

**Breaking Through Barriers:  
Overcoming Challenges Faced by Crime Victims with Cognitive or Developmental  
Disabilities**

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## I. INTRODUCTION

Nearly two years ago, a Minnesota county prosecutor possessed a stack of allegations against a nursing home assistant.<sup>1</sup> A separate state investigative body had found by a preponderance of the evidence that the assistant had physically, sexually, or emotionally abused six residents,<sup>2</sup> and the aide had been fired.<sup>3</sup> Yet the prosecutor initially did not believe he could charge the aid with a crime. In a news story published after the investigatory report was made available to the public in November 2008, Chippewa County Attorney Dwayne Knutson said he would “probably not go forward” with criminal charges against the nursing assistant.<sup>4</sup> The reason: all but one of the residents had dementia, and a man who could talk about the abuse was too embarrassed to talk to police.<sup>5</sup> The aide denied any abuse.<sup>6</sup> [W]ithout something stronger, we probably will not proceed,” Knutson said.<sup>7</sup>

The case is illustrative of the problems that persons with certain kinds of disabilities face in receiving justice when they are victims of crime. This paper will demonstrate that crime victims with cognitive or developmental disabilities are more vulnerable to abuse and crime than the general population. It will also demonstrate that their access to the legal system is limited, and it is limited from the time the crime is committed until they reach the courtroom as witnesses.

Crime victims with cognitive or developmental disabilities have historically received less attention than the rights of defendants with such disabilities.<sup>8</sup> In part, this focus may be due to stronger constitutional protections afforded to criminal defendants.<sup>9</sup> Interest, however, is growing in the issues faced by persons with cognitive or developmental disabilities as crime victims.<sup>10</sup> A new national consciousness that developed regarding the rights of crime victims from historically powerless groups, such as minorities or woman, likely helps spur this interest.<sup>11</sup>

In 1998 Congress passed the Crime Victims with Disabilities Awareness Act, which mandated the development of a research agenda on victims with developmental disabilities.<sup>12</sup> In 2000, groups talked of bringing a class action lawsuit on behalf of crime victims with disabilities, claiming the Americans with Disabilities Act required police to involve an “appropriate adult” when they question a victim or suspect with developmental disabilities.<sup>13</sup> Advocates said an appropriate adult was analogous to an ADA requirement to have a sign language interpreter present during interviews with people who have hearing impairments.<sup>14</sup> Despite this growing awareness, however, justice is too often out of reach for persons with cognitive or developmental disabilities.

This paper first shows that persons with cognitive or developmental disabilities are more likely to be victims of crime and discusses reasons for this vulnerability. Second, it examines some common problems people with disabilities face in the initial stages of a case. Third, it discusses major barriers, particularly issues related to credibility and competency, to testifying in court. Finally, it suggests solutions, including assigning trained advocates to guide victims through the process and establishing a center for such support similar to that those available to children who are victims of crimes. Examples from the state of Minnesota are used to illustrate these barriers. Throughout the paper, these crime victims are referred to interchangeably as persons with cognitive or developmental disabilities because both groups of persons face the same issues.

## II. STATISTICS ABOUT CRIME VICTIMS WITH DEVELOPMENTAL DISABILITIES

Persons with developmental disabilities are estimated to comprise three to five percent of the population of the United States.<sup>15</sup> A person with developmental disabilities is generally someone who has a mental impairment that

- manifested itself before the person attained age twenty-two,
- is likely to continue indefinitely, and
- results in substantial functional limitations in three or more life activities.<sup>16</sup>

The major categories of developmental disabilities are autism, cerebral palsy, epilepsy, and mental retardation.<sup>17</sup> A person with a cognitive impairment may have an IQ that is average or above average, but most have IQ scores below 75.<sup>18</sup> Often, their less-than average intellectual functioning limits their ability to live without assistance and to communicate.<sup>19</sup> The term is used to encompass a broad range of disabilities in a variety of contexts. For example, the Counseling Center at the University of Illinois at Urbana-Champaign defines cognitive disability as being “caused by central nervous system dysfunction” and cites dyslexia, learning difficulties, and ADHD as examples.<sup>20</sup> WebAIM, a project dedicated to improving Web accessibility for persons with disabilities, includes in its definition of cognitive disability the clinical diagnoses of autism, Down Syndrome, traumatic brain injury and dementia.<sup>21</sup> In this paper cognitive disability refers to disabilities that involve impaired intellectual functioning regardless of the age at which the disability manifested itself, including dementia and Alzheimer’s disease.

