Child Sex Abuse Case

February 10, 2014 | by Einhorn Barbarito

Allegations of sexual abuse upon children are far more powerful than any other criminal accusation. They evoke instant revulsion and sympathy. The younger the child, the greater the adverse reaction by prosecutors, judges and more importantly, jurors. Many jurors may initially tend to disbelieve that such offenses occur, but invariably they ask themselves two critical questions: (1) Why is this child coming forward; and (2) Where did he or she gain knowledge about such sordid sexual details.[1] Unfortunately, for the defense attorney, this scenario creates what is tantamount to a shift in the burden of persuasion. The State may technically have the burden of proof, but the jury will filter its consideration of the case based upon the these two questions. Therefore, the usual approach must be discarded and pre-trial discovery becomes more important and extensive. Similarly, pre-trial motion practice and R.104 hearings become critical tools in preparing an effective defense. The following is an approach to preparing for trial in this category of cases which involve either a very young witness or an older witness who was abused at a younger age.

DEVELOPING YOUR THEME

The thematic approach must focus primarily on the two questions. It requires exhaustive examination of the following issues which surround the initial and any subsequent disclosure of abuse:

1. When the disclosure was made;
2. To whom it was made;
3. How it was made;
4. What was described; and
5. Why would the accusation burden the particular time.

The answer to these questions provides the framework for the entire case, including discovery, pre-trial motions, motions in limine and overall trial strategy and tactics.

DISCOVERY

The State will never provide all necessary information. The defense of sexual abuse cases requires extensive discovery motions and independent investigation. The life of the accuser and his/her family must also be examined to determine if there is an explanation for the accusations other than the "truth".

THE K.A.W. APPLICATION

Invariably, the initial complaint and indictment will set forth a broad range of time within which the sexual abuse incidents allegedly occurred. Although the State need not provide specific dates on which incidents occurred, it does have a duty to narrow the time frame to provide the defendant the ability to confront the allegations. State v. K.A.W., 104 N.J. 112 (1986). A motion to dismiss the indictment accompanied by an application for a bill of particulars is critical. It will require the State to make a diligent inquiry and to narrow the time frame, if not to an exact date, then to seasons of the year, incidents in the victim's live, such as a death in the family or change of family member's job, routine, the beginning of the school year, vacation time or other extracurricular activities. K.A.W. at 123.

The K.A.W. motion must be couched in terms of dismissing the indictment, which the Court will invariably not do unless there exists some independent ground. However, in deciding the motion, the Court should require the State to make an additional diligent inquiry as to the time frame. That will usually result in additional statements being taken by witnesses, including the accuser (always the accuser — never "alleged victim.") The State cannot avoid dismissal of the indictment merely by positing that it has turned over to defendant all information "at its disposal," or that its "information gathering events represents its best efforts." K.A.W. at 121. The State must make additional efforts to narrow the time base upon the age and intelligence of the victim, the extent and thoroughness of the investigative efforts actually made, whether there was a continuous course of conduct. K.A.W. at 122.

If the K.A.W. application is successful, discovery will be forthcoming and will hopefully obtain additional statements providing material for cross examination and to address the “why question”.

DISCLOSURE MOTIONS

Perhaps the most critical issues in any child sexual abuse case centers around the disclosure and the facts surrounding it. Under most circumstances, the accuser will make a disclosure, which, in turn, will result in parallel investigations being conducted by both the Division of Youth and Family Services and a law enforcement agency.[2] Such investigations are conducted pursuant to statutory authority set forth in Tile 9, N.J.S.A. 9:8.36(a). Where there has been a parallel or independent DYFS investigation, the defense is entitled to obtain relevant information notwithstanding the confidentially which surrounds DYFS records. N.J.S.A. 9:6-8.10A; State v. Allen, 70 N.J. 474 (1976); State v. Van Dyke, 361 N.J. Super. 403 (App. Div. 2003); State v. L.J.P., 270 N.J. Super. 429 (App. Div. 1994); State v. Cusick, 219 N.J. Super. 452 (App. Div. 1987).

