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Opinion No. 09-58

Testimony of a Forensic Interviewer

QUESTIONS

1. Whether proposed legislation specifying that, in any criminal proceeding involving certain sex offenses committed against a victim less than 13 years of age, the testimony of a forensic interviewer is admissible and may be considered for its bearing on any matter to which it is relevant subject to the provisions of Tenn. R. Evid. 403 would be constitutional.

2. If the answer to question 1 is no, whether the legislation would be constitutional if language providing "or is unavailable to testify at trial" were removed.

OPINIONS

1. No. The proposed legislation likely encompasses statements to a forensic interviewer that are "testimonial" for purposes of the Confrontation Clause. The Clause conditions the admissibility of such statements not only on the unavailability of the declarant, but also on a prior opportunity for cross-examination. As the proposed legislation would allow a forensic interviewer to relay statements made by an unavailable victim who has not been subject to cross-examination, it would be unconstitutional as applied to such circumstances.

2. Yes. When a declarant appears for cross-examination at trial, the Confrontation Clause places no constraints on the use of his prior testimonial statements.

ANALYSIS

I. The Proposed Legislation

The draft legislation proposes to amend Tenn. Code Ann. Title 24, Chapter 7, Part 1, which generally governs the admissibility of evidence. Tenn. Code Ann. §§ 24-7-106 *et seq*. The proposal would add the following new section:

(a)

(1) Notwithstanding the provisions of any rule or statute to the contrary, in any criminal proceeding in which the victim is less than thirteen (13) years of

> age at the time the offense occurred and the defendant is charged with any of the sex offenses listed in subsection (b) of this section, or any attempt, solicitation or conspiracy to commit any of the offenses listed in subsection (b) of this section, the testimony of a forensic interviewer who has interviewed the victim is admissible and may be considered for its bearing on any matter to which it is relevant, subject to the provisions of Rule 403 of the Tennessee Rules of Evidence.
>
> (2) The provisions of subsection (a)(1) shall only apply if the victim has previously testified at trial or is unavailable to testify at trial.

Additionally, the proposed legislation goes on to specify the sex offenses as to which the testimony of a forensic interviewer is admissible, and to define certain educational and experiential qualifications which a forensic interviewer must possess.

We understand, from other draft legislation provided to this office, that amendments concerning forensic interviewers are envisioned respecting the current Tenn. Code Ann. § 37-1-406(e) and § 37-1-607. These sections provide for investigations of child abuse and the composition of child protective teams. In judicial districts having a child advocacy center that meets the requirements of Tenn. Code Ann. § 9-4-213(a) or (b), the draft legislation provides that a forensic interviewer "shall interview the child to determine the treatment and services that are necessary to ensure the child's well-being." More generally, the draft legislation provides: "Whenever possible, child protective investigations shall be conducted by the team members in a manner that not only protects the child but that also preserves any evidence for future criminal prosecutions." In instances in which a forensic interviewer determines that child sexual abuse has occurred, reporting to law enforcement would be mandatory.

II. The Confrontation Clauses

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Additionally, article I, section 9 of the Tennessee Constitution commands "[t]hat in all criminal prosecutions, the accused hath the right to ... meet the witnesses face to face...." Tenn. Const. art. I, § 9. Although the language of the federal and state constitutional provisions is somewhat different, the Tennessee Supreme Court has traditionally adopted and applied the standards enunciated by the United States Supreme Court in determining the rights of an accused under article I, section 9. *State v. Cannon*, 254 S.W.3d 287, 301 (Tenn. 2008).

In determining whether an out-of-court statement may be admitted into evidence without violating an accused's right of confrontation, the threshold question is whether the statement is testimonial or nontestimonial. *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *Cannon*, 254 S.W.3d at 301. Statements are testimonial if the primary purpose of the statement is to establish or to prove past events potentially relevant to later criminal prosecutions. *Davis v. Washington*, 547 U.S. 813, 822 (2006); *Cannon*, 254 S.W.3d at 303. A testimonial statement is inadmissible

unless the State can establish that: "(1) the declarant is unavailable and (2) the accused had a prior opportunity to cross-examine the declarant." *Cannon*, 254 S.W.3d at 303 (internal quotation marks omitted). If the statement is nontestimonial, the Confrontation Clause does not apply, and the statement must be analyzed under the "traditional limitations upon hearsay evidence." *Davis*, 547 U.S. at 821; *Cannon*, 254 S.W.3d at 303.

In *State v. Cannon*, the Tennessee Supreme Court considered, as a matter of first impression, the proper classification of out-of-court statements made by a sexual assault victim to someone other than law enforcement personnel. *Cannon*, 254 S.W.3d at 304. In concluding that the primary purpose of statements made to a sexual assault nurse examiner was to establish or prove past events potentially relevant to later criminal prosecution, the Court noted the following facts:

> The policy of both the CPD [Chattanooga Police Department] and of the hospital is to have a sexual assault nurse examiner speak with victims of sexually-related crimes. Nurse Redolfo testified that she had been trained to question suspected rape victims and that she had been instructed by speakers from law enforcement agencies and from the district attorney's office on how to collect evidence and how to ask questions. Nurse Redolfo often testifies at trials in her capacity as a sexual assault nurse examiner. When she spoke to M.N. [the victim], Nurse Redolfo introduced herself and explained her role. Nurse Redolfo performed a structured examination and interview of the victim, which Nurse Redolfo described as an "investigation" designed to gain information about the rape. Additionally, Nurse Redolfo described the physical examination she performed as a forensic examination. Detective Dudley questioned M.N. along with Nurse Redolfo. M.N. had already been examined by a nurse and the emergency room physician before Nurse Redolfo interviewed her, so there was no ongoing emergency.

