

DETERMINATE SENTENCE  
RELEASE AND TRANSFER HEARINGS IN  
LIGHT OF  
CRAWFORD V. WASHINGTON

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PROFESSOR ROBERT O. DAWSON  
JUVENILE LAW INSTITUTE  
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Jill Mata  
Chief, Juvenile Section  
Bexar County District Attorney's Office  
San Antonio, Texas  
(210) 531-1960

**DETERMINATE SENTENCE RELEASE OR TRANSFER HEARINGS  
IN LIGHT OF  
CRAWFORD v. WASHINGTON**

The Supreme Court decision in Crawford v. Washington, 541 U.S. 36 (2004), is having a significant impact on the use in trial of prior statements made by a witness. The question presented is how will the Crawford rule affect Release or Transfer hearings pursuant to 54.11 of the Texas Family Code.

First lets review the Crawford decision. The facts indicate that on August 5<sup>th</sup>, 1999 Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife Miranda warnings, detectives interrogated each of them twice. Petitioner eventually confessed that he and his wife had gone in search of Lee because petitioner was upset over an earlier incident in which Lee had tried to rape petitioner's wife. The two found Lee at his apartment and a fight ensued in which Lee was stabbed in the torso and petitioner's hand was cut. Petitioner's wife generally corroborated her husband's story about the events leading up to the fight but her account of the fight itself was arguably different, particularly with respect to whether Lee had drawn a weapon before petitioner assaulted Lee. The wife's statement was used in Crawford's prosecution over defense objections. The wife was unavailable as a witness under the state's marital privilege statute, which Crawford invoked. The jury convicted Crawford of assault.

The Washington Court of Appeals reversed, using a nine-factor test to determine that the wife's statement lacked guarantees of trustworthiness. The Washington Supreme Court reinstated the conviction deciding the statement bore guarantees of trustworthiness. The Supreme Court granted certiorari and overturned the conviction, finding that the defendant's 6<sup>th</sup> amendment right of confrontation was violated. The precedent of Ohio v. Roberts held that an unavailable witnesses' out of court statement might be admitted so long as it has adequate indicia of reliability. The offered statement had to fall within a firmly rooted hearsay exception or bear particularized guarantees of trustworthiness. The Supreme Court in Crawford held that the proffered statements were testimonial in nature and did not fall under any hearsay exception. The trustworthiness test of Ohio v. Roberts was overturned, or at least narrowed by Crawford to include only those statements that are a product of a prior hearing where the defendant had an opportunity to cross-examine the witness.

How does this ruling apply to Release or Transfer Hearings?

Transfer hearings are governed by Texas Family code Statute 54.11 (d):

54.11 (d) At a hearing under this section the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the Texas youth Commission, in addition to the testimony of witnesses. At least one day before the hearing, the court shall provide the attorney for the person to be transferred or released under supervision with access to all written matter to be considered by the court.

In Texas, the transfer hearing relies largely on the TYC report compiled by Mr. Leonard Cucolo, TYC Court Liaison for the Department of Sentenced Offender Disposition. Mr. Cucolo's report is based on his review and incorporation of the opinions and reports of several professionals at TYC who regularly deal with the respondent. He usually does not have actual knowledge of the respondent. The Transfer Report can be classified as a business record, which is an exception to hearsay, however it also often contains hearsay within that hearsay. Regardless of whether the report is classified as a business record, statute and case law clearly allows its use:

In the Matter of C.D.R., 827 SW2nd 589, (Tex. App.-Houston (1<sup>st</sup> Dist.) 1992) the court held that the TYC written report is admissible as evidence from a "professional consultant" or "professional court employee" under TFC 54.11.

Hearsay was admissible in the testimony of a TYC employee testifying in a Release or Transfer hearing. In the Matter of T.C.K., Jr., 877 SW2nd 43 (Tex. App.-Beaumont, 1994).

TFC 54.11(d), as amended in 2001, creates a hearsay exception for the testimony of TYC employees. Clearly, the prosecutor's biggest safe guard against a Crawford 6<sup>th</sup> Amendment claim is the provision itself. The statute allows you to rely on reports from TYC and the availability to confront the witness should satisfy the possible Crawford objection. In the Matter of J.M.O., 980 SW2nd 811 (Tex. App.- San Antonio, 1998, reviewed denied.) the court permitted the designated TYC witnesses to testify from TYC records as to the efforts made by the appellant to recruit other TYC inmates into a gang. The confrontation clause was not in issue because the respondent had received notice of the report and had the ability to call witnesses on his behalf.

In fact, when the trial court denied a respondent's continuance for the sole purpose of investigating witnesses listed in the Transfer Report, the appellate court found error. In the Matter of M.R., 5 SW 3<sup>rd</sup> 879 (Tex. App.-San Antonio, 1999, pet. Denied).