A motion must be directed for a “Cusick hearing” requiring the Court to review the DYFS records in camera, and to provide the defendant with all relevant material. Clearly, defendant is entitled to obtain statements obtained by DYFS from the accuser, treating therapist and anyone to whom disclosure has been made. The application permits the Court to pierce not only the DYFS privilege, but other privileges as long as the defendant can show a compelling need for the material it seeks. Barring the defense from obtaining relevant exculpatory information constitutes reversible error. Cf., State v. L.J.P. 270 N.J. Super. 429 (App. Div. 1994). Psych record containing recantation.

The defendant is not only entitled to obtain DYFS records, but can obtain other privileged information, including records of physicians, psychologists and mental health professionals.

DYFS and the prosecutor may have obtained releases from mental health professionals. That obviously constitutes a waiver of any privilege. Even if such a waiver does not exit, a defense motion will be successful where there exists a legitimate need for the shielded evidence, materiality to a trial issue, and the material sought is not available from other less intrusive sources. L.J.P., supra; see also State v. McBride, 213 N.J.Super. 255 (App. Div. 1996). A defendant’s rights under the Sixth Amendment and

our State Constitution require the release of privileged records, following an in camera review, as long as defendant can show by a preponderance of the evidence the information is necessary and cannot otherwise be obtained.

Similarly, if disclosure has been made to others such as school personnel, an application should be made to obtain those school records. Such an application must be made upon notice to the Board of Education to assure confidentiality, which is pierceable based upon the factors above. School records may also be useful to establish other reasons for the accuser's disclosure such as disciplinary or emotional problems.

Additionally, all such records may become relevant material if they contain information revealing other accusations of sexual abuse against third parties which disclose that the accuser gained sexual knowledge or experience as a result of incidents occurring with individuals other than the accused. State v. Budis, 125 N.J. 519 (1991).

OTHER LITIGATION MATERIALS

Special attention must be paid to other litigation which may have involved either the accuser or his/her family. Certainly, if the accuser has a juvenile record, the defendant is entitled to pierce statutory confidentially and obtain those records. State v. Davis, supra. Similarly, if the State, DYFS or the prosecutor have been involved in an investigation of the family in the past, defendant should make an application to secure that material. For example, if there had been a complaint by the defendant against accuser's other parent, an application should be made for discovery of that material since it would be relevant on the issues of credibility. See, e.g., State v. P.H. If the family has been embroiled in divorce, custody or other litigation, all pleadings may be obtained since they are public record.

COMPELLING R. 104 HEARINGS

The evidence rules and case law are filled with opportunities to obtain pre-trial hearings pursuant to the provisions of Evidence R. 104. Such preliminary hearings are available on a multitude of issues, including fresh complaint, rape shield statute, and suggestibility.

THE MICHAELS' HEARING

The manner of disclosure is always highly significant, if it not be determinative in a child sex abuse case. It is now well settled the use of coercive or highly suggestive interrogation techniques distort a child witness' recollection of events undermining the reliability of subsequent testimony concerning the sexual abuse accusations. State v. Michaels, 36 N.J. 299 (1999).

Interviewing a child accuser is a difficult task which is far more difficult with younger children. That difficulty leads to the use of improper interrogation techniques. However, the issue of suggestibility exists regardless of the accuser's age. It merely diminishes in importance as an accuser is older. The determination of admissibility of pre-trial statements encompass all relevant circumstances, including the person or persons to whom a statement was made, the manner and form of interrogation, the physical and mental condition of the accuser, the use of inducements, threats or bribes, and the underlying believability or trustworthiness of the statement. As stated by the Michael court:

The basic issue to be addressed at a pre-trial hearing is to determine the reliability of out of court and in court testimony of a alleged child sex abuse victim owing to improper interviewing techniques is whether pre-trial events, the investigatory interviews and the interrogations, were so suggestive that they give rise to substantial likelihood of irreparably misstating a false recollection of material facts bearing on defendant's guilt.

To entitle a defendant to such a pre-trial hearing there must be a showing of "some evidence" that the victim's statements were products of suggestive or coercive techniques. The specific factors supporting unreliability include interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact between children and references to their statements, and use of threats, bribes and cajoling as well as failure to videotape or other document initial interview sessions.

Once a Michael's hearing is ordered, it provides a wealth of opportunity to examine the State's witnesses, including the accuser.

