



State of Connecticut
DIVISION OF CRIMINAL JUSTICE

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Tender Years Exception: Constitutional Claims Unfounded

The Division of Criminal Justice takes exception to the testimony presented by Brian S. Carlow, on behalf of the Office of the Chief Public Defender, and Jon L. Schoenhorn, on behalf of the Connecticut Criminal Defense Lawyers Association, in opposition to **S.B. No. 1245, An Act Concerning a Tender Years Exception to the Hearsay Rule.**

Mr. Carlow testified that the bill "conflicts" with **Connecticut General Statutes Section 54-86g, *Testimony of the victim of child abuse. Court may order testimony taken outside the courtroom.*** To the contrary, the proposed tender years exception is complementary to Section 54-86g: both provisions facilitate the prosecution of offenses, particularly sexual offenses, against children. Both recognize the special vulnerability of child victims and the unique problems in prosecuting those who prey on children. While General Statutes Section 54-86g offers ways to reduce the often intimidating trial setting to accommodate to child witnesses, the proposed legislation provides a vehicle for the admission of reliable out-of-court statements by children. These two provisions will thus work hand-in-hand to ensure reliable evidence is available to prosecute those who offend against children.

As to Mr. Schoenhorn's testimony, his concerns regarding the constitutionality of the proposed bill are unfounded. Recent developments in Sixth Amendment jurisprudence do not render this, or any other hearsay exception, unconstitutional. Under *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) the United States Supreme Court held that the Sixth Amendment bars the admission of *testimonial* statements of a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross examination. Whether a statement is testimonial is a question for trial courts to decide based on the circumstances of the particular statement. Testimonial statements are those the primary purpose of which is to establish past events for a later criminal prosecution. Examples of testimonial statements are documents such as affidavits and statements taken by police officers. Other statements, such as those made to a teacher, minister or friend, will generally be *nontestimonial*. What is clear under *Crawford*, and the later cases of *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006) and *Wharton v. Bockting*, 2007 597530 (Feb. 28, 2007) is that the admission of statements which are *nontestimonial* is not restricted under the Sixth Amendment.

Thus, the Constitution erects no bar to the admission of *nontestimonial* statements, or testimonial statements where cross examination is available. These types of statements, if found to be reliable, are subject to admission under the proposal. Despite the fears expressed by Mr. Schoenhorn, recent United States Supreme Court decisions have not rendered this proposed exception, or any existing hearsay exceptions, unconstitutional.