THROWN OFF BALANCE: TEXAS’S UNIQUE APPROACH TO CONFRONTATION CLAUSE ISSUES IN CHILD ABUSE CASES

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I. INTRODUCTION

In the wake of confusion over the Confrontation Clause, *Crawford* revolutionized the way courts look at the clause and set clear guidelines for courts to follow.¹ The rules under *Crawford*, however, present a unique problem in child abuse cases.² In these cases, the child is often the only witness, and therefore the child’s testimony is crucial to the prosecution’s case.³

Because children are the main witnesses, it creates a problem in that they are often unavailable to testify because either they are incompetent to testify due to their age or they are emotionally unable to be in the courtroom with the defendant.⁴ But, the only way to satisfy the Confrontation Clause is for the defendant to have an opportunity to cross-examine the child.⁵ This requirement has the potential to exclude many out-of-court statements by child abuse victims because the child was not cross-examined due to unavailability.⁶ One way to get around this problem is to create opportunities for the defendant to cross-examine the child victim and admit the out-of-court statement into evidence.⁷

Due to the emotional strain that facing the defendant has on child abuse victims, states have an interest in protecting them from situations that would cause further harm.⁸ In order to protect them from the emotional strain of coming face-to-face with the defendant, states have enacted procedures to protect the interest of the child while still protecting the rights of the defendant.⁹ One procedure, used by Texas, involves using written interrogatories, submitted by the defense, to cross-examine the child.¹⁰ Other states, including Texas as well, use closed circuit television.¹¹

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² *Id.* at 368.
³ *Id.*
⁴ *Id.* at 368-69.
⁶ McMahon, *supra* note 1, at 369.
⁸ McMahon, *supra* note 1, at 387.
⁹ See discussion infra Part II.D.3.
¹⁰ See TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2(b) (Vernon Supp. 2009).
¹¹ See discussion infra Part II.D.3.
Because these procedures often present Confrontation Clause issues, this Comment addresses the history and purpose of the Confrontation Clause as a means of evaluating Texas’s procedures in child abuse cases.  

Part II begins discussing this history by reviewing English common law, the cases that precede Crawford, and the various interests that must be taken into account when addressing Confrontation Clause issues. This part emphasizes the importance of defining a “prior opportunity for cross-examination” and what satisfies this requirement. Part III shifts the focus to Texas’s current statute for handling Confrontation Clause issues and how that statute has been applied. Part IV then applies the history and purpose underlying the Confrontation Clause to determine whether Texas strikes the proper “balance” between the defendant’s rights and the protection of child abuse victims through its child abuse statutory procedures. This part offers suggestions for different procedures to use in child abuse cases for Confrontation Clause issues. Overall, this Comment addresses the unique twists child abuse cases place on the Confrontation Clause. Ultimately, it looks to Texas as an example of a different approach to these issues and concludes that Texas does not properly conform to the goals of the Confrontation Clause because it ignores too many of the defendant’s rights in favor of protecting child abuse victims.

II. HISTORY OF THE CONFRONTATION CLAUSE

A. Pre-Crawford

1. The History of the Confrontation Clause

The origins of the Confrontation Clause are unclear, but they can be traced back to the trial of Sir Walter Raleigh in England. The procedure in England at this time was for the justice of the peace to interrogate the witnesses before the trial in a private setting, and then the justice would offer the testimony of the witness at trial without the witness being present to testify. This procedure of judicial examination is commonly referred to

12. See discussion infra Parts II-IV.
13. See discussion infra Part II.
14. See discussion infra Part II.D.
15. See discussion infra Part III.
16. See discussion infra Part IV.
17. See discussion infra Part IV.E.
18. See discussion infra Part IV.B.
19. See discussion infra Parts IV-V.
21. Id. at 7.
as the civil law practice. The English court accused Raleigh of treason for conspiring to remove the King of England and replace him with Arabella Stuart. The main evidence against Raleigh was a confession by a co-conspirator, Lord Cobham. Cobham’s confession was allegedly obtained by torture and renounced later in a letter to Raleigh. Nonetheless, the confession was read into evidence at trial without the co-conspirator, Cobham, being present for Raleigh to confront. The court ultimately convicted Raleigh and punished him with execution.

The unfairness of Raleigh’s trial spurred awareness for a defendant’s need to be able to confront witnesses. Prior to the American Revolution, however, England allowed the admiralty courts to follow the civil law practice against the protest of the colonists. As a reaction, many states around the time of the Revolution adopted declarations of right that included the right to confrontation.

Despite the clear opinion of the states, the proposed Federal Constitution did not include the right to confrontation. After opposition by the Anti-Federalists to the lack of individual rights, the First Congress included the right to confrontation in the Sixth Amendment to the Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

22. Crawford v. Washington, 541 U.S. 36, 43 (2004). England adopted a form of the civil law practice as described previously. Id. During the 16th century, statutes in England required the justice of the peace to examine witnesses before trial and certify the results. Id. at 44. These examinations eventually were used in court in lieu of live testimony, as in the trial of Raleigh. Id. England later developed statutes that allowed confrontation in order to limit the abuse of out-of-court testimony. Id.
24. Id.
25. Id.
26. Id.
27. Id.
30. Id. at 48.
31. Id.
32. U.S. CONST. amend VI.
The Framers believed that the confrontation guarantee would prevent hearsay from being relied on solely to convict a criminal defendant.  

2. Ohio v. Roberts

Although many early Supreme Court cases interpreted the Confrontation Clause, perhaps the most significant case was *Ohio v. Roberts*. In *Roberts*, a grand jury indicted the defendant for forgery, receiving stolen property, and possession of heroin. In a preliminary hearing, Anita, a defense witness, denied that she gave the defendant her parent’s checks and credit cards without telling him that she was not allowed to use them. At the initial trial, Anita was not present, and the prosecution introduced the transcript of her testimony from the preliminary hearing. The defense objected to the introduction of the transcript on Confrontation Clause grounds, but the trial court admitted the transcript, and the defendant was convicted on all three counts.

Justice Blackmun, writing for the Supreme Court majority, held that in order to satisfy the Confrontation Clause, the prosecution must show that the witness is unavailable and that the testimony bears some “indicia of reliability.” The evidence is reliable if it “falls within a firmly rooted hearsay exception” or has “particularized guarantees of trustworthiness.” The Court determined that Anita’s statements bore the requisite indicia of reliability because the defense sufficiently questioned Anita at the previous hearing to equal effective cross-examination.

