected child abuse." MCRC does not use the term "forensic interview" but instead refers to both the interview and the medical exam as an "evaluation."[13] Yet in a news article featuring MCRC, representatives state the forensic interview is "to elicit a free-flowing, uncorrupted account of *what happened*," and MCRC staff have acknowledged many of the cases for which they conduct an interview are "essential in prosecution" and "end up in court."[14]

The protocols guiding interview processes are purportedly intended to ensure a process that protects the rights of the accused, thus indicating that the statements are considered critical in prosecutions.[15] The *Cornerhouse Forensic Interviewing Protocol: RATAC*[16] is a commonly followed protocol designed as a "semi-structured non-directive questioning process for alleged victims of child sexual abuse."[17]

Typically, the only person in the room with the child is a trained forensic interviewer, though the other people who need information from the interview (law enforcement and/or child protection, and a county attorney) often watch through closed circuit television from another room.

U.S. Supreme Court confrontation clause jurisprudence

The promise that the accused has a right to confront their accuser in open court is directly stated in the Sixth Amendment and was reinforced by Justice Scalia in *Crawford v. Washington*.[18] His opinion was clear: Use of testimonial statements by witnesses absent from trial must be excluded unless the declarant is 1) unavailable to testify at trial; and 2) the defendant had a prior opportunity to cross-examine the declarant regarding the statement.[19]

When *Crawford* was decided, it was widely believed that it would have its greatest impact in cases of domestic assault. In such cases, it is not uncommon for alleged victims to change their story by the time a case comes to trial or to refuse to comply with a subpoena. In such circumstances, prior to *Crawford*, police would often be allowed to testify to what they were told on the night of the arrest. This practice made the hearsay admissible if it was deemed sufficiently reliable.[20] *Crawford* changed that.

What *Crawford* did not do, however, was "spell out a comprehensive definition of 'testimonial'."[21] That analysis came two years later in *Davis v. Washington/Hammon v. Indiana* (*Davis*), in which the Court distinguished between testimonial and nontestimonial statements.[22] The Court declined to produce an exhaustive classification of every type of statement, but described the difference between the two, turning on what the primary purpose of the interrogation is:

> Statements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[23]

Davis made clear that the product of interrogations "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are testimonial.[24] Statements that are neither "a cry for help nor the provision of information enabling officers immediately to end a threatening situation" are testimonial.[25]

Fast forward to 2015, when *Ohio v. Clark* became the United States Supreme Court case to decide the issue so far unanswered: "whether statements made to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause."[26] In *Clark*, the Court held that a three-year-old alleged victim's statements to his preschool teachers identifying the defendant as the person who had caused his injuries were not testimonial because the statements were made during on ongoing emergency, and it needed to be determined if it was safe for the child to return home at the end of the day. Further, there was no indication that the statement was taken for future use in a prosecution but instead to protect the child and finally, the setting was an informal lunchroom or classroom, not a station house.[27]

The Court also noted that the child's age supported its conclusion: "Statements made by very young children will rarely, if ever, implicate the Confrontation Clause" because they don't understand the criminal justice system.[28] Further, historically, according to the Court, statements made in "circumstances like those facing [the child] and his teachers were admissible at common law." Though the Court declined to adopt a rule that statements made to those other than law enforcement are categorically outside the Sixth Amendment, "the fact that [the child] was speaking to his teachers remains highly relevant:"

> Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.[29]

Minnesota confrontation clause jurisprudence

Minnesota's case law began a notable evolution in child criminal sexual conduct cases beginning in 2005, after *Crawford* but before *Davis*. In early 2005, the Minnesota Supreme Court held in *State v. Wright* (*Wright I*) that a 911 call reporting an assault and a police interview with the assault victims, conducted soon after the incident, were both nontestimonial.[30] That case set forth eight "relevant considerations" to determine on a case-by-case basis the testimonial nature of a statement.[31]

In February 2006, *State v. Bobadilla* built on *Wright I* by holding that statements of a three-year-old child (determined incompetent to testify) to a child protection worker during an interview at the Kandiyohi Law Enforcement Center that implicated the defendant in sexually abusive acts were nontestimonial.[32] The interview was conducted in a child-friendly room and was video recorded.[33] The investigating police officer observed the interview behind a one-way mirror.[34]

