S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
P. O. BOX 20207
NASHVILLE, TENNESSEE 37202

May 8, 2007

Opinion No. 07-63

Constitutionality of HB1477/SB1499: Constitutionality of video testimony from child victims

QUESTIONS

1. Proposed legislation would allow for the admissibility of a videotaped statement made by a child under the age of thirteen (13) years describing sexual contact or physical abuse if: 1) the court finds in a hearing outside the presence of the jury or in a hearing in juvenile court that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and 2) the child either testifies or is available to testify, or the child is unavailable as a witness and this unavailability includes a finding that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm. Is this proposed legislation constitutional?

2. If amended to mandate the availability of the declarant as a prerequisite to admissibility, would this proposed legislation be constitutional?

OPINION

1. No. The proposed legislation is unconstitutional under the Sixth Amendment to the United States Constitution as well as Article 1, § 9 of the Tennessee Constitution.

2. The proposed legislation, as amended, would not violate the Confrontation Clause; however, it is vulnerable to attack under Article II, § 2 of the Tennessee Constitution.

ANALYSIS

1. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Article I, § 9 of the Tennessee Constitution affords the accused even greater constitutional protection by establishing the right "to meet witnesses face-to-face." *See State v. Stephenson*, 195 S.W.3d 574, 591 (Tenn. 2006).

In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the United States Supreme Court ruled that out-of-court statements that are "testimonial" in nature by a witness absent from trial are

inadmissible under the Confrontation Clause unless the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. It follows that the threshold question is whether the statement challenged is "testimonial." *State v. Maclin*, 183 S.W.3d 335, 345 (Tenn. 2006). The Tennessee Supreme Court has held that "testimony involves a formal or official statement made or elicited with a purpose of being introduced at a criminal trial." *Id.* at 346. Likewise, the United States Supreme Court has observed that out-of-court statements made to investigators are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 126 S.Ct. 2266, 2274 (2006). The type of out-of-court statement that this legislation seeks to make admissible is thus by its very nature "testimonial" for purposes of the Confrontation Clause.

The Confrontation Clause as interpreted by the Court in *Crawford* permits the admission into evidence of an out-of-court testimonial statement by an absent witness only if the witness is unavailable to testify at trial *and* the defendant has had a prior opportunity to cross-examine the statement. *Crawford*, 541 U.S. at 53-54. Nothing in this bill requires as a condition of admissibility that there has been a prior opportunity to cross-examine such an out-of-court statement. Accordingly, this bill is unconstitutional under *Crawford*.

Further, the admission of testimony through the use of video recordings also likely violates the "face-to-face" provision of the Tennessee Constitution even absent *Crawford*. While the Tennessee Supreme Court has established that this provision grants greater protection than that of the United States Constitution, it has yet to define the extent of this protection. *See, e.g.*, *Stephenson, supra* at 591. Pennsylvania, however, has an identical confrontation clause, as noted by the Tennessee Supreme Court in *State v. Deuter*, 839 S.W.2d 391, 395 (Tenn. 1992). In *Commonwealth v. Ludwig*, 584 A.2d 281 (Pa. 1991), the Pennsylvania Supreme Court held that its confrontation clause did not allow for the use of testimony through one-way closed circuit television. Indiana's state constitution likewise requires face-to-face confrontation, and that state's supreme court also found that testimony presented by means of a one-way closed circuit televison violated its confrontation clause. *Brady v. State*, 575 N.E.2d 981, 988 (Ind. 1991). Given that video-recorded testimony would be even further removed from face-to-face confrontation than testimony presented through the use of a one-way closed circuit television, a Tennessee court would likely conclude that the statements made admissible by the bill would violate Tennessee's confrontation clause.

2. *Crawford* holds that the admission of prior testimonial statements does not violate the Confrontation Clause, if the declarant appears for cross-examination at trial. *Crawford*, 541 U.S. at 59 n.9. An out-of-court statement that otherwise meets the requirements of the Confrontation Clause may still be inadmissible hearsay, however. *Idaho v. Wright*, 497 U.S. 805, 814 (1990). Hearsay is any statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801(c). Hearsay is not admissible as evidence except as provided by the Tennessee Rules of Evidence or

"otherwise by law."[1] Tenn. R. Evid. 802. The video testimony contemplated by this bill would be hearsay and is not made admissible by any existing exception to the hearsay rule. Thus, the proposed legislation seeks to craft a new exception to the hearsay rule.

"Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state . . [and] this power cannot be constitutionally exercised by any other branch of government." *State v. Mallard*, 40 S.W.3d 473, 480-81 (Tenn. 2001); Tenn. Const. Art. II, § 2. Our Supreme Court, however, has recognized a degree of overlap in the lines of demarcation between the branches of government and has thus "frequently acknowledged the broad power of the General Assembly to establish rules of evidence in furtherance of its ability to enact substantive law." *Id.* at 481. The Court has emphasized that any consent of courts to such legislative regulation of inherent judicial authority is purely the result of "inter-branch comity and is not required by any principle of free government." *Id*. at 482. The Supreme Court will not extend such considerations of comity to any act of the legislature that would "strike at the very heart of a court's exercise of judicial power" and represent the exercise by the legislature of an inherently judicial power, such as the powers to hear facts, to decide issues of fact made by the pleadings, and to decide questions of law involved in a case. *Id*. at 483.

No Tennessee court has directly addressed the issue of whether the creation of hearsay exceptions by the legislative branch violates Art. II, § 2 of the Tennessee Constitution by usurping an inherently judicial power.[2] The Arizona Supreme Court, however, considered a similar law providing a hearsay exception for the out-of-court statements of minors describing sexual abuse in *State v. Robinson*, 735 P.2d 801 (Ariz. 1987). Citing its constitutional authority[3] to make rules relative to all procedural matters in any court, the court ruled that the hearsay rules "go to the heart of the judicial process," and found the legislative creation of this hearsay exception unconstitutional. *Id.* at 807.

---

[1]Tennessee courts have yet to determine if the phrase "otherwise by law" implicitly authorizes the creation of additional hearsay exceptions by statute or if that phrase only anticipates the creation of further exceptions as a result of judicial decisions.

[2]In *Baldwin v. Knight*, 569 S.W.2d 450 (Tenn. 1978), the Tennessee Supreme Court encountered a law that provided a legislatively-created hearsay exception for formal statements of Medical Malpractice Review Boards; however, because no party questioned the admissibility of the statement at issue, the Court declined to address the issue of the law's constitutionality.

[3]A.R.S. Const. Art. 6, § 5 states, "The Supreme Court shall have . . . power to make rules relative to all procedural matters in any court."

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

BENJAMIN A. BALL
Assistant Attorney General

Requested by:

General James W. Kirby
Executive Director
Tennessee District Attorneys General Conference
226 Capitol Boulevard, Suite 800
Nashville, Tennessee 37243-0890

House Representative Janis Sontany
53rd District
32 Legislative Plaza
Nashville, TN 37243-0153