Thus, Justice Blackmun noted that the underlying purpose of the Confrontation Clause is to ensure accuracy and allow the defendant adequate means to test adverse evidence. Without cross-examination, the statement is only admissible if it bears other indicia of reliability; therefore, cross-examination guarantees the defendant a chance to confront and test the reliability of the evidence.

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34. See generally *id.* at 845-53 (describing the cases leading up to the decision in *Ohio v. Roberts* that influenced how courts determined what constituted a prior opportunity for cross-examination). The article points specifically to four Supreme Court cases that dealt with the Confrontation Clause issue. See *id*.
36. *Id.* at 58.
37. *Id.*
38. *Id.* at 59.
39. *Id.* at 60-61.
40. *Id.* at 65-66.
41. *Id.* at 66.
42. *Id.* at 70-71.
43. *Id.* at 65.
44. See *id.* at 66.
In the aftermath of Roberts, circuit courts began to inconsistently apply the rule the Court set out.\textsuperscript{45} Notably, the Court failed to specify if anything other than cross-examination would make testimony reliable enough to satisfy the Confrontation Clause.\textsuperscript{46} Also, the Court did not demonstrate what would qualify as a firmly rooted hearsay exception.\textsuperscript{47} Circuit courts became confused on which hearsay rules would qualify under Roberts and whether anything but cross-examination could guarantee the reliability of testimony.\textsuperscript{48} This uncertainty often allowed the admission of unreliable testimony because it was not tested by cross-examination.\textsuperscript{49}

B. Crawford v. Washington

During this time of uncertainty, between Roberts and Crawford, Roberts was the main case governing Confrontation Clause issues and hearsay.\textsuperscript{50} Crawford essentially clarified the analysis of hearsay statements under the Confrontation Clause by narrowing the pool of hearsay statements that trigger the Confrontation Clause and mandating that these statements only be admitted when the declarant is unavailable and the defendant has had an adequate opportunity to cross-examine the declarant.\textsuperscript{51}

In Crawford, the defendant, Michael Crawford, stabbed Kenneth Lee, who allegedly had raped Crawford’s wife.\textsuperscript{52} Crawford claimed self-defense—that Lee pulled something out of his pocket, and Crawford stabbed to protect himself.\textsuperscript{53} The testimony of Crawford’s wife, Sylvia, however, did not indicate that Lee had a weapon in his hands when Crawford stabbed him.\textsuperscript{54} Sylvia did not testify at Crawford’s trial because of the state marital privilege, but the prosecution brought in her statements that she made to the police the night of the incident.\textsuperscript{55} The prosecution introduced Sylvia’s testimony through a hearsay exception that admits statements against the declarant’s penal interests.\textsuperscript{56} The trial court followed the rule in Roberts that admits hearsay statements if they fall under a firmly rooted hearsay exception.\textsuperscript{57} The Supreme Court granted certiorari and ultimately redefined the purpose and use of the Confrontation Clause.\textsuperscript{58}

\textsuperscript{45} See Pittman, supra note 23, at 856.
\textsuperscript{46} See id. at 855.
\textsuperscript{47} See id. at 854.
\textsuperscript{48} See id. at 856-58.
\textsuperscript{49} See id. at 856.
\textsuperscript{50} See Counseller & Rickett, supra note 20, at 2-4.
\textsuperscript{51} See id.
\textsuperscript{53} Id. at 38-39.
\textsuperscript{54} Id. at 39-40.
\textsuperscript{55} Id. at 40.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} See id. at 42.
1. Defining the Purpose of the Confrontation Clause

While Roberts focused on the reliability of hearsay statements, Crawford shifted the view of the Confrontation Clause from an evidentiary rule to a procedural rule that focuses on preventing ex parte testimony from being used against a defendant. Writing for the majority, Justice Scalia began with an analysis of the history of the Confrontation Clause and pulled two inferences from its history. First, history supports the notion that the Confrontation Clause protects against the use of ex parte statements against a defendant. And second, it shows that the Framers never intended courts to allow out-of-court statements into evidence unless the declarant is unavailable and the defendant has a “prior opportunity for cross-examination.”

Thus, Crawford rejects the notion that because a statement falls within a hearsay exception it is reliable. Reliability should not be assessed by a judge, and although the Confrontation Clause is in place to ensure reliability, it does so through a particular procedural process and not through an evidentiary rule. The particular procedural process the Court referred to is cross-examination.

2. What Triggers the Confrontation Clause

Unlike the Roberts Court, the Court in Crawford held that the Confrontation Clause did not apply to all hearsay statements. The Sixth Amendment refers to “witnesses,” whom the Court defined as those who “bear testimony.” The Court used the example of a person who gives a statement to a police officer as one who bears testimony, but a person who makes an informal remark to a friend is not giving testimony but simply making a statement. Therefore, the Confrontation Clause only refers to testimonial statements and not all out-of-court statements by declarants.

60. See Crawford, 541 U.S. at 43-50.
61. Id. at 53.
62. Id. at 53-54.
63. Id. at 61.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
3. What Satisfies the Confrontation Clause

When non-testimonial hearsay statements are at issue, the states can develop their own hearsay requirements, but when testimonial hearsay statements are at issue, the common law requires (1) the unavailability of the declarant and (2) a prior opportunity for cross-examination by the defendant. Crawford does not detail what qualifies as testimonial and a prior opportunity for cross-examination but leaves those issues open for another day. Crawford does, however, hold that police interrogations qualify as testimonial, as well as testimony at a preliminary hearing, testimony before a grand jury, and testimony at prior trials.

As applied to the case, because Sylvia gave her statements during a police interrogation, her statements qualified as testimonial and triggered the Confrontation Clause. Sylvia could not testify because of the marital privilege; therefore, she was unavailable. The defendant was not able to cross-examine Sylvia during the interrogation or at any other proceeding; so, the trial court violated the Confrontation Clause by allowing Sylvia’s testimony into evidence at trial.

C. Post-Crawford

The Supreme Court in Crawford remedied the trial court’s mistake and clearly laid out the two requirements for satisfying the Confrontation Clause, but failed to define each requirement and instead left the decision to another day. The other day came along only a couple of months later in Davis v. Washington.