THE FRESH COMPLAINT HEARING

Fresh complaint evidence is admissible pursuant to the provisions of Evidence R.803(c)(2). Such evidence represents a subset of the excited utterance rule. Admission of such testimony requires a R. 104 Hearing.

The first type of fresh complaint testimony arises from an "excited utterance" arising under the stress of excitement of a particular event, made without time to deliberate or fabricate. It may be used as substantive evidence. State v. Hill, 121 N.J. 150 (1990).

The second type of fresh complaint evidence is not substantive since it is not admitted into evidence to prove the offense. Rather, it is admissible to explain to the jury that the alleged victim did confide in someone sought out for sympathy, solace, comfort, protection advice or guidance. State v. Pillar, 359 N.J. Super 49 (App. Div.), certif. denied, 177 N.J. 572 (2003). Previously, this category of fresh complaint was admissible only if it arose from self-motivated statements by the accuser. However, it is now admissible if it was elicited by "general non-coercive questioning" and if the statements were made under circumstances having the necessary spontaneity and voluntariness to qualify as a fresh complaint. State v. Pillar, supra at 282. However, any "fresh complaint," responses which emanate from pointed, inquisitive or coercive interrogation would not be admissible. The admissibility of determination requires a preliminary hearing for the judge to consider the following factors:

1. the age of the victim,
2. the circumstances under which the interrogation takes place;
3. the victim's relationship with the interrogator, i.e., relative, friend, professional, counsel or authority, and the party who initiated discussion
4. the type of questions asked — whether they are leading and the specificity regarding the alleged abuser and the acts alleged.

Hill, supra at 121, N.J. at 168.

When young children are the accusers, there is greater latitude permitted with respect to the nature and type of questioning. Hill, supra at 167. However, where there is clear coercive questioning, statements of even young children are deemed inadmissible due to the lack of "self motivation."

The admission of fresh complaint testimony at trial creates a significant potential for prejudice. The testimony must be limited to the existence of "complaint," and the court must take steps to ensure that unnecessary details of what allegedly happened are not repeated in the jury's presence. State v. Hill, supra. The only details which may properly be testified about are those which are minimally necessary to identify the subject matter of the complaint. If the testimony exceeds those parameters, immediate limiting instructions must be given by the trial court that the testimony is not to be considered as substantive evidence that the alleged sexual abuse occurred. More importantly, that the evidence may not be used to bolster the credibility of the alleged victim. In essence, the fresh complaint testimony is only admissible to explain the apparent, "self-contradiction," jurors might find in the absence of the evidence of some complaint. This type of fresh complaint testimony is only admissible if the victim testifies at the trial. Hill, supra at 163. Again, the R.104 hearing conducted on this issue provides significant opportunity to gain advantage at trial.

DELAYED DISCLOSURE

A significant lapse of time may specifically affect the admissibility of the fresh complaint statement. However, the delay is merely a factor to be considered in determining the weight to ascribe to the evidence. State v. Bethune, 232 N.J. Super 532 (App. Div. 1989), affirmed, 121 N.J. 137 (1990).

Thus, a substantial lapse of time between the alleged incident and the time of making the complaint can be overlooked if it is otherwise trustworthy, based upon the age of the accuser, and the circumstances surrounding the giving of a statement. As expressed in Bethune, supra, this recognizes the "special vulnerability" of children to be cajoled and coerced into remaining silent by their abuser. In certain circumstances, a delay of a year was not deemed to bar testimony, since the accuser had been subject to an "aura of intimidation." In that particular case, the accuser had allegedly been threatened

by the abuser that she would be killed if she revealed the abuse. State v. L.P., 352 N.J. Super 369 (App. Div.) certif. denied, 174 N.J. 546 (2002). The lapse of time was explained by that fact of the accusers eventual removal from the home which ended the intimidation of the accused. A delay of three years did not bar a fresh complaint testimony where the child victim was threatened with being removed from her home and placed in a shelter if she disclosed the information and then revealed it after leaving. State v. Hummel, 132 N.J. Super 412 (App. Div.), certif. denied, 67 N.J. 102(1979).

