REPORT OF THE
VIRGINIA STATE CRIME COMMISSION

Videotaped Statements of Child Victims

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

REPORT DOCUMENT NO. 276

COMMONWEALTH OF VIRGINIA
RICHMOND

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I. Authority for Study

The *Code of Virginia*, § 30-156, authorizes the Virginia State Crime Commission (Crime Commission) to study, report, and make recommendations "on all areas of public safety and protection." Additionally, the Crime Commission is to study "compensation of persons in law enforcement and related fields" and to study "trial and punishment of criminal offenders." Section 30-158(3) empowers the Crime Commission to "conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156. . . and formulate its recommendations to the Governor and the General Assembly."

Pursuant to a letter request from the House Courts of Justice Committee and statutory authority, Crime Commission staff conducted a study of the feasibility of permitting the admissibility of videotaped statements in child sexual abuse/neglect cases.

II. Executive Summary

During the 2005 Session of the Virginia General Assembly, Delegate Robert B. Bell introduced House Bill 2932.[1] This bill was referred to the House Courts of Justice Committee, which sent a letter to the Crime Commission, asking it to review the proposal.

House Bill 2932 would permit videotaped statements made by victims under the age of thirteen to be admissible as evidence in criminal trials involving either a felonious sexual offense or an abuse or neglect charge. Under the bill, the statement would be admissible only if the defendant received notice of the intent to introduce the videotaped recording at least ten days prior to the court proceeding, the child testified at the proceeding, and the judge specifically considered enumerated factors to determine if the recording "possesses particularized guarantees of trustworthiness and reliability."

The aim of the bill is to address and ameliorate difficulties child witnesses encounter when they testify in sexual abuse and neglect trials. There are a least 20 states that currently allow videotaped testimony in child sexual abuse and neglect cases. While the proposed change in House Bill 2932 is similar to the law in a number of other states, any change to the traditional rules of hearsay must conform to the recent Supreme Court decision in Crawford v. Washington.[2]

The Crawford decision holds that testimonial statements obtained outside of a criminal proceeding are prohibited under the Sixth Amendment from being introduced into direct evidence, unless the witness is available for cross-examination at the proceeding, or the witness is "unavailable" and the statement was subject to prior cross-examination. While House Bill 2932 requires the child to testify in order for the videotaped statement to be admissible, the bill contains language concerning factors of

[1] House Bill 2932, 2005 General Assembly, Reg. Sess. (Va. 2005). *See* attachment A.
[2] Crawford v. Washington, 541 U.S. 36 (2004).

"trustworthiness and reliability" that come from earlier Supreme Court cases that are now overruled by Crawford. And, were the bill to be enacted into law, it could create practical problems in its implementation. If the videotaped statements were played for a jury, and then the child refused to testify, Crawford would prohibit the introduction of the evidence that had just been heard. A mistrial or dismissal would then be the only permissible outcomes.

At a minimum, any new statutory scheme allowing videotaped statements of children to be used as direct evidence should require the child to testify before the introduction of the recorded statement. The child must also be available for cross-examination. No specific tests as to the "believability" of the recorded testimony should be required, as that is for the trier of fact to determine. Instead, the legislature should simply require that any recorded interviews be conducted in accordance with professionally recognized standards. Finally, before any new statute is enacted, further study should be done on how interviews are conducted in other states that permit the use of videotaped testimony.

III. Methodology

The Virginia State Crime Commission utilized three research methods to examine the topic presented for study. First, staff analyzed House Bill 2932 to see if it was consistent with existing Virginia law. Second, relevant statutes and case law from other states were reviewed. Finally, staff analyzed the constitutional issues that might arise in light of the Crawford decision if House Bill 2932 were passed.