1. Defining Testimonial Statements: Davis and Hammon

Davis involves two cases in one opinion. Davis involved a domestic dispute in which the woman, Michelle McCottry, reported her boyfriend,
the defendant, to the police. 78 McCottry described the defendant to the 911 operator and explained the incident while it was still occurring. 79 The trial court allowed the recording of the 911 call into evidence, and the defendant was convicted. 80 

Hammon involved a domestic disturbance between Hershel and Amy Hammon. 81 The police arrived at the Hammon’s house, and after talking to both Amy and Hershel, the police had Amy fill out a battery affidavit. 82 In the affidavit, Amy described the events: she stated that Hershel broke some household items and attacked her and her daughter. 83 The trial court admitted the affidavit under the hearsay exception for present sense impressions, and Hershel was convicted. 84 

With these two similar cases the Court took the opportunity to further define what “testimonial” means:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. 85

Thus, the Court looks to the primary purpose of the statements to determine whether they are testimonial. 86

In Davis, the primary purpose of the 911 conversation was to assess the situation and provide help for an emergency. 87 McCottry was describing events as they were happening, as opposed to Amy Hammon, whose statement in the affidavit was made after the domestic altercation ended. 88 The purpose of the interrogation of Amy was to gather evidence for a possible crime, and although it was less formal than some police interrogations, the primary purpose was the same: for testimony about the incident. 89

Despite the Davis holding, the Court does not rule out the possibility that a 911 call can turn into a testimonial statement. 90 For example, once

78. Id. at 817-18.
79. Id.
80. Id. at 819.
81. Id.
82. Id. at 820.
83. See id.
84. Id. at 820-21.
85. Id. at 822.
86. Id.
87. Id. at 827.
88. See id. at 827, 829.
89. See id. at 829-30.
90. Id. at 828.
the 911 operator has received enough information to send emergency assistance or the emergency has ended during the call, the statements become testimonial. The statements become testimonial because the operator is no longer gathering information to assist in an emergency; instead, the operator is gathering information for use in a possible crime prosecution.

D. Expanding and Defining Crawford

I. Defining a Prior Opportunity to Cross-Examine

Once the court deems a statement testimonial, the prosecution must prove that the declarant is unavailable and the defense had a prior opportunity for cross-examination. Unlike the Roberts court, the Crawford court requires confrontation and does not allow any exceptions to the prior opportunity to cross-examine rule. Several Supreme Court and lower court cases, both pre- and post-Crawford, shed light on this requirement.

In United States v. Owens, a pre-Crawford Supreme Court case, a correctional officer was attacked and beaten with a metal pipe. The officer suffered severe memory loss that impaired his ability to remember the events at trial. During cross-examination, the officer was unable to remember seeing the person who assaulted him, but the officer did remember identifying the defendant as his assailant to an FBI agent while he was in the hospital. The defense argued that the testimony should be barred because the cross-examination was ineffective due to the officer’s memory loss. The Court held that the Confrontation Clause guarantees an opportunity for effective cross-examination, but this does not mean cross-examination “that is effective in whatever way, and to whatever extent, the defense might wish.”

In Lewis v. Woodford, a post-Crawford district court case, the prosecutor introduced evidence of the defendant’s past, including a past victim’s statement from a previous hearing. The court held that adequate cross-examination does not have to mean the same full examination

91. Id.
92. See id.
96. Id.
97. Id.
98. See id.
99. Id. at 559 (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)).
afforded at trial.\textsuperscript{101} Similarly, in \textit{Larrimore v. Scribner}, the defendant was convicted of first degree burglary and false imprisonment.\textsuperscript{102} In this post-\textit{Crawford} case, the defendant argued that his confrontation rights were violated because the witness’s statement at a prior hearing was introduced at trial.\textsuperscript{103} The district court held that if the defense attorney was not significantly limited in his cross-examination, then the Confrontation Clause was satisfied.\textsuperscript{104} There are no precise standards for cross-examination such as a requirement that it take place at trial.\textsuperscript{105}

Finally, in \textit{United States v. Vigil}, the United States District Court for New Mexico held that the Confrontation Clause is generally satisfied when the defendant can prove the inadequacies of a witness’s testimony to show the jury the infirmities so they can give less weight to the testimony.\textsuperscript{106} The Eleventh and Eighth Circuits follow a similar rule for cross-examination.\textsuperscript{107} These circuits opine that a violation of the Confrontation Clause occurs only when the defendant shows that the jury might have received a “significantly different impression of the witness’s credibility” if the defense had been allowed to pursue its preferred line of cross-examination.\textsuperscript{108}

In general, an opportunity for cross-examination may not be all that the defendant expects it to be. The federal courts have held that an effective cross-examination does not have to be all that a defendant wants it to be, but the defendant nonetheless has a right to test the declarant’s testimony.\textsuperscript{109}

2. The Right to Face-to-Face Confrontation Is Not Absolute

The primary objective of the Confrontation Clause is to protect against the civil law practice that did not allow defendants to come face-to-face with their accusers.\textsuperscript{110} The purpose is to allow the witness to come face-to-

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\textsuperscript{101} Id. at *7.


\textsuperscript{103} Id. at *4.

\textsuperscript{104} See id. at *11.

\textsuperscript{105} Id.


\textsuperscript{107} See United States v. Chappell, 307 Fed. App’x 275, 279-80 (11th Cir. 2009); United States v. Street, 548 F.3d 618, 626 (8th Cir. 2008).

\textsuperscript{108} Chappell, 307 Fed. App’x at 280 (quoting United States v. Orsinord, 483 F.3d 1169, 1179 (11th Cir. 2007)); see Street, 548 F.3d at 626 (citing United States v. Love, 329 F.3d 981, 984 (8th Cir. 2003)).


\textsuperscript{110} Mattox v. United States, 156 U.S. 237, 242 (1895). Mattox is a pre-\textit{Crawford}, Supreme Court case that admitted the transcript testimony of two witnesses who had passed away prior to the trial, but the Court allowed in their transcript testimony from a previous trial. Id. at 240. Although defendants
face with the jury so that they can judge the witness. The defendant needs the advantage of confronting the witness in order to subject the witness to cross-examination.