If fresh complaint testimony is deemed admissible after a 104 hearing, great pains should be made to limit it. Counsel should object to multiple witnesses presenting the testimony to avoid the impression that the prosecution has gathered a greater number of witnesses than the defense.

Similarly, the jury must be instructed that the fresh complaint evidence is limited to the proposition of neutralizing the inference that otherwise might be drawn that the accuser's behavior was inconsistent with the claim of sexual abuse. State v. Bethune, supra. Morever, the jury charge must make it clear that the fresh complaint testimony cannot be utilized to bolster the victim's credibility or to prove the truth of the charges, and it only exists to dispel the potential inference that the victim was silent.

THE CHILD SEXUAL ABUSE ACCOMMODATIONS SYNDROME

Often times the State will attempt to explain away the lack of fresh complaint, delay in reporting, initial denial, or subsequent recantation of the accuser by utilizing expert testimony of the Child's Sexual Abuse Accommodation Syndrome (CSAAS). That syndrome does not constitute a diagnosis. Rather, it provides a behavioral science explanation of how certain child sexual abuse victims react. As explained in State v. J.Q., 130 N.J. 554 (1993), CSAAS testimony has a non-substantive purpose. It can be utilized to rehabilitate a victim's testimony when the defense is asserts that a child's delay in reporting the abuse or recanting it indicates that the child was unworthy of believe. J.Q., supra at 564. Testimony about the syndrome cannot be used as substantive evidence. The syndrome is based upon certain preconditions:

1. secrecy;
2. helplessness;

3. entrapment;
4. delayed, conflicted and unconvincing disclosure; and
5. retraction or reversal of accusation.

Significantly, those conditions can exist based upon the existence of other psychological conditions such as extreme poverty or generalized psychological abuse. The existence of the underlying CSAAS, does not prove the existence of sexual abuse at all. J.Q. at 573.

There exists no justification for using CSAAS evidence as affirmative proof that abuse has occurred with respect to any particular child who may "fit" the model. Id. at 582. An expert may not render an opinion as to a particular witness' credibility. They may only testify to the existence of the syndrome as an explanation of the accuser's behavior. CSAAS testimony must be general at most. It may be utilized to buttress fresh complaint as evidence, since it explains away the delay element of the fresh complaint document. State v. L.P., 352 N.J. Super 369 (App. Div.), certif. denied, 174 N.J. 546 (2002). When accused, threaten to kill - lapse of 3 year spontaneous fresh Complaint.

PRACTICE NOTE

It is vitally important to obtain a CSAAS report from the State's proposed witness and to obtain your own witness for rebuttal purposes. Moreover, if the State chooses not to present CSAAS testimony, that decision must be explored on the record. The best practice is to continually ask the State if they are presenting such evidence. If they do not, no comment can be made by the State during summation to "explain away" delayed reporting, recantation, or other CSAAS factors.

Significantly, when CSAAS testimony is admitted it eliminates the need for an instruction to the jury to disregard any delay in reporting the abuse when evaluating a victim's credibility. State v. P.H., 178 N.J. 378 (2004).

Defendant is entitled to present evidence regarding a child's delay in reporting alleged acts since it impacts the jury's evaluation of the child's credibility. State v. P.H., supra. In that case our Supreme Court noted that the testimony at trial revealed that the delay in reporting was "intertwined" with other

evidential factors which had a clear effect upon the accuser's credibility. Specifically, testimony at trial revealed that the child accuser was undergoing disciplinary problems at the time of the alleged abuse and that the child had admitted efforts to gain attention from her mother. Additionally, there had been prior denials that the accused had touched her sexually.

Under those circumstances, both the Appellate Division and ultimately the Supreme Court agreed that the trial court's instruction which directed the jury to disregard the delay when assessing the child's credibility constituted a violation of Evidence R. 607, as well as the Confrontation Clause.

The decision in P.H., makes it all the more critical to develop answers to the question of why a child accuser creates and presents the accusations. For example, where a child accuser expressed a desire to discontinue visitation, such facts are admissible. It is critically important to explain the child's motivation for making the accusations. State v. E.B., 348 N.J. Super 336 (App. Div.), certif. denied, 174 N.J. 192 (2002).