The statute attempts to safe guard the rights of the respondent by requiring the court to make available, at least one day before the hearing, to the attorney of the respondent, all written matter to be considered by the court. Section 54.11, Texas Family Code. This affords the opportunity to call the witnesses. Assuming the witnesses are available, Crawford would not even apply.

A San Antonio case, In the Matter of D.L., is currently on appeal to the Fourth Court and one of the issues presented is whether the Appellant was denied the opportunity to confront and cross-examine the witnesses against him in the release or transfer hearing for a determinate sentence disposition. The respondent pled true and was adjudicated for aggravated robbery. He received a 6-year determinate sentence and was committed to TYC. When he returned for his release or transfer hearing in March of 2005, Leonard Cuculo testified as the sponsor for the TYC Transfer Report. Defense counsel complained that he was denied the opportunity to cross-examine the witnesses who were responsible for negative entries in the TYC records. The trial court offered the Appellant the opportunity to continue the case to call the absent witnesses but the Appellant demurred, arguing he had no duty to summon the State's witnesses in order to preserve his constitutional claims. In the Matter of D.L., Texas Family Code Section 54.11 (d) allows the use of the TYC Transfer report. It will be interesting so see how the Fourth Court of Appeals decides this issue in light of Crawford.

What should the defense do in light of Crawford? First and foremost-read the report! If you determine that the information contained in the report supporting transfer warrants investigating, ask the court for a continuance. Call the sources listed or referred to in the report and see if their testimony would provide mitigating evidence for the respondent. Don't forget to speak with the child. Your client may be able to shed light on the entries and help you explain mitigating circumstances surrounding the conduct described in the report. Often you will discover that any additional or explanative information is aggravating rather than mitigating. If this is the case you will proceed with the hearing and rely solely on your cross examination of the State's witnesses. Remember though, hearsay contained within the business record is still hearsay and likely objectionable!

What should the prosecution do when faced with a Crawford complaint? First, verify that the report is available at least one day before the hearing- earlier if possible. You don't often have control over this but make every effort to assist the defense with this. Never oppose a reset when the defense request is for the purpose of investigating the possibility of calling witnesses from the Transfer Report. Case law clearly upholds a respondent's right to call witnesses who are

contained and identified in the TYC Transfer report. See In the Matter of M.R., 5 SW3rd 879, and (Tex. App.-San Antonio 1999, pet. denied). Whenever possible do not rely solely on specific hearsay statements contained within the Transfer Report but rather on objective scores or results the respondent earns on tests and evaluations.

What should judges do when faced with a Crawford complaint? Allow the respondent a continuance to procure witnesses. Clearly state this offer on the record and make sure the respondent has had ample time to review the report.

Only time will tell what the real impact of Crawford will have on Juvenile Transfer or Release hearings, but anticipating the issues and planning ahead will help ensure fairness to both sides.

**Determinate Sentence Release or Transfer Hearing  
In Light of US. V. Crawford**

**CASES CITED IN PRESENTATION**

*Crawford v. Washington*, 541 U.S. 36 124, S.Ct. 1354, 158 L.Ed. 2d 177 (2004)

*In the Matter of C.D.R.*, 827 SW2nd 589, (Tex. App.-Houston (1<sup>st</sup> Dist.) 1992)

*In the Matter of T.C.K., Jr.*, 877 SW2nd 43 (Tex. App.-Beaumont, 1994).

*In the Matter of R.M.*, UNPUBLISHED, No. 04-03-00505-CV, 4004 Tex.App.Lexis 11908, Texas Juvenile Law Reporter ¶ 05-2-04 (Tex.App.— San Antonio 11/3/04).

*Ohio v. Roberts*, 448 U.S. 56 (1980)

*In the Matter Of J.M.O.*, 980 SW2nd 811 (Tex. App.- San Antonio, 1998,

*In The Matter Of M.R.*, 5 SW 3<sup>rd</sup> 879 (Tex. App.-San Antonio, 1999, pet. Denied).

*In re J.A.W.*, 976 S.W.2d 260, 264 (Tex. App.--San Antonio 1998, no pet.)

*In re Q.D.*, 600 S.W.2d 392, 394 (Tex. Civ. App.--Fort Worth 1980, no writ)

*In re S.J.M.*, 922 S.W.2d 241, 242 (Tex. App.--Houston [14th Dist.] 1996, no writ)

*In the Matter of L.D.T.*, MEMORANDUM, No. 10-05-00016-CV, 2006 Tex.App.Lexis 1082, Tex. Juv. Law Reporter ¶ 06-1-20 (Tex.App.— Waco, 2/8/06).