

Appendix C. Impact of *Crawford v. Washington*, *Davis v. Washington* and *Giles v. California*

Crawford v. Washington and subsequent related court cases are only an issue when a victim is unavailable for cross-examination at trial, which occurs infrequently in sexual assault cases. A prosecutor will rarely be able to prosecute successfully a sexual assault of a competent adult victim without the victim's cooperation because of the difficulty in overcoming the consent defense. The term "competent adult" is used to describe an adult victim who is viewed by the legal system as able to understand and participate in the criminal proceedings, i.e., know the role of all the players. It is important to refer to state laws for definitions or interpretations of what constitutes a competent adult in a given jurisdiction.

In the rare instance in which a sexual assault of a competent adult is prosecuted without the victim's cooperation, examiners' testimony may be objected to as "testimonial" hearsay under *Crawford v. Washington*³²⁴ and *Davis v. Washington*³²⁵ under the theory that the examiner was acting as an arm of law enforcement. In *Crawford*, the Court held that testimonial statements of an unavailable witness could be admitted at trial only when the defendant has had a prior opportunity to cross-examine that witness. Although the *Crawford* holding offers examples of both testimonial and nontestimonial statements, it did not include a specific definition.

In *Davis*, the Court defined statements that are made to government agents for the primary purpose of receiving assistance in an ongoing emergency as nontestimonial. It defined as testimonial statements made under circumstances that objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution. Forensic examiners who perceive their primary role as law enforcement and conduct their practice with law enforcement rather than medical goals risk having their statements excluded as testimonial under *Crawford* and *Davis*. Forensic examiners should be asked about and must be able to articulate a practice philosophy that is patient-centered and medically focused.

In cases in which it is established that the victim's lack of cooperation is the result of a defendant's actions that are designed to cause the unavailability of a victim in order to prevent that victim from testifying in a current or future prosecution, the prosecution may introduce a witness' hearsay statements in a prosecution based on the doctrine of forfeiture by wrongdoing.

For health-care providers, *Crawford* and its progeny do not change the priorities of the medical-forensic examination, which should continue to hold the health and well-being of patients of primary importance. The problem arises when clinicians are perceived to be investigators rather than health-care providers. Even in cases in which a victim is cooperating in the prosecution of the perpetrator, statements made to the examiner for the purpose of medical diagnosis and treatment may still be excluded as hearsay if it is established that the examiner is acting as an arm of law enforcement rather than acting primarily as a medical treatment provider.³²⁶

³²⁴ 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

³²⁵ 126 S. Ct. 2266 (2006).

³²⁶ *Giles v. California*, 128 S. Ct. 2678 (2008).