For an excellent discussion regarding the use and misuse of a Child's Sexual Abuse Accommodation Syndrome see the much divided opinion in State v. R. B., 183 N.J. 308 (2005); more particularly the thoughtful discussion of Justice Albine who criticized the majority's affirmance of the conviction for sexual abuse offense. There, the State's entire case rested upon the credibility of the child accuser, and was unsupported by any other evidence. See also, State v. Schnobel, 196 N.J. 116 (2008), discussing the nexus between CSAAS testimony and the existence of third party sexual abuse.

EVIDENCE RULE 803(C)(27) STATEMENTS BY A CHILD RELATED TO A SEXUAL OFFENSE

This evidence rule permits the introduction of a statement by a child under the age of 12 in certain circumstances. It requires a request for a R. 104 Hearing. The Rule requires the following condition for a statement to be admissible: (a) the proponent makes known the intention to offer the statement and its contents to provide a fair opportunity to prepare to meet it; (b) a finding arising from a Rule 104(a) hearing that based on the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either the child testifies at the proceeding or the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual

abuse.

At the outset, it is fairly clear that the final section of the Rule regarding unavailable child witness is no longer viable pursuant to the decision in Crawford v. Washington, 541 U.S. 36 (2004). See, State v. Burr, 392 N.J. Super 538 (App. Div.), affirmed and remanded, 195 N.J. 119 (2008) (wherein the Appellate Division noted that it entertained considerable doubt as to the continuing validity of the unavailability section of the Rule).

At the R. 104 Hearing, the trial court must consider the totality of circumstances that surround the statement proffered by the State. In addition to the overall trustworthiness requirement, to be admissible, the out of court statement must satisfy the requirements of the Confrontation Clause by possessing independent indicia of reliability and inherent trustworthiness, without reference to other evidence at trial. Idaho v. Wright, 497 U.S. 805 (1990); State v. D.G., 157 N.J. 112 (1999). Thus, a court may not compare the child's statement and a defendant's confession to establish trustworthiness. See, e.g., State v. J.G., 261 N.J. Super 409, (App. Div.), certif. denied, 133 N.J. 436 (1993). Pursuant to the decision in Crawford, supra, if the statement is deemed testimonial it may not be admitted, unless the defendant has had a prior opportunity to cross examine the declarant.

During the R. 104 hearing, the following factors should be explored:

1. The extent to which the statement was made with or without suggestive questioning - and the mental state of declarant at the time;
2. the use of terminology unexpected of a child of a similar age;
3. a lack of a motive to fabricate - objectivity of the witness - individual powers of the witness' ability to perceive or remember.

Significantly, the requirement to hold a R. 104 hearing is mandatory. State v. D.G., supra. There must also be a specific statement of findings to support admissibility. At no time should the R.104 hearing be waived.

Where the State is permitted to introduce testimony under this Rule, it is especially important to proffer testimony establishing that the accuser had a motive to make a false accusation. Moreover, if there exists a history of false accusations made against others, that fact is admissible, even in light of the provisions of the rape shield law. State v. B.M., 397 N.J. Super 367 ( ).

PIERCING THE RAPE SHIELD LAW

Pursuant to statute N.J.S.A 2C:14-7, events of a victim's previous sexual conduct is generally deemed inadmissible. If Defendant seeks to admit such evidence, an application must be made prior to the Trial.

The statute contains narrow narrative tests determining the circumscribed situations where victims' prior sexual conduct can be considered as relevant. The language of the Rape Shield Law provides that the victim's prior sexual conduct is only admissible:

"If the Court finds that evidence offered by the Defendant regarding the sexual conduct of the victim is relevant and highly material and reaches the requirements of subsections (c) and (d) of the section and that the probative value of the evidence offered substantially outweighs its collateral nature of the probability that its admission will create undue prejudice, confusion of the issues or unwarranted invasion of the privacy of the victim".

Upon review, our Supreme Court concluded that this language violated the Confrontation Clause. State v. Garron, 177 N.J. 147, 172 (2003). The Court declared that if the evidence of prior sexual conduct is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled.