Although there is a preference for face-to-face confrontation, this requirement can be bent in some circumstances. In Maryland v. Craig, Sandra Craig was charged with child abuse against a child that attended Craig’s daycare center. In order to protect the child from severe emotional distress, the trial court allowed the child to testify through closed circuit television. Craig objected on Confrontation Clause grounds, but the trial court overruled her objection. The Court stated that it has never held that the Confrontation Clause gives an absolute guaranteed right to face-to-face confrontation with accusers. Instead, the Court followed its precedent that the Confrontation Clause’s preference for face-to-face confrontation “must occasionally give way to considerations of public policy and the necessities of the case.” One such public policy concern is for rape and child abuse victims in which the state has an interest in protecting these victims from the trauma of testifying.

The Court found that the safeguard the trial court put in place for the closed circuit television interview conformed with the requirements and purpose of the Confrontation Clause. With closed circuit television, the defendant is able to fully cross-examine the child, and the jury is able to view and judge the competency and reliability of the child such that reliability and adversarial testing are ensured.

Even though Craig was decided before Crawford, the Court did not overrule the decision in Craig, and it remains in force today. “The rule from Craig regarding the use of in-court protective procedures is still governing precedent.” Crawford seems to not cast any doubt on the use should have the advantage of coming face-to-face with their accusers, in this case the witnesses was fully cross-examined at a previous trial, which sufficiently tested their testimony. See id. at 244.
and authority of Craig or the constitutionality of using closed circuit television procedures in states. In order to protect both of these interests, it seems the courts are balancing the interests in a way that ensures both sides are protected.

3. States’ Use of Closed Circuit Television in Child Abuse Cases

Outside of the federal courts, state courts also allow a method besides face-to-face confrontation in child abuse cases. In State v. Foster, a pre-Crawford case, Washington had a statute that allowed a child victim to testify through closed circuit television. The court said that the constitutional right to face-to-face confrontation is not absolute, and the testimony can be allowed when it furthers the state’s interest and the procedures used ensure reliability. In State v. Apilando, another pre-Crawford case, the court allowed videotaped statements as long as the witness was present at trial for cross-examination. In this case, the child witness was available at trial, but the prosecution had already introduced the videotaped testimony before the child was presented. This delay deprived the defendant of his right to test the truthfulness of the testimony while the video was still fresh in the jury’s minds.

By not requiring the prosecution to present its evidence through the live, in-court testimony of the [child witness] or to demonstrate the [child witness’s] “unavailability” prior to presenting the videotape, [the defendant] was not only precluded from confronting his accuser face-to-face and contemporaneously cross-examining her, but he was also effectively precluded from making crucial tactical decisions regarding his defense.

Also, in State v. Henrid, Utah allowed the child victim to testify through closed circuit television so that the child would be outside of the defendant’s presence. The court said that the Confrontation Clause does not strictly prohibit a procedure that does not require face-to-face

126. See discussion infra Part II.D.3.
128. Id. at 714.
130. Id. at 146.
131. Id.
132. Id.
confrontation if reliability is ensured and adversarial testing is used to preserve the essence of the Confrontation Clause.\textsuperscript{134}

III. TEXAS

The procedure for child abuse cases in Texas, however, allows for a procedure unlike those described in Washington, Hawaii, and Utah.\textsuperscript{135} Texas allows the use of closed circuit television for child abuse cases, but it also allows a procedure using written interrogatories.\textsuperscript{136}

A. The Texas Rules of Criminal Procedure

The procedures in Texas are codified in the Texas Code of Criminal Procedure article 38.071, which sets guidelines for introducing the testimony of a child who is the victim of an offense.\textsuperscript{137} The article only applies to children under the age of thirteen who are shown to be unavailable to testify.\textsuperscript{138} It applies to various offenses including indecency with a child, sexual assault, aggravated assault, aggravated sexual assault, prohibited sexual conduct, sexual performance by a child, and continuous sexual abuse of a young child.\textsuperscript{139} Section 2 of article 38.071 concerns the admission of oral statements by the child before a complaint is filed:

(a) The recording of an oral statement of the child made before the indictment is returned or the complaint has been filed is admissible into evidence if the court makes a determination that the factual issues of identity or actual occurrence were fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter.

(b) If a recording is made under Subsection (a) of this section . . . by motion of the attorney representing the state or the attorney representing the defendant and on the approval of the court, both attorneys may propound written interrogatories that shall be presented by the same neutral individual who made the initial inquiries . . . and recorded under the same or similar circumstances of the original recording with the time and date of the inquiry clearly indicated in the recording.\textsuperscript{140}

\textsuperscript{134} Id. at 236.
\textsuperscript{135} See TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2 (Vernon 2005 & Supp. 2009).
\textsuperscript{136} Id. art. 38.071, §§ 2(b)-3(a). The statute also gives the option of recording the testimony before trial and then presenting it to the court. Id. art. 38.071, § 4(a). During this procedure, the child should not be able to see or hear the defendant, but the defendant should be able to communicate with his attorney either during recess or through audio contact. Id. The statute also allows courts to set out conditions that it finds “just and appropriate, taking into consideration the interests of the child, the rights of the defendant, and any other relevant factors.” Id. art. 38.071, §§ 3(b), 4(b).
\textsuperscript{137} See id. art. 38.071, § 1.
\textsuperscript{138} See id.
\textsuperscript{139} See id.
\textsuperscript{140} Id. art. 38.071, § 2(a)-(b).
In sum, the statute provides that in child abuse cases, the child must be interviewed by a neutral, competent child investigator, and the prosecution and defense can submit written interrogatories to be posed to the child on video by the child investigator.\textsuperscript{141}

This section strives to balance the rights of the defendant with the state’s interest in protecting child victims.\textsuperscript{142} The legislature recognizes the right of the defendant to confrontation, including cross-examination, and the right to due process of law.\textsuperscript{143} The legislature also recognizes the state’s interest in guarding child sexual abuse victims from having to confront the defendant and be subjected to the pressures of testifying in a courtroom.\textsuperscript{144} Because children are more susceptible to trauma from abuse than adults, it is better for the children to testify early and infrequently.\textsuperscript{145} The legislature believes that this system will allow the interests of both parties to be protected by having “a sufficiently flexible system that properly protects the rights of defendants while reducing the deleterious effects of the criminal justice system on certain child sex crime victims.”\textsuperscript{146}

