

4th Circuit Ruling: Child's Statements to Social Worker Are Non-testimonial

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Date : June 13, 2012

The U.S. Supreme Court's new *Crawford* confrontation clause rule has had significant impact in child victim prosecutions, largely because of problems with getting children to testify. One frequent *Crawford* question that arises in these cases is: Are a child's statements to a social worker testimonial? In a paper [here](#), I explore the testimonial analysis and other *Crawford* issues. However, on this particular question, there is no North Carolina law on point. Recently a former N.C. judge, now serving on the 4th Circuit, provided some guidance in *United States v. DeLeon*, ___ F.3d ___ (4th Cir. May 15, 2012).

In *DeLeon*, the defendant was convicted for murdering and assaulting his eight-year-old stepson Jordan. Jordan died while under the defendant's exclusive care. An autopsy showed that Jordan died from hemorrhaging due to a lacerated liver and that he had bruising on his face, torso, and buttocks. All of the injuries resulted from blunt force. The medical examiner determined that Jordan's death was a homicide. The government's theory was that the defendant—who had a history of using corporal punishment—struck Jordan, lacerating his liver.

At trial the government introduced extensive evidence of the defendant's physical punishment of Jordan. It also presented evidence that about five months before his death, Jordan and his family met with Beth Thomas, a social worker and treatment manager at the Air Force Family Advocacy Program (FAP). A teacher referred Jordan to the FAP after noticing a bruise on his forehead. The FAP is a medical program; one of its purposes is preventing and treating child abuse. Jordan told Thomas that the defendant punished him by spanking him with a hand and belt and forcing him to hold a hammer for several minutes while leaning down. When Thomas asked about the forehead bruise, Jordan said that the defendant punished him by forcing him to lie on the floor while the defendant kneeled and stood on Jordan's back. After meeting with Jordan and his family, Thomas concluded that only "minor physical" abuse had occurred. She had several subsequent meetings with the family to provide counseling and parenting advice.

After the defendant was convicted, he appealed arguing that his confrontation clause rights were violated when the trial court admitted Jordan's statements to Thomas. The Fourth Circuit began by noting that whether there is an ongoing emergency is a key factor in the testimonial analysis. Here, it concluded, no emergency existed. It noted that Jordan's forehead injury occurred several days earlier and there was no basis to conclude that either Thomas or Jordan intended to develop information to respond to an ongoing emergency. The court was careful to note however that it was not suggesting "that ensuring a child's safety and removal from an abusive home could never present an ongoing emergency." Instead it found that the facts presented did not support such a finding.

The court next rejected the defendant's argument that nature of the FAP made Jordan's statements testimonial. The court noted that although part of the force's medical command, the FAP uses both medical and security personnel and requires reporting and investigation of allegations of family abuse. In fact, Thomas testified that she occasionally worked with law enforcement. However, the court rejected the argument that the FAP's reporting requirements and security component were determinative of whether Jordan's statements were testimonial.

The court then proceeded to an objective analysis of the primary purpose and circumstances of the interview. It noted that Thomas did not have, nor did she tell Jordan that she had, a prosecutorial purpose. Thomas was not employed as

a forensic investigator but rather as a treatment manager. Additionally, there was no evidence that Thomas recorded the interview or sought to preserve Jordan's answers for use at trial. Rather, Thomas used the information to develop a treatment plan and she continued to provide the family with counseling afterwards. These actions are consistent with her testimony that her "primary purpose [was] to provide the treatment and assistance that the family needs." Acknowledging that an evaluation of the primary purpose of Jordan's statement was more difficult, the court rejected the notion that a child's age is determinative. Instead, it held that a child's age is just one relevant factor. It found it significant that Thomas never told Jordan that his answers would be reported to the authorities, and there was no evidence that Jordan thought that would occur. It concluded:

[W]e are satisfied . . . that the primary purpose . . . [was] not . . . the preservation of evidence for a future criminal prosecution. A review of the circumstances of the meeting reinforces our conclusion. Jordan came to the meeting with his family Although protocol required that Thomas meet with each family member independently, no effort was made to separate Jordan from [the defendant] in the waiting area. Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed the FAP, as well as other mental health service providers. In short, the interview between Thomas and Jordan simply does not bear the hallmarks of a testimonial interrogation.

Importantly, the court noted, this was not a case where the social worker was an agent of law enforcement. Thomas did not respond to a law enforcement request and no criminal investigation was ongoing. Also there was no evidence that the discussion was videotaped or otherwise preserved as evidence or that anyone else listened in on or secretly observed the meeting.

For those involved in child abuse prosecutions, *DeLeon* is significant. It holds that notwithstanding the lack of an ongoing emergency and the fact a social worker may have a reporting requirement, statements made to a social worker still can be non-testimonial. This is big news.