The *Bobadilla* Court reasoned that the interview was "initiated by a child-protection worker in response to a report of sexual abuse for the overriding purpose of assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child." Justice Page's lengthy dissent concluded the child's statement was testimonial because it "was made as part of a police interrogation, in the presence of a police officer, to a government official who was taking the statement as a surrogate interviewer for the police."[35]

Justice Page noted the interview was set up by a county child-protection worker at the request of a Willmar police detective and fit squarely within *Crawford*. Because the interview took place five days after the initial report of abuse at a doctor's office, there was no exigency, and the purpose of the interview served two functions: preliminary fact-finding

and collection of evidence for a future trial.[36] Justice Page's dissent illuminates the inconsistent, results-oriented analyses that lead to inconsistent outcomes.

One month later, in March 2006, the Court held in *State v. Scacchetti* (Justice Page) that statements made by a three-and-a-half-year-old child during a medical assessment by a nurse practitioner without law enforcement or other government actor involvement are not testimonial and admission of the statements at trial did not violate the Sixth Amendment.[37]

In January 2007, the Court considered *State v. Wright* (*Wright II*) to revisit its opinion in *Wright I* in light of the United States Supreme Court's decision in *Davis* (June 2016). The Court held that statements made to the 911 operator were nontestimonial, but that statements made to police on-scene and after the incident occurred were testimonial and their admission at trial violated the Sixth Amendment because they were made after the emergency had abated and concerned past events.[38]

In August 2007, the Court considered in *State v. Krasky* the very issue raised in this article: whether statements elicited from a child victim by a nurse at MCRC were testimonial and therefore inadmissible.[39] Upon receiving a child protection report, a Willmar Police Department detective and Kandiyohi County Family Services worker "decided to have [MCRC] interview and examine" the child.[40] The county social worker and the child's adoption social worker both watched the videotaped interview from an observation room.[41] The child was also given a physical examination and tested for sexually transmitted diseases.[42]

The Court concluded the MCRC nurse practitioner is not a government actor, and because the primary purpose was to assess and protect the child's health and welfare (physical examination, STD tests, and recommendation for psychotherapy), the statements were nontestimonial.[43] The Court further reasoned that a joint decision to refer the child to MCRC by law enforcement and social services as "the best way to proceed with the investigation" was not problematic because Minn. Stat. 626.556, subd. 10a requires such joint decisions.[44]

Krasky thus further muddied the waters. The statements were considered nontestimonial because of the venue of the interview (a children's hospital) and the fact that no law enforcement was present. Yet the decision to conduct the interview was jointly made by law enforcement and social services. Still, according to the Court, there was no evidence the interviewer was acting a "proxy" for law enforcement.

Minnesota federal court declines to follow state courts

Meanwhile, nearly a year after *Krasky*, Mr. Bobadilla petitioned for a writ of *habeas corpus*, arguing that the Minnesota Supreme Court unreasonably applied clearly established law in concluding that his right to confrontation was not violated by the introduction of the child victim's out-of-court statement.[45]

Judge Patrick Schiltz held that the child's statement in the forensic interview was inadmissible evidence under *Crawford*, and granted Bobadilla's requested *habeas* relief. Judge Schiltz reasoned that the child's interview was conducted five days after the crime was committed; the detective in charge of the criminal investigation initiated the interview; the county social worker conducted the interview as a "surrogate interviewer" for law enforcement; the interview took place at police headquarters; there was nothing spontaneous or informal about the interview; and there was no evidence the primary purpose of the interview was to assess or respond to imminent risk to the child's health and welfare.[46]

Considering Minn. Stat. 626.566, subd. 10a, and the requirement that law enforcement and local welfare agencies work together upon receiving reports of abuse, the court reasoned that it does not mean "that everything done by a social worker must be for the 'overriding purpose' of protecting the child, any more than it means that everything done by the police officer must be for the 'overriding purpose' of collecting evidence."[47] Further, the statute requires joint coordination for interviews to avoid multiple interviews of the child.[48] The requirement that they be recorded allows the social worker to assess immediate needs and preserve the statement so police can use it in their investigation.[49]

Minnesota case law grows more expansive

The current Minnesota landscape is clearly seen in *State v. Glover*, in which the Minnesota Court of Appeals, in an unpublished decision, reversed the pretrial suppression of statements made a five-year-old child in an MCRC interview.[50] In *Glover*, the child disclosed to an adult friend in January 2016 that the previous summer (2015) the defendant had touched the boy's penis and showed the child pictures of the defendant's penis on his phone.[51] On referral by St. Paul Police, MCRC interviewed the child.[52]

Davis made clear that the product of interrogations "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are testimonial.