IV. Background

Child victims of sexual abuse often suffer trauma and embarrassment when testifying at the accused abusers trial.[3] One solution proposed by child advocates, and adopted in some states, is to have the child's testimony taken by videotape, in a less intimidating environment.[4] This videotape can then be played during the trial. Twenty states have statutory provisions which allow children to testify via videotape in this manner.[5] In most of these states, the videotaped testimony must meet certain requirements if it is to be accepted into evidence. For instance, the videotape must be both an oral and visual recording, it must be un-altered, each individual in the recording must be identified, and the victim must be unavailable.[6] In all twenty states, these statutes were enacted before the Crawford decision was issued in 2004, though some states have amended their statutes after the Court's ruling .

[3] *See,* Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 190.32, at 254.
[4] *Id.*
[5] Alabama, Arizona, Colorado, Hawaii, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New York (grand jury testimony only), North Dakota, Ohio, Oklahoma, Rhode Island (grand jury testimony only), Texas, Utah, and Wisconsin. Some of these states require the videotaped evidence in the form of an adversarial deposition, which is not required in HB 2932 (2005).
[6] LA. REV. STAT. ANN. § 15:440.5 (West 2004).

House Bill 2932 would allow videotaped statements, made by the victim of a sex crime or a crime of abuse or neglect, to be admissible at trial, provided certain requirements are met:

- The victim must be 12 years of age or younger;
- Every person appearing on the tape, and all voices heard, must be identified;
- The videotape has not been altered;
- No attorneys were present when the tape was made;
- The person conducting the interview of the child was authorized to do so by the child-protective services coordinator of a local department of social services;
- The child must testify at the proceeding.
- The videotaped statement contains "particularized guarantees of trustworthiness and reliability," as evidenced by a number of factors:
    - the child's personal knowledge of the event;
    - the age and maturity of the child;
    - any apparent motive for the child to falsify testimony;
    - the timing of the statement;
    - whether the child was suffering pain or distress during the statement;
    - whether the statement is beyond the child's knowledge and experience;
    - whether the statement has a "ring of verity;"
    - whether the statement is spontaneous or a response to questioning;
    - whether the statement is responsive to suggestive or other leading questions;
- All persons present at the time the videotape was made are available to testify at the proceeding; and
- The adverse party must be notified at least 10 days prior to the proceeding of the intent to enter the tape into evidence, and must be given the opportunity to view it.

Potential Problems with the Proposed Statute

Out-of-court statements by a victim, who is available to testify, are hearsay, and are generally inadmissible under Virginia law. However, this prohibition on hearsay is a rule of evidence, and could be modified or changed by statute.

A more serious problem is presented by the recent U.S. Supreme Court case of Crawford v. Washington.[7] In Crawford, the Supreme Court held that a defendant's Sixth Amendment right to confront witnesses in a criminal case does not permit testimonial statements to be used in evidence against the accused, unless the witness is available for cross-examination, or was available for cross-examination at the time the statement was made. In its decision, the Court eliminated the reliability standard, set forth in Ohio v. Roberts, which previously had permitted these testimonial statements to be introduced, provided there were sufficient indicia of reliability to guarantee the trustworthiness of the

[7] Crawford v. Washington, 541 U.S. 36 (2004)

statements.[8] The Crawford opinion now requires the witness to be present and available for cross-examination if the testimonial statement is to be introduced. If the witness is not present, the testimonial statement may only be introduced if the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness at the time the statement was made.[9]

The proposed legislation comports with Crawford in that it requires the child to testify at the proceeding. A problem might still arise, however, if the videotape were introduced into evidence, and subsequently the child refused to testify. This problem could be prevented if it were made a requirement that the child testify before the introduction of the videotaped statement.