The Rape Shield Law does have application in child sexual abuse cases. For example, in State v. Budis, 125 N.J. 519 (1991), the Appellate Division reversed the conviction of the Defendant who had attempted to admit testimony about the child accuser's prior abuse at the hands of another person. The Trial Court had relied upon the Rape Shield statute and restricted the Defendant's examination of a nine year old victim and the police witness regarding prior sexual assault on the victim by another. The exclusion was deemed to be reversible error since the Defendant had the right to explain to the Jury

how a girl of such tender years could describe the sexual acts that she had attributed to him. The Court reinforced the concept that the Jurors, the sole judges of credibility, were entitled to hear evidence that the Defendant may not have been the sole source of the victim's sexual knowledge. See also, State v. Schnoebl, supra; State v. Guenther, 181 N.J. 129 (2004); State v. Ross, 240 N.J. Super 246 (1991). (Where the Appellate Division reversed a conviction based upon the Court's refusal to admit testimony regarding two separate sexual incidents involving the complaining witness that had been documented in DYFS records). Where there are allegations of the accuser of having made false allegations, the Rape Shield Law is not implicated because such false allegations do not constitute prior sexual conduct. State v. Guenther, 181 N.J. 129 (2004); State v. R.E.B., 385 N.J. Super 72 (App. Div. 2006); State v. Bray, 356 NJ Super 485 (App. Div. 2003). Where claim virgin after alleged act.

To obtain a Hearing, the Defendant must provide a meaningful proffer establishing "clear proof", that the alleged prior sexual act did in fact occur. Budis, supra. State v. Buschan 360 N.J. Super 346 (App. Div. 2003). The relevance of prior sexual abuse clearly is dependent upon the similarity between the acts.

The Court must also weigh the possibility of prejudice, to the accuser, including likely trauma and the extent to which privacy may be invaded. Budis, supra. The issue of prejudice to the child may be reduced if evidence is establishable from other sources. However, if the accuser must be questioned, Defense counsel will be precluded from excessive cross-examination. Budis, supra.

CONCLUSION

Child Sexual Abuse cases are inherently difficult, but present incredible opportunities for pre-trial hearings which can and must be conducted on all available issues. This presents an incredible opportunity to pre-try your case.

CAUTIONARY PRACTICE NOTE

In a recent decision, the New Jersey Supreme Court State v. Nyhammer overruled the Appellate Division which had reversed Defendant's conviction for sexual assault of a seven year old. The

Appellate Division had ruled that the admission of a video-taped statement of the accuser at trial violated the rule espoused in Crawford v. Washington, 541 U.S. 36, 124 Supreme Court 1354, 158 Lawyer's Edition 2nd 177 (2004).

At the Trial, the accuser did testify and the State introduced a video tape statement taken by a Detective which contained a description of sexual abuse. The Appellate Division made an analysis of Evidence Rule 803(c)(27), emphasizing that to be an admissible statement, it must be evaluated at a R. 104 Hearing to establish trustworthiness of the Court statement. State v. D.G., 157 N.J. 112 (1999). The Appellate Division assumed that the Trial Court's decision on the trustworthiness issue was supported by the trial proofs and then analyzed its admissions under the Confrontation Clause and Crawford v. Washington, supra. It then deemed the accuser's video-taped statement to be testimonial. The Court reasoned that the video-taped statement constituted the main evidence against the Defendant. Interestingly, during her trial testimony, the accuser was totally unresponsive on direct. She did not repeat the accusations appearing on the video. Due to the unique circumstances, the Appellate Division found that the video-tape statement was testimonial but that no prior opportunity for Defendant to cross-examine existed since the accuser was unresponsive during both her direct and cross-examination.

Upon appeal, our Supreme Court reversed the Appellate Division and reinstated the conviction. In its Opinion, the Supreme Court noted that the State encountered great difficulty in having the child accuser testify. The child was not responsive in giving details but did state that she had spoken the truth when she had given her interview. However, when she was specifically asked if the Defendant had touched her, she did not respond. On cross-examination, Defense counsel asked a number of "safe questions" which the Supreme Court described as "…questions intended to elicit answers that would reveal only mundane information, rather than information that might damage, or even worse, might implicate her client." Those questions were limited to biographical information, age, school, family and pets. The child could not give details of what she had told the investigating police officer. As a result of the cross-examination, Counsel was able to highlight the child's unresponsiveness on direct examination. Significantly, the Supreme Court "approved" of the Defense's examination technique utilized [3].