\textit{B. Application of Texas Rules}

\textit{1. Rangel v. State}

A recent, post-\textit{Crawford} Texas case interpreted the written interrogatory procedure provided by Texas as satisfying the Confrontation Clause.\textsuperscript{147} In \textit{Rangel}, a Child Protective Services (CPS) agent investigated the defendant and his wife on alleged accounts of abuse of two of their biological children, E.R. and C.R., and two of the wife’s biological children, R.T. and G.T.\textsuperscript{148} All four children were removed from the home, and over a year later, the defendant was indicted on several accounts of aggravated sexual assault of a child, indecency with a child, and attempted indecency.\textsuperscript{149} Before trial, the prosecution sought to introduce a videotaped CPS interview of one of the victims, C.R.\textsuperscript{150} The CPS investigator conducted the interview about two months after CPS removed C.R. from the defendant’s home.\textsuperscript{151} The court determined that C.R. was unavailable to

\textsuperscript{141} Id.
\textsuperscript{143} See id.
\textsuperscript{144} See id.
\textsuperscript{145} See id.
\textsuperscript{146} See id.
\textsuperscript{147} See Rangel v. State, 199 S.W.3d 523, 534-36 (Tex. App.—Fort Worth 2006, pet dism’d).
\textsuperscript{148} Id. at 529.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
testify due to the trauma that testifying would cause C.R. The court also determined that although closed circuit television would alleviate some of the trauma from C.R., C.R. would not be able to testify through closed circuit television because strangers would be involved. C.R. still was experiencing signs of trauma from sexual abuse up to trial. The trial court granted the state’s motion to allow the videotaped evidence in under article 38.071. The court convicted the defendant of aggravated sexual assault of a child, indecency with a child, and attempted indecency with a child.

On appeal, the defendant contended that the court erred by denying him his right to confront and cross-examine C.R. The defendant asserted that the videotaped interview of C.R. was testimonial hearsay, and that because he did not have an opportunity to cross-examine C.R., the interview was inadmissible. Before analyzing the issue, the appellate court recognized that the case was one of first impression in Texas post-Crawford.

The court determined that written interrogatories satisfy the requirement of a prior opportunity to cross-examine under the Confrontation Clause. To arrive at its conclusion, the court first determined that C.R.’s statements were testimonial under Crawford. The court held that cross-examination does not necessarily require a face-to-face confrontation, and the procedures set out in article 38.071, for the submission of written interrogatories, satisfy the prior opportunity for cross-examination condition.

The court referred to another Texas case, Smith v. State, in which the Tyler court of appeals (pre-Crawford) held that the Confrontation Clause was satisfied by allowing the defendant to submit written interrogatories under article 38.071. The Tyler court reasoned that although the written interrogatories lacked spontaneity, they allowed the defendant to test the reliability of the child’s responses. The Tyler court also held that the

152. Id.
153. Id.
154. Id. C.R. was having nightmares and wetting the bed, which according to her counselor were symptoms of her abuse. Id. C.R.’s counselor said C.R. was in remission, but she was still unable to express herself and had troubled talking about the incident. Id.
155. Id.
156. Id. at 528.
157. Id. at 530.
158. Id. at 532.
159. Id.
160. See id. at 537.
161. See id. at 534.
162. Id. at 536.
163. Id. (citing Smith v. State, 88 S.W.3d 652, 670-71 (Tex. App.—Tyler 2002, pet. ref’d)).
164. See Smith, 88 S.W.3d at 670-71.
written interrogatories were more effective than cross-examination because the child could not testify in a courtroom. 165

In Rangel, because the defendant failed to take advantage of the procedures in article 38.071, he waived his Confrontation Clause challenge to article 38.071. 166 The defendant had the opportunity to cross-examine the child through the written interrogatories and test the reliability of her testimony, but he did not use this opportunity. 167 Because the child’s statements were testimonial, the child was unavailable, and the defendant had an opportunity to cross-examine, the court held that the defendant was not denied the right to confrontation. 168 According to the court, article 38.071 § 2 satisfies the prior opportunity to cross-examine requirement; therefore, it complies with the Confrontation Clause. 169

2. Rangel Unendorsed

On appeal to the Texas Court of Criminal Appeals, the court did not decide the Confrontation Clause issue. 170 The court dismissed the petition as improvidently granted without endorsing the lower court’s opinion. 171 A dissent was filed, however, that strongly argued against written interrogatories satisfying the Confrontation Clause requirement of an adequate opportunity to cross-examine. 172 The dissent argues that written interrogatories do not conform to the historical purpose of the Confrontation Clause, which is to get rid of the civil law practice of private examinations outside of the courtroom. 173 The lower court relied on the Maryland v. Craig case for an exception to the face-to-face confrontation rule, which the dissent argued was wrong because Craig required the child to testify under oath and to be observed by the defendant, judge, and jury while the child was testifying, unlike in Rangel. 174 Therefore, according to the dissent, written interrogatories are not “an acceptable substitute for live cross-examination.” 175

165. Id. at 671.
166. Rangel, 199 S.W.3d at 537.
167. Id. “When a defendant fails to use the statutory procedures available to him that could safeguard his rights, his failure to do so cannot later form the basis for his constitutional attack on article 38.071.” Id. (citing Adams v. State, 161 S.W.3d 113, 114 (Tex. App.—Houston [14th Dist.] 2004, pet. ref’d)).
168. Id.
169. Id.
171. Id.
172. See id. at 105-07 (Cochran, J., dissenting).
173. Id. at 105-06.
174. Id. at 106-07 (citing Maryland v. Craig, 497 U.S. 836, 857 (1990)).
175. Id. at 106.
3. Subsequent Reliance on Rangel

Other courts have cited Rangel for Confrontation Clause issues in child abuse cases, both agreeing and disagreeing with the decision concerning written interrogatories and testimonial statements. In Morales v. State, the concurring opinion agreed with the decision in Rangel and stated that written interrogatories satisfy the requirements of Crawford. And in Ficcaro v. State, the court also followed the rule in Rangel and held that the Confrontation Clause was not violated if the defendant had the opportunity to present written interrogatories to the witness.

Outside of Texas, other courts have dealt with the issue of whether a child’s out-of-court statement in an interview is testimonial, but they have not addressed whether written interrogatories will satisfy the adequate opportunity to cross-examine requirement.