#### A. MORE LIKELY TO BE CRIME VICTIMS

Studies from the United States and other countries confirm that children and adults with disabilities experience high rates of violence and abuse. In October 2009, the U.S. Department of Justice released the first estimates of crimes against persons with disabilities measured by the National Crime Victim Survey.<sup>22</sup> Using Census Bureau questions to identify persons with disabilities,<sup>23</sup> the study found that in 2007,

- Persons with disabilities had an age-adjudged rate of nonfatal violent crime rate of 1.5 times greater than the rate for persons without disabilities.

- Persons with a cognitive disability had a higher total violent crime rate than persons with other kinds of disabilities. The rates were higher for rape, sexual assault, robbery, and aggravated assault.
- Nineteen percent of violent crime victims with a disability believed they were victimized because of their disability.<sup>24</sup>

Before the Bureau of Justice Statistics were released, persons with disabilities in general had already been identified as being particularly vulnerable for many kinds of crime.<sup>25</sup> They were identified as being particularly at risk for becoming victims of sexual abuse or assault.<sup>26</sup> A study of 87 girls and women with mental retardation who were referred for birth control found that 25 percent were known to have been sexually assaulted.<sup>27</sup> Other studies have shown the sexual abuse to be chronic. One study found that only 17.4% of sexually abused young persons with disabilities occurred on a single occasion.<sup>28</sup> Children with disabilities also experience higher rates of crime. One study found that children with disabilities were 2.1 times as likely to endure criminal physical abuse and 1.8 times more likely to experience sexual abuse than children without disabilities.<sup>29</sup>

Notably, the Bureau of Justice Statistics found that crime victims with disabilities said that police responded to crimes they reported less often than those without a disability said that police responded to their reports.<sup>30</sup> Police did not respond to about 23 percent of reported violent crimes against persons with disabilities, while they did not respond to about 10 percent of reported violent crimes against victims without disabilities.<sup>31</sup>

Elsewhere, the Australian Bureau of Statistics analyzed its Victims of Crime Survey and found that intellectually disabled adults were more likely than the general population to be victims of crime.<sup>32</sup> They were 2.9 times more likely to be assaulted, 10.7 times more likely to be

sexually assaulted, and 12.7 times more likely to be robbed.<sup>33</sup> In fact, the only category in which persons with intellectual disabilities were less likely to be victimized was auto theft, which may be because they are less likely to own vehicles.<sup>34</sup> Eighty-three percent of women in the Australian study had been repeatedly sexually assaulted.<sup>35</sup> Nearly half had been sexually assaulted at least ten times.<sup>36</sup> The study also found low reporting rates: 70 percent of crimes against persons with severe mental retardation went unreported.<sup>37</sup>

Within institutions, rates of violence in institutions are often as high or higher than those in the community.<sup>38</sup> Institutional abuse has a “long and controversial history.”<sup>39</sup> It is characterized by extreme power inequities between staff and residents, typically involves more than one offender and more than one victim, and is frequently covered up.<sup>40</sup> In institutions and out in the community, persons with cognitive or developmental disabilities are more likely to be victims of crime.

#### B. FACTORS THAT CONTRIBUTE TO HIGH RATE OF VICTIMIZATION

Although crime rates in institutions are high, deinstitutionalization may also play a role in the crime rates for victims with cognitive or developmental disabilities living in the community. Until the 1970s and 1980s, persons with these disabilities were often in large, congregate institutions.<sup>41</sup> When the service delivery system changed, persons with disabilities were often sent into poverty and dangerous environments.<sup>42</sup> They are also more likely to take public transportation.<sup>43</sup> Poverty, unsafe community settings and public transportation make persons with cognitive or developmental disabilities easy targets.

Persons with developmental or other cognitive disabilities also have characteristics that make them more vulnerable to crime and abuse. They are more likely to be “more retiring[,] easily confused[,] easily intimidated[,] easily manipulated[,] less likely to report for fear of

reprisal[,] have strong desire for acceptance[,] have difficulty making judgment calls.”<sup>44</sup> Because of these characteristics, they may acquiesce to behavior that they neither understand nor desire.<sup>45</sup> Additionally, some disabilities can prevent a victim from verbally reporting, running from, or fighting the attacker,<sup>46</sup> and a high percentage of perpetrators are care providers or family members.<sup>47</sup> Victims may be less likely to report abuse or theft by people they depend upon for help.<sup>48</sup>

Some of these factors can be found in the Minnesota nursing home abuse case described in the introduction. The six victims had diagnoses that included dementia or Alzheimers’ disease.<sup>49</sup> They continued to depend on the nursing assistant for help during and after the abuse occurred.<sup>50</sup> At least one, a patient who also had vulvar cancer, suffered dementia or illness severe enough to prevent her from communicating her needs.<sup>51</sup> One man, who was sexually abused, was especially worried, because he had heard that the abuser “liked girls,” and that she would be inappropriate with his girlfriend, who also lived in the facility.<sup>52</sup> He did not report the abuse until he was asked about it.<sup>53</sup> The characteristics that make persons with cognitive or developmental disabilities more likely to be victims of crime may also hinder their access to the criminal justice system.