Holding the statements were nontestimonial, the court concluded that the MCRC nurse was not acting as a proxy for law enforcement.[53] That was based on testimony of the nurse that the "'purpose of MCRC'" is for the "'assessment and treatment of child sexual abuse'" and her testimony that "'I don't do investigation [sic] of child abuse.'"[54] The nurse explained the protocol for questioning and further said that the questions were not directed by law enforcement and that she was thus "seeking truthful answers about what happened to [the child] for the purpose of assessing his health and making recommendations for treatment."[55] Accordingly, "Nurse Carney's primary purpose was medical."[56]

Conclusion

The testimonial v. nontestimonial determination suffers from Minnesota courts engaging in an "ends justify the means" analysis. Judicial decisions often seem based on emotion—or getting to the "right" result—rather than on a set of well-defined factors that the United States Supreme Court has articulated to ensure a consistent and honest analysis.

Minnesota courts' biggest failure has been their hardline approach: If there is any inkling the statement has a medical or therapeutic purpose, it will be deemed nontestimonial and admissible. In alleged sex abuse cases of a child, there may be dual purposes—both investigative and medical. The analysis should turn on the two factors set forth at the beginning of this article and that get to the nub of a statement's testimonial nature: 1) whether it was made during an ongoing emergency; and 2) whether it was made to describe past events. Minnesota has strayed far beyond this straightforward and intellectually honest analysis to the detriment of the constitutional rights of the accused. ▲

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Notes

[1] The Sixth Amendment's confrontation clause is binding on the States through the 14th Amendment. *See, e.g., Ohio v. Clark*, 576 U.S. 237, 243 (2015). *See also* Minn. Const. Art. 1, Sec. 6.

[2] *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

[3] The child may be unavailable either because the child is deemed incompetent to testify or the parent/caregivers do not allow the child to testify or are otherwise not cooperative.

[4] "The right to confront one's accusers is a concept that dates back to Roman times." *Crawford v. Washington*, 541 U.S. 36, 43, 47 (2004).

[5] *State v. Warsame*, 735 N.W.2d 684, 696 (Minn. 2007).

[6] *Davis*, 126 S.Ct. at 2273-74.

[7] Webster's Ninth New Collegiate Dictionary (1988).

[8] National Children's Advocacy Center, *https://www.nationalcac.org/forensic-interview-services/* (last visited 4/23/2020).

[9] Kathleen Coulborn Faller, "Forty Years of Forensic Interviewing of Children Suspected of Sexual Abuse, 1974–2014: Historical Benchmarks," 4 Social Sciences 34, 36 (12/24/2014).

[10] What to know before a forensic interview, CornerHouse, *https://www.cornerhousemn.org/visiting-cornerhouse-1/common-questions-before-the-forensic-interview* (last visited 4/23/2020) (emphasis added).

[11] Response Services, CornerHouse, *https://www.cornerhousemn.org/response* (last visited 4/23/2020). These protocols are contained in The Cornerhouse Forensic Interview Protocol: RATAC, *see infra* note 17.

[12] Midwest Children's Resource Center, *https://www.childrensmn.org/services/care-specialties-departments/midwest-childrens-resource-center/what-to-expect/* (last visited 4/23/2020).

[13] *Id.*

[14] "Their abuse stories are hard to tell. Listening can be just as hard." Pioneer Press, (2/15/2014) *https://www.twincities.com/2014/02/15/their-abuse-stories-are-hard-to-tell-listening-can-be-just-as-hard/* (last visited 4/23/2020).

[15] *Id.* The index terms to describe the document at the National Criminal Justice Reference Service include: "Child abuse investigations; Child Sexual Abuse; Criminal investigation; Interview and interrogation; Investigation techniques; Police interview/interrogation of juvenile; Sex offense investigations." *Id.*

[16] Jennifer Anderson, Julie Ellefson, Jodi Lashley et al, "The Cornerhouse Forensic Interview Protocol: RATAC, 12." T.M. Cooley J. Pract. & Clinical L. 193, 193.