IV. CONFRONTATION CLAUSE ANALYSIS

The procedure in Texas of using written interrogatories to satisfy the Confrontation Clause is unique. As discussed earlier, most other states use the closed circuit television technique, but Texas goes one step further to protect its children in child abuse trials. The question, however, is whether Texas’s unique approach conforms to the requirements of the Confrontation Clause or whether its priorities are off balance.

A. Written Interrogatories and the Confrontation Clause

1. Differences Between Written Interrogatories and Other Forms of Cross-Examination

Written interrogatories, as used in child abuse cases in Texas, differ from traditional forms of cross-examination in three main ways.

176. Id. at 98-99; see cases cited infra notes 177-79.
179. See, e.g., State v. Bentley, 739 N.W.2d 296, 300 (Iowa 2007). This case cited Rangel and ultimately held that the child’s statements to police, recorded on video, were testimonial and not allowed because the child did not testify. Id. The court, however, did not decide whether a child’s out-of-court statement to non-police interviewers were testimonial and cited Rangel as an example. Id.; see also State v. Henderson, 160 P.3d 776, 778 (Kan. 2007) (not allowing the videotaped interview of the three year old child because she did not testify at trial).
180. See supra note 179 and accompanying text.
181. See supra Parts II.D.3, III.A.
First, with written interrogatories there is not a live interaction between the defense counsel and the witness.\textsuperscript{182} The statute allows the defense counsel to submit questions, but the defense cannot change the questions or alter the approach based on the child’s response.\textsuperscript{183} Of course, the answers the witness gives may not be what the defense expects; therefore, in a normal cross-examination the defense sometimes alters its approach in order to deal with unexpected answers. Without live interaction, however, the defense cannot react to the answers, which is the second major difference between written interrogatories and regular cross-examination.\textsuperscript{184} With in-court cross-examination or even closed circuit cross-examination, the defense can change its questioning or strategy based on the witness’s answers.

Third, the defense counsel does not present the questions directly to the witness in the written interrogatories approach.\textsuperscript{185} The government agent or other agent presents the questions to the child, and the defense is not allowed in the room.\textsuperscript{186} Within court and closed circuit cross-examinations, the defense counsel presents the questions to the witness directly.\textsuperscript{187}

These three major differences are in place to protect the child from suffering more emotional stress than necessary, but these differences can affect the defense’s ability to construct an effective cross-examination.

2. Do Written Interrogatories Follow the Purpose of the Confrontation Clause?

An effective cross-examination is a part of the main purpose of the Confrontation Clause that protects the defendant from ex parte evidence.\textsuperscript{188} The Confrontation Clause also requires the defendant to be present and prefers the witness to be in view of the jury.\textsuperscript{189}

\textit{a. Effective Cross-Examination}

The requirement of an effective cross-examination can include several different requirements within itself, but two of the main ones are that the cross-examination should be live or contemporaneous and controlled by the defense. Written interrogatories allow the defendant to question the witness

\begin{itemize}
  \item \textsuperscript{182} See supra Part III.A for a discussion of the written interrogatory procedure in Texas.
  \item \textsuperscript{183} See supra Part III.A.
  \item \textsuperscript{184} See supra Part III.A.
  \item \textsuperscript{185} See supra Part III.A.
  \item \textsuperscript{186} See supra Part III.A.
  \item \textsuperscript{187} See supra Part III.A.
  \item \textsuperscript{188} Counseller & Rickett, supra note 20, at 2-3.
  \item \textsuperscript{189} See id. at 2-3, 20-21.
\end{itemize}
without live, contemporaneous interaction.\textsuperscript{190} Obviously, the defense would prefer a live interaction because the defense could control the questions and the situation better. The Confrontation Clause, however, does not require effective cross-examination “in whatever way, and to whatever extent, the defense might wish.”\textsuperscript{191} Because there are no precise standards for cross-examination, the Confrontation Clause leaves room for other approaches, such as written interrogatories.\textsuperscript{192} Despite the lack of precise standards, courts have agreed that the defendant should have the right to test the declarant’s testimony, and to be effective, this test requires a contemporaneous interaction.\textsuperscript{193}

Written interrogatories take away some of the control from the defense that it uses to test the credibility and reliability of the declarant’s testimony.\textsuperscript{194} The only part of the cross-examination that the defense can control when using written interrogatories is the questions it submits.\textsuperscript{195} The procedure gives the defense one shot at testing the child’s testimony.\textsuperscript{196} To adequately test the declarant’s testimony, the defense must ask the right set of questions. The defense, however, cannot change the questions once they are presented and therefore may lose an opportunity to further probe an area in the testimony that could prove unreliable or not credible.\textsuperscript{197}

\textit{b. Presence of the Defendant}

Also, besides a live interaction, the Confrontation Clause requires the court to allow the defendant to confront the witness, meaning the defendant should be present for cross-examination.\textsuperscript{198} As previously discussed, the Confrontation Clause does not always require face-to-face confrontation, but even with closed circuit television the defendant can see the child and interact with the defense counsel during the examination.\textsuperscript{199}

\textsuperscript{190} See supra Part III.A for a discussion of the written interrogatory procedure in Texas.
\textsuperscript{194} See supra Part III.A for a discussion of the written interrogatory procedure in Texas.
\textsuperscript{195} See supra Part III.A.
\textsuperscript{196} See supra Part III.A.
\textsuperscript{197} See supra Part III.A. It is assumed in this Comment, according to the procedure in the statute, that the defense cannot change the questions while the agent presents them to the child. There may be procedures for additional questions to be presented, but the defense seems to be committed to the questions it initially presents and cannot alter them during the examination of the child.
\textsuperscript{198} See Crawford v. Washington, 541 U.S. 36, 53-54 (2004); see also Counseller & Rickett, supra note 20, at 20-21 (explaining that Crawford requires face-to-face confrontation in addition to a substantive guarantee of testimonial reliability).
\textsuperscript{199} Maryland v. Craig, 497 U.S. 836, 844 (1990); see supra note 115.
With written interrogatories, the defendant cannot see the child while the child answers the questions because the interview is conducted without the defense present.\textsuperscript{200} This situation allows very little confrontation but instead offers greater protection for the child victim.

c. In View of the Jury

The defendant should be able to confront the witness, but the jury should also be able to view the witness to assess the reliability and credibility of the testimony. Even though the jury does not view the interview live when using the written interrogatory approach, it is still able to see the entire cross-examination on video in the courtroom.\textsuperscript{201} Even without a live viewing, the jury still sees the child’s reactions and emotions during the interview and can judge the testimony accordingly.\textsuperscript{202} A live viewing would not change the jury’s perception of the child witness because the child’s answers and reactions would be the same whether the interview was streamed-in live or played back later. Written interrogatories satisfy this requirement because the jury is able to view the child’s cross-examination.