### III. BARRIERS TO ACCESS

Although persons with cognitive or developmental disabilities are more likely to be victims of crime, they frequently have less access to the criminal justice system. Perpetrators are often people the victims know well, and victims may be less inclined to report crimes by people they know and depend upon for help.<sup>54</sup> Further, victims may have less access to police, they may have to overcome agency protocols to reach authorities, and they may fear the loss of their independence if they report the crime.<sup>55</sup>

Even when victims report crimes, they face barriers. First, victims who live in institutions or state-licensed housing often must deal first or simultaneously with an investigation from one of myriad state agencies in addition to a local police investigation. Second, any crime victim may find police interaction daunting, but persons with cognitive or developmental disabilities face even greater burdens because they may have trouble dealing with police, and police may lack training or have misperceptions about the victim.

#### A. INSTITUTIONAL QUAGMIRE

States frequently have enacted legislation aimed at protecting persons with disabilities, often called vulnerable adults in the statutes. Professionals such as physicians and medical personnel, social workers and adult day care providers are often required by law report suspected abuse or neglect for state agencies to investigate.<sup>56</sup> State agencies must often refer cases to prosecutors or police for possible prosecution.<sup>57</sup> States also may have specific crimes or enhanced penalties for perpetrators who commit crimes against persons with cognitive or developmental disabilities or are otherwise considered vulnerable adults.<sup>58</sup>

In Minnesota the Vulnerable Adults Act requires certain professionals to report maltreatment of vulnerable adults, including those with cognitive or developmental disabilities.<sup>59</sup> What is less clear is what agency investigates the allegations, how the agency investigates, whether police are referred for further criminal investigation, and whether police actually do so. Vulnerable adults are classified as persons who are older than 18, are residents of a facility or receiving services from an adult service facility, or receiving services from a home care provider, or have a physical, mental, or emotional dysfunction that impairs their ability to provide for their own care without assistance.<sup>60</sup> Many persons with cognitive or developmental would be considered vulnerable adults. The state of Minnesota monitors and licenses more than 30 types

of facilities, providers or services provided to vulnerable adults, as varied as nursing homes, intermediate care facilities for persons with mental retardation, outpatient surgical centers.<sup>61</sup>

Depending on the type of facility, investigations may be conducted by the Minnesota Department of Health’s Office of Health Facility Complaints, to the Department of Human Services’s Licensing Division, or the adult protection service in the county in which the facility or service is located.<sup>62</sup> The investigations are civil in nature, though there is an expectation that law enforcement agencies will be called if appropriate.<sup>63</sup>

The Minnesota Department of Health Office of Facility Health Complaints investigates alleged violations of Minnesota Department of Health regulations, residents’ rights or the Vulnerable Adults Protection Act.<sup>64</sup> Below are results of its investigations in 2009.<sup>65</sup> Complaints that were not substantiated were either unsubstantiated or unresolved.

<b>Type of facility</b>	<b>Number of investigations</b>	<b>Substantiated complaints</b>
Boarding care homes	5	3 substantiated complaints at 1 facility
Nursing homes	206	118 substantiated complaints at 84 facilities
Supervised living facilities	53	21 substantiated complaints at 20 facilities
Home health care providers	193	80 substantiated complaints at 64 facilities
Hospices	4	2 substantiated complaints at 2 facilities
Hospitals	24	14 substantiated complaints at 13 facilities

Some of the complaints involved allegations of likely noncriminal matters, such as feeding food with chunks to a patient who could eat only pureed food.<sup>66</sup> Others, however,

involved allegations of sexual abuse or other matters more likely to be considered criminal. In one case, an investigation at Mounds Park Facility, a boarding home in St. Paul, found that an employee took a vulnerable adult to her house, gave him alcohol, and had sexual intercourse with him.<sup>67</sup> The vulnerable adult felt coerced.<sup>68</sup> The report found by a preponderance of the evidence that sexual abuse had occurred.<sup>69</sup>