The Supreme Court reviewed the video-taped testimony which had involved the use of drawings and dolls and included specific testimony regarding the Defendant's sexual conduct, which led the Court to conclude that the child possessed sexual knowledge beyond her years. The Court then held that since the child took the stand the Defendant did have the opportunity to cross-examine her. The Court specifically found that pursuant to the decision in Crawford, supra., there was no question that the child's video-taped interview constituted testimonial hearsay for Sixth Amendment purposes. The Court further recognized that the Confrontation Clause places no constraints at all upon the use of a witness' prior testimonial statements provided that the witness appears for cross-examination at Trial."

The Court then criticized the Appellate Division's conclusion that the accuser's "complete inability to detail at Trial the real facts of the sexual abuse and her inability to testify to her prior statement meant that Defendant had no opportunity for an adequate and meaningful Cross-examination." The Court declared the following:

"Although the Defendant had the opportunity to cross-examine Amanda on the core allegations contained in the statement, he declined to do so at Trial. However how unresponsive Amanda may have been on direct examination, as contended by Defendant, he had the opportunity to question her on the inculpatory statements and description she gave in her taped interview. It is irrelevant that the reliability of some out of Court statements cannot be replicated, even if the witness testifies to the same matters at Court." (Citation omitted).

The Court noted that Defense counsel specifically chose not to cross-examine the child about the core allegations. Under these unique facts, the Supreme Court held that Counsel's decision to forego critical examination because of the child's unresponsiveness under direct did not deny the Defendant the right to cross-examine. The Court them opined that had the accuser been directly confronted on cross-examination and then had remained silent or unresponsive. These would have been a basis on which to decide whether her silence or unresponsiveness effectively denied the Defendant his constitutional right of Confrontation. The Court declined to presume that the child would have remained silent or unresponsive under more vigorous cross-examination. It concluded:

"We do not fault Defense counsel for not pursuing cross-examination which may of damaged the Defendant's case. Having chosen that strategic course, however, Defendant cannot now claim that he was denied the opportunity for cross-examination. Simply, Defendant has not made out the fundament for a constitutional challenge under the Confrontation Clause or either the Sixth Amendment, Article I, Article X of our State's Constitution."

Obviously, the Court's analysis ignores certain cardinal principles held dear by all Criminal Defense Attorneys: Quit While You Are Ahead, and Do Not Ask That Question To Which You Do Not Know (or Fear) The Answer. Here, the Defense Counsel made a well-reasoned decision based upon the inability of the State's key witness to directly accuse the Defendant in the presence of the Jury. Both the State and the Defendant were faced with a reticent accuser. It can be easily argued that the child witness here is no different than a witness who invokes the Fifth Amendment privilege. Unfortunately, our Supreme Court completely rejected that type of analysis stating that it could not presume that Amanda would have remained silent or unresponsive to questions that Defense Counsel never asked. [4]

A review of this reasoning leads to the inescapable conclusion that, unfortunately, Courts, as well as Juries tend to shift the burden of persuasion in cases involving child victims.

[1]This article is premised upon a "he said, she said" case when there exists little or no evidence to corroborate the accusations. It does not address the approach to a case involving the existence of independent witnesses or physical evidence.

[2]Usually, the DYFS case proceeds first. During that proceeding insist on protective orders to shield the use of any statements which may be given by your client. Alternatively, utilize the preliminary adjustment proceeding provided by N.J.S.A. 9:6-8.35 and 8-31 which prohibits the admissibility of any statement taken from the client in either a fact finding or criminal proceeding. Also, be aware that representing your client in the DYFS proceeding may bar you from involvement in the criminal prosecution. There is a split of authority on this issue. DYFS v. JC, 399 NJ Super 444 (Ch. Div. 2006) (finding against dual representation); DYFS v. J and R.J., 386 NJ Super 71 (Ch. Div. 2000) (finding for dual representation).

[3]The Supreme Court wrote the following, "...we do not suggest in any way that the strategic course pursued by counsel was not well calculated to advance the Defense."

[4]Unfortunately, it was noted by the Court, that approach to the case was not preserved upon Appeal.