Although the jury is able to view the cross-examination, written interrogatories still fall short of the other requirements. Using written interrogatories may not be the preferred way of cross-examination by the defense, but the Confrontation Clause does not guarantee the defense a cross-examination that conforms to all its wishes.\textsuperscript{203} The Confrontation Clause guarantees an adequate opportunity for cross-examination that tests the declarant’s testimony.\textsuperscript{204} Without a live interaction between the defense counsel and the child, the defense is not able to fully test the credibility and reliability of the child’s testimony. The Confrontation Clause gives defendants the right to come face-to-face with their accusers, and even though this right is not absolute, the defendant is not afforded his right to be present for cross-examination with written interrogatories.\textsuperscript{205} Therefore, written interrogatories do not conform to the requirements of an adequate opportunity to cross-examine under \textit{Crawford} because they are ineffective and do not allow confrontation by the defendant.

\begin{enumerate}
\item \textsuperscript{200} See supra Part III.A.
\item \textsuperscript{201} See supra Part III.A.
\item \textsuperscript{202} See supra Part III.A.
\item \textsuperscript{203} United States v. Owens, 484 U.S. 554, 559 (1988).
\item \textsuperscript{205} Maryland v. Craig, 497 U.S. 836, 844 (1990).
\end{enumerate}
B. Should Child Abuse Cases Be Treated Differently?

In certain circumstances, however, the requirements of the Confrontation Clause, like face-to-face confrontation, should give way to considerations of public policy. One situation that courts bend the Confrontation Clause for is child abuse cases.

1. The Uniqueness of Children’s Testimony

Having a child testify presents unique problems for the court to handle. These problems include the child’s age, competency, and susceptibility to trauma.

The Federal Rules of Evidence do not have an age requirement. The child must simply comply with the competency rules that are required of all other witnesses testifying. The child’s age, however, plays an important role in how effective a witness the child will make. Different states have come up with different regulations and statutes to deal with children in court.

Typically, a state statute on incompetency of children will provide that a child under a certain age is incompetent unless shown to understand the duty to tell the truth and to be of sufficient understanding to be able to testify accurately. In recent years, concern for prevention of child abuse has led to relaxation of competency requirements in some states.

Despite the child’s age, courts usually have to deal with the credibility of the child’s testimony and whether different techniques should be used to help make the testimony more credible. Children often have a hard time explaining things; therefore, some believe that special techniques, such as leading questions, should be used when interviewing the child. Others, however, believe that because the child is more susceptible to suggestion that special techniques should not be used. Also, lawyers may not be able to deal with children effectively on the stand so that the best response is elicited from the child. Lawyers may use language that the child is

206. Id.
207. Id. at 852.
209. Id. at 727.
210. See id. at 726-27.
211. Id. at 727.
212. Id. (quoting ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT’S GUIDE TO THE LAW OF EVIDENCE AS APPLIED TO AMERICAN TRIALS 232 (2004)).
213. Id. at 734.
214. Id.
215. Id. at 734-35.
unable to understand, or the child simply may be intimidated by the setting and so cannot effectively testify.

Last, children are affected by their surroundings. Children are still developing and can be affected more by situations than adults. Therefore, children can be traumatized by a court setting, which could lead to a “second victimization” of the child.216

2. How Much Change Is Necessary?

Just because child abuse cases are different and present different challenges to the court does not mean that other interests, like the defendant’s rights, should be overlooked in order to accommodate the children. Yes, states have an interest in protecting children, but states must also keep in mind that defendant’s rights are the first priority in the Confrontation Clause.217

Some believe that states must strike a delicate balance between protecting child abuse victims and protecting defendant’s rights.218

The criminal justice system, in pursuit of truth and justice, continues to struggle with the difficult balance of protecting the interests of child witnesses without offending the constitutional rights of the accused. The dilemma presented by the child witness raises the most fundamental issues of fairness and the role of the court in assuring a just result.219

Balancing, however, may not be the proper way to approach the issue. Balancing assumes that one side must give in order for the other side to receive. Defendant’s rights, though, are not up for negotiation for the most part. The proper way to approach the issue is to ensure all of the defendant’s rights are protected and then form whatever protections the child needs around the rights of the defendant. In other words, keep the defendant’s rights fixed and adjust the protections to the child.

In order to protect the defendants’ rights, the defense must be able to cross-examine the child.220 The defendant should be afforded the opportunity for a live interview where the defendant is present and the jury


218. Ebisike, supra note 208, at 731.

219. Id. (quoting THE CHILD WITNESS IN CRIMINAL CASES: A PRODUCT OF THE TASK FORCE ON CHILD WITNESSES OF THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE § 9 (2002)).

can view the interaction. These requirements seem to be the minimum that a court should allow a defendant.

After fixing the rights of the defendant, alterations to the cross-examination procedure can be made to accommodate the child victim. The main goal that states wish to achieve is to protect the child from more trauma. The two main things that cause the child stress are the defendant and the courtroom. The child is reluctant to face the defendant because the child most likely understands that the defendant is in trouble and that what the child says will get the defendant into more trouble. Also, a courtroom can be very intimidating to a child. Imagine this scenario described by Norbert Ebisike in his introduction to The Evidence of Children:

The large door to the courtroom opens. A small child enters, accompanied by a victim advocate who walks with the child toward the witness stand. At the end of the public seats, the child is turned over to a court officer who escorts the child to the witness stand. In the typically high-ceilinged, expansive courtroom where we conduct our jury trials, the small child looks even smaller. Some children slouch in the witness chair, as if they were trying to hide. The jurors look at the child with barely disguised sympathy.