Id. at 305.

A. Declarant Unavailable

Cannon suggests that there likely will be circumstances in which statements made to a forensic interviewer would be deemed to be testimonial in nature. Although a forensic interviewer is envisioned to act to "determine the treatment and services that are necessary to ensure the child's well-being," members of child protective teams equally seek to preserve evidence "for future criminal prosecutions." Current Confrontation Clause analysis "does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial." *United States v. Bordeaux*, 400 F.3d 548, 555 (8th Cir. 2005) (holding that statements to a "forensic interviewer" were testimonial). In situations in which a forensic interview takes place under non-emergent circumstances—where, for example, an initial investigation has already commenced and protective steps have been taken, *see* Tenn. Code Ann. § 37-1-607(a)(2) (contemplating possibility that initial investigations of child sexual abuse might commence with fewer than all members of a child protective team being present)—the evidence preservation

function of a forensic interviewer might be seen as the primary purpose of the interview. This conclusion is fortified by the involvement of law enforcement in child protective teams and mandatory reporting of positive findings to prosecutors. *See* Tenn. Code Ann. §§ 37-1-607(a)(2), (b)(3)(B) (current provisions which are replicated in draft legislation). A number of court decisions have held, on the facts of the particular case, that statements made to a forensic interviewer were testimonial in nature. *See, e.g., Bordeaux*, 400 F.3d at 556 (further noting that, by definition, a forensic interview pertains to use in courts of law); *North Dakota v. Blue*, 717 N.W.2d 558, 564-65 (N.D. 2006) (additionally noting that forensic "by definition means 'suitable to courts'"); *see also Florida v. Contreras*, 979 So.2d 896, 905 (Fla. 2008) (primary purpose of Child Protection Team interview "was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to later criminal prosecution").

In instances in which the primary purpose of a forensic interview was to develop evidence for criminal prosecution, the draft legislation would not contain sufficient safeguards to satisfy the Confrontation Clause. The draft legislation provides for admissibility of the testimony of a forensic interviewer where the victim is "unavailable to testify at trial." The Confrontation Clause requires both unavailability and a prior opportunity for cross-examination. *Cannon*, 254 S.W.3d at 303. The draft legislation would be unconstitutional as applied to situations in which the declarant was unavailable but there was no opportunity for cross-examination. *Cf. State v. Pilkey*, 776 S.W.2d 943, 951 (Tenn. 1989) (holding that, insofar as a statute purported to authorize use of a videotaped statement of a child abuse victim, it was "unconstitutional as utilized in this case").

B. Declarant Available for Cross-Examination

Removing the provision for unavailability in the draft legislation would give rise to circumstances in which the defendant would have the opportunity for cross-examination of the victim at trial prior to introduction of the testimony of the forensic interviewer, but no opportunity for contemporaneous cross-examination at the time of the interview. In a footnote to its opinion in *Crawford v. Washington*, the United States Supreme Court stated: "we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)). The Tennessee Supreme Court endorsed the *Crawford* note in *State v. Banks* and held that, where a declarant was available and in fact was cross-examined by the defendant, the defendant was not deprived of his confrontation rights by admission of the declarant's statements to a police officer. *Banks*, 271 S.W.3d 90, 118-19 (Tenn. 2008).

We note that, as the declarant did not appear at trial in *Crawford*, the United States Supreme Court's footnote is technically a dictum. *See Crawford*. 541 U.S. at 40. The case upon which the *Crawford* Court relied, *California v. Green*, only partially supports the dictum. In *Green*, the Supreme Court left open the possibility that, where a declarant suffered a lapse of memory such that he could give no current version at trial of important events described in an earlier testimonial statement, a Confrontation Clause issue might arise. *Green*, 399 U.S. at 168-

69. A pair of older decisions by the Tennessee Supreme Court construed *Green*, among other cases, and indicated that admission of videotaped statements by alleged victims of child sexual abuse would violate a defendant's confrontation rights absent contemporaneous cross-examination or some other procedural protection, even where the victims were available or in fact testified at trial. *Pilkey*, 776 S.W.2d at 945 ("in our opinion something more than the mere availability of a child witness for cross-examination is required before the *ex parte* unsworn statement or affidavit of such a witness could be admitted in evidence as substantive proof in chief against an accused criminal defendant"); *State v. Deuter*, 839 S.W.2d 391, 394, 396 (Tenn. 1992) (invoking *Pilkey* and holding that admission of *ex parte*, unsworn video testimony of alleged child victims of sexual battery violated confrontation rights where video was followed by "reluctant, uncertain, and vague" testimony of each child).

In a case in which, for example, a forensic interviewer proposed to relay a victim statement after the child witness complained of a failing memory on the same subject at trial, a defendant might lodge a constitutional challenge on the strength of *Pilkey and Deuter*. Nevertheless, the *Banks* Court's approval of the *Crawford* dictum would appear to foreclose such challenges—and *Crawford* itself significantly altered the constitutional landscape in removing "amorphous notions of 'reliability'" from the Sixth Amendment calculus. *Crawford* 541 U.S. at 61. In this regard, we observe that the draft legislation appropriately incorporates the provisions of Tenn. R. Evid. 403. Pursuant to that Rule, the testimony of a forensic interviewer might be excluded as unfairly prejudicial if it were preceded by "reluctant, uncertain, and vague" testimony of a child witness. *Deuter*, 839 S.W.2d at 394. Accordingly, we conclude that, where a victim appears for cross-examination at trial, the Confrontation Clause is not implicated, and concerns regarding the "reliability" of prior statements to a forensic interviewer are best addressed through the Rules of Evidence.

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