The final problem with the bill is the list of factors enumerated in Paragraph B of the proposed statute. They create a test for the trial judge to apply, requiring an initial determination of the believability of the videotaped statement, before it may be admitted into evidence. The Virginia legislature generally has not created statutory tests to determine the admissibility of evidence, and never before has created a statutory test to determine if evidence is credible. How much weight a particular piece of evidence is to be accorded, and how believable the testimony of a witness is, have traditionally been matters for the trier of fact in a trial to decide. If testimony or other evidence is admissible under the general rules of evidence, then it is admitted, but it is not first evaluated by the judge for an initial determination as to credibility. Creating a procedure for an initial evaluation, as proposed by this bill, would be unique for Virginia. Therefore, it is the recommendation of staff that the list of factors enumerated in Paragraph B of the bill be eliminated, and replaced with language requiring "the interview be administered in conformity with accepted professional standards of practice for interviews of child victims of sexual assaults."

V. Conclusion and Recommendation

If it is the determination of the General Assembly that videotaped statements of a child victim should be admissible as direct evidence in sexual abuse cases, it should be a requirement of admissibility that the child testify before the videotape is played. The constitutional requirements of the Sixth Amendment mandate that the child also be available for cross-examination. No specific statutory tests should be created that evaluate the credibility or believability of the testimony. Instead, the legislature should require that all videotaped interviews be conducted in conformity with professional standards of practice.

[8] Ohio v. Roberts, 448 U.S. 56 (1980). Specifically, the standard for admissibility of hearsay evidence was based on either a "firmly rooted hearsay exception" or evidence which has "particularized guarantees of trustworthiness." *Id*. at 60.

[9] An example where this might occur would be at a preliminary hearing in a court. If the witness was subject to cross-examination during the hearing, and then died prior to trial, the statements would still be admissible under the Sixth Amendment.

Recommendation

It is the recommendation of the Crime Commission that before any legislation similar to House Bill 2932 is passed, further study be done to determine how such interviews are conducted in other states.

ATTACHMENT A

059704232

HOUSE BILL NO. 2932

Offered January 21, 2005

A BILL to amend the Code of Virginia by adding a section numbered 18.2-67.9:1, relating to use of videotape statements for certain crimes against children.

Patron—Bell

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 18.2-67.9:1 as follows:

§ 18.2-67.9:1. Use of videotaped statements of complaining witnesses as evidence.

A. In any criminal proceeding involving alleged abuse or neglect of a child pursuant to Article 7 (§ 18.2-61 et seq.) of Chapter 4 or Article 4 (§ 18.2-362 et seq.) of Chapter 8 of this title, a recording of a statement of the alleged victim of the offense, made prior to the proceeding, may be admissible as evidence if the requirements of subsection B are met and the court determines that:

1. The alleged victim is the age of 12 or under at the time the statement is offered into evidence;

2. The recording is both visual and oral, and every person appearing in, and every voice recorded on, the tape is identified;

3. The recording is on videotape or was recorded by other electronic means capable of making an accurate recording;

4. The recording has not been altered;

5. No attorney for any party to the proceeding was present when the statement was made;

6. The person conducting the interview of the alleged victim was authorized to do so by the child-protective services coordinator of a local department of social services;

7. All persons present at the time the statement was taken are available to testify or be cross-examined at the proceeding when the recording is offered; and

8. The alleged victim testifies at the proceeding, or testifies by means of closed-circuit television.

B. A recorded statement may be admitted into evidence as provided in subsection A if the recorded statement is shown to possess particularized guarantees of trustworthiness and reliability, including, but not limited to:

1. The child's personal knowledge of the event;

2. The age and maturity of the child;

3. Any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;

4. The timing of the child's statement;

5. Whether the child was suffering pain or distress when making the statement;

6. Whether the child's age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

7. Whether the statement has a "ring of verity," has internal consistency or coherence, and uses terminology appropriate to the child's age;

8. Whether the statement is spontaneous or directly responsive to questions; and

9. Whether the statement is responsive to suggestive or other leading questions.

C. A recorded statement may not be admitted under this section unless the proponent of the recording notifies the adverse party of his intent to offer the recording at least 10 days prior to the proceeding and the adverse party is given sufficient and timely opportunity to view the recording before it is shown in the proceeding.