[17] Abstract, CornerHouse Forensic Interviewing Protocol: RATAC, *https://www.ncjrs.gov/App/Publications/Abstract.aspx?id=258656* (last visited 4/23/2020).

[18] 541 U.S. 36 (2004).

[19] *Id.* at 59 ("Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only when the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.")

[20] *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (conditioning the admissibility of hearsay evidence on whether 1) the declarant is unavailable to testify; and 2) the statement bears adequate "indicia of reliability"). *Crawford* overruled Roberts' two-part test. *Crawford*, 541 U.S. at 68-69. Looking to the historical roots of the confrontation clause, the Court determined that "testimonial" statements are the concern: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required; unavailability and a prior opportunity to cross-examination." *Id.* at 68.

[21] *Id.*

[22] 547 U.S. 813 (2006). The statement involved in Davis was a 911 recording in which the alleged victim said her boyfriend assaulted her. *Id.* at 818. He left the house, and the alleged victim continued to speak with the 911 operator and, upon questioning by the 911 operator, provided identifying information. *Id.* The question in *Davis* was "whether, objectively considered, the interrogation during the 911 call produced testimonial statements." *Id.* at 814. *Hammon*, on the other hand, concerned statements given to police who responded to a domestic disturbance. *Id.* at 819. Upon arrival, the husband and wife were in separate areas of the house, and each was questioned about what had occurred during their dispute. *Id.*

[23] *Id.* at 822.

[24] Id. at 826.

[25] Id. at 833.

[26] 135 S. Ct. 2173 (2015).

[27] *Id.* at 2181-82.

[28] *Id.*

[29] *Id.* at 2182.

[30] 701 N.W.2d 802, 804 (Minn. 2005).

[31] *Id.* At 812-31. The considerations include:
(1) whether the declarant was a victim or an observer; (2) the declarant's purpose in speaking with the officer (e.g., to obtain assistance); (3) whether it was the police or the declarant who initiated the conversation; (4) the location where the statements were made (e.g., the declarant's home, a squad car, or the police station); (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the officer and declarant; (7) the officers' purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence); and (8) if and how the statements were recorded.

[32] *Id.* at 255.

[33] *Id.* at 246-47.

[34] *Id.*

[35] *Id.* at 258.

[36] *Id.* at 259.

[37] 711 N.W.2d 508, 516 (Minn. 2006). The Court applied the eight *Wright I* factors, relying heavily on the fact that the statements were taken largely for medical assessment purposes. *Id.* at 515.

[38] 726 N.W.2d 464, 475-76 (Minn. 2007).

[39] 736 N.W.2d 636, 640 (Minn. 2007).

[40] *Id.* at 639.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 642. The Court further reasoned that a joint decision to refer the child to MCRC by law enforcement and social services as "the best way to proceed with the investigation" was not problematic because Minn. Stat. 626.556, subd. 10a requires such joint decisions.

[44] The statute reads: "**Subd. 10a. Law enforcement agency responsibility for investigation; welfare agency reliance on law enforcement fact-finding; welfare agency offer of services.** (a) If the report alleges neglect, physical abuse, or sexual abuse by a person who is not a parent, guardian, sibling, person responsible for the child›s care functioning within the family unit, or a person who lives in the child›s household and who has a significant relationship to the child, in a setting other than a facility as defined in subdivision 2, the local welfare agency shall immediately notify the appropriate law enforcement agency, which shall conduct an investigation of the alleged abuse or neglect if a violation of a criminal statute is alleged."

[45] *Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1100 (D. Minn. 2008) (*aff'd*, *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. 2009)).

[46] 570 F. Supp. 2d at 1107-09. Judge Schiltz found nothing in the record to suggest any imminent risks to the child's health or welfare, nor was there any evidence in the record showing that the overriding or main purpose of the questions asked by the social worker were to assess immediate risks to the child.

[47] *Id.* at 1109-10.

[48] *Id.* at 1110.

[49] *Id.* at 1110-11.

[50] 2018 WL 2090637, at *6 (Minn. Ct. App. 2018).

[51] *Id.* at *1.

[52] *Id.*

[53] *Id.* at *3.

[54] *Id.* at *5.

[55] *Id.*

[56] *Id.* at *6.