To protect children from these situations, often the best solution is to conduct the examination outside of the courtroom or at the least shield them from the defendant while in the courtroom and allow them to be accompanied by a person they are comfortable with.

These protections for the child are a great way to shield them from further trauma, as long as the defendant’s rights are not reduced in the process. Extra protections for children should be allowed, but only in situations where they do not interfere with the defendant’s rights.

C. Texas’s Use of Written Interrogatories

In writing the provision for written interrogatories in the statute, Texas sought to strike a balance between the rights of the defendant and the state’s interest in protecting child victims. Texas wants to protect children from having to face the defendant and from the trauma that testifying can cause.

221. See McMahon, supra note 1, at 369.

222. See id.

223. Ebidiike, supra note 208, at 724.

224. See id.


226. See id.
Texas’s written interrogatories procedure provides adequate safeguards for the child. The interview is not conducted in a courtroom or even in a courthouse if so chosen.\textsuperscript{227} The child does not have to face the defendant or the defense counsel.\textsuperscript{228} Because the questions are presented by “a neutral individual experienced in child abuse cases that seeks to find the truth of the matter,” the child does not have to deal with anyone but the neutral individual.\textsuperscript{229} These procedures ensure that the child is in a comfortable setting with an individual that knows how to properly deal with child abuse victims. It seems as if Texas could not do more to protect its children.

On the other hand, the procedures for the defendant allow the defendant to review the initial interview of the child by the neutral individual and then submit written questions that the neutral individual presents to the child.\textsuperscript{230} The defendant and counsel are not allowed to present the questions and neither is present for the interview.\textsuperscript{231} Also, if the defendant does not take advantage of article 38.021 § 3, the defendant waives his Confrontation Clause right.\textsuperscript{232} This means that the defendant would not be able to exclude the videotaped testimony of the child on Confrontation Clause grounds.\textsuperscript{233}

Texas chooses, as evidenced by the written interrogatories provision, to give more weight to protecting children at the expense of the defendants’ rights. Texas’s choice to balance these two interests takes away some of the defendant’s rights that are guaranteed by the Constitution.

\subsection*{D. Waiver}

Not only does Texas diminish the defendant’s rights through limiting cross-examination, but in \textit{Rangel}, the court held that defendants can waive their Confrontation Clause rights if they do not take advantage of the procedures that the statute provides.\textsuperscript{234} The court’s use of waiver, however, is not to be confused with forfeiture. Forfeiture is more akin to a consequence or “loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.”\textsuperscript{235} “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of

\begin{thebibliography}{9}
\item[228.] See \textit{id}.
\item[229.] \textit{Id}.
\item[230.] See \textit{id}.
\item[231.] \textit{See id}.
\item[233.] \textit{See id}.
\item[234.] \textit{Id}.
\item[235.] \textsc{Black’s Law Dictionary} 677 (8th ed. 2004).
\end{thebibliography}
a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’"236

Not taking advantage of the written interrogatories procedure is not the same as intentionally relinquishing a known right. Although the defense attorney will most likely know about the statute, failing to use it does not amount to waiving a right because the defense does not intentionally waive the right to confrontation; it ignores the opportunity to use a certain procedure. Therefore, besides the misuse of written interrogatories for fulfilling the prior opportunity to cross-examine requirement, Texas also crosses the line by allowing defendants to waive their right to confrontation simply through inaction.

E. Suggested Alternatives for Texas

Since the written interrogatories provision in the Texas statute is not sufficient to protect the rights of the defendant, either the statute should be amended or other procedures should be used. As mentioned earlier, Texas already has in place provisions for closed circuit television.237 This alternative to written interrogatories satisfies all of the requirements of the adequate opportunity to cross-examine requirement under the Confrontation Clause; therefore, using this option instead of the written interrogatories is most likely the best and easiest way to ensure that both sides are protected.238

Another alternative is to simply modify the existing statute to give the defendant stronger rights. If protecting children is the first priority, and Texas wishes to achieve this by conducting the interview outside of the courtroom with a child services interviewer, then perhaps some adjustments can be made to accommodate the state’s interest and give the defendant all rights and protections.239 The statute could allow the defense counsel to be present during the videotaped interview so that the counselor could change or modify the questions as needed to ensure a proper cross-examination. If possible, the statute should allow the defendant to communicate with the counselor during the interview but away from the child so that there is no visual contact, like in closed circuit television interviews.240

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237 See TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3(a) (Vernon 2005 & Supp. 2009).
240 Other alternatives include altering the setup of the courtroom, having support people present for the child witness, having court recesses for the child, or using anatomically correct dolls. Ebisike, supra note 208, at 742-45. Altering the courtroom can help the child become more comfortable testifying. Id. at 742. One judge allowed a child to sit at a child-sized table in front of the jury while the defendant sat at the counsel table. Id. Small changes can help the child witness adjust to the courtroom...
These changes allow for a live interview between the defense and the child and give a more adequate opportunity for cross-examination. Also, defendants should not automatically waive their Confrontation Clause rights because of inaction. An alternative would be to discuss with the judge, if possible, and the prosecution, the best way to conduct the cross-examination.

V. CONCLUSION

Texas could greatly benefit from altering its statute to ensure defendants are guaranteed all of their rights while still allowing adequate protection for children. The purpose of the Confrontation Clause is to ensure and protect defendants’ rights by allowing them to confront witnesses against them; therefore, to satisfy the Confrontation Clause, statutory procedures should ensure that defendants receive all guaranteed rights before protection procedures are implemented for the child abuse victims.241 It is possible to protect the child victims from further trauma while still guaranteeing defendants’ rights. It is not a matter of balancing, but a matter of using innovative procedures to comply with traditional constitutional rights.242

setting and make the situation less intimidating. Some courts allow children to have a support person with them in the courtroom and by them when testifying. Id. at 743. This person can be anyone that the child is comfortable with. Id. Courts also allow recesses for the child because the child can become overwhelmed by the situation and need time for composure. Id. at 743-44. Last, children sometimes have trouble expressing what they want to say; therefore, anatomically correct dolls can help compensate for deficiencies in language. Id. at 744. It should be noted though that using anatomically correct dolls is highly criticized, and there is no general agreement between psychologists as to its effectiveness. Id. at 744-45.

241. See discussion supra Parts II.B.1, IV.E.
242. See discussion supra Part IV.B.2, E.