A note referring the matter to police was listed on the investigation report. Whether an criminal investigation and a referral for possible charges ensued is not known, for this or other investigations. It is unlikely that the state tracks whether criminal prosecutions result from these civil investigations.<sup>70</sup> With 87 counties, there are 87 ways of doing things, multiple law enforcement agencies that may be involved and no easy way to track the results, said Roberta Opheim, Ombudsman, State of Minnesota Office of the Ombudsman for Mental Health and Developmental Disabilities.<sup>71</sup> There is an expectation that law enforcement will be called in, though protocols may vary by jurisdiction, she said.<sup>72</sup>

Even when a potential crime is investigated by an agency, there is uncertainty about how the incident will be classified. “The culture of the service delivery system may characterize these crimes as lower-level instances of abuse or neglect rather than as a criminal offense.”<sup>73</sup> Professor Ruth Luckasson writes:

Anecdotally, victimization of people with disabilities is frequently classified as abuse and neglect. Specific acts that occur – torturing and perhaps killing an individual, violating an individual’s body, hitting, yelling, withholding food, subjecting someone to dangerously unsanitary living conditions, depriving an individual of necessary medical care – are similar, if not identical to, the acts that occur in more serious crimes such as rape.<sup>74</sup>

This downgrading of offenses may reflect society’s attitude toward persons with developmental disabilities.<sup>75</sup> Attacks on group homes for persons with disabilities are frequently called “discrimination” rather than bias-related hate crimes.<sup>76</sup> Homicides are sometimes called

mercy killings.<sup>77</sup> Persons with cognitive or developmental disabilities must thus overcome institutional and other barriers before their case even reaches the desk of a police officer. Once the case arrives, more problems arise.

## B. POLICE CONTACT

A misperception exists that persons with cognitive or developmental disabilities are unable to accurately communicate. This misperception is central to the problems persons with cognitive or developmental disabilities face in police interviews. Studies show the main factor to solving a case is a complete statement from eyewitnesses, and police officers report that eyewitness testimony provides the major evidence for investigations.<sup>78</sup> Even for someone of average mental capacity, dealing with police investigations and the criminal justice system is daunting at best. These systems are “likely to be completely impenetrable” for persons with cognitive disabilities.<sup>79</sup>

Persons with cognitive or developmental disabilities may have actual trouble communicating with police. There are, however, ways to interview people who communicate differently, Opheim said.<sup>80</sup> Without training, however, an interviewer would not know how to facilitate communication, she said.<sup>81</sup> Police may lack training to interview persons with cognitive disabilities.<sup>82</sup> They may also have misperceptions about the credibility of a person with a disability. “I’ve actually seen where nobody bothered to interview the victim . . . And these were victims who can talk,” Opheim said.<sup>83</sup>

In some countries, special accommodations are required for police contact with persons with cognitive or developmental disabilities. England, for example, requires the presence of a legal advocate during police questioning of a person with an intellectual impairment.<sup>84</sup> This

person is usually someone close to the victim who will help the victim understand what is being asked during the investigation.<sup>85</sup> No state, however, mandates these accommodations.<sup>86</sup>

Not only are persons with cognitive or developmental disabilities more likely to be victims of crime, but they face barriers to getting their case to the prosecutor's office. Crime victims living in institutions must deal with a state civil investigation that is simultaneous to or before a police investigation. During a police investigation, they must deal with real or perceived communication problems. Problems continue once a case is in the hands of a prosecutor.

#### IV. BARRIERS TO COURT TESTIMONY

Prosecutors need to bring cases in which they can obtain convictions. Because witnesses are so important to evidence, a witness with suspect credibility, including the misperceptions that accompany persons with cognitive or developmental disabilities, decrease the chance of a conviction.<sup>87</sup> Furthermore, court witnesses with developmental disabilities face not only the prospect of diminished credibility, but difficulty testifying in court and sometimes questions about whether they may testify at all.

As a matter of law, persons with disabilities have long been presumed competent to testify in court.<sup>88</sup> As a matter of practice, however, this presumption does not hold true. Commentators have identified a general perception that persons with cognitive disabilities are not competent eyewitnesses.<sup>89</sup> As a result, "many cases that rely on witnesses with learning disabilities are not prosecuted because it is believed that they will not be able to withstand the rigors of giving evidence in court, particularly cross examination."<sup>90</sup> Opheim believes that most cases in which persons with developmental disabilities are victims do not see a courtroom.<sup>91</sup> Prosecutors have told her they would not prosecute because of concerns about success, given the victim's disability.<sup>92</sup>

The perception that crime victims with disabilities cannot stand the rigors of testifying is not necessarily reality, however. Some researchers assert that testimony from persons with developmental disabilities is sometimes more reliable because they often have good memories and their testimony is “less subject to distortion.”<sup>93</sup> Another study showed that after viewing tapes or staged events showing crimes, persons with developmental disabilities were as competent as persons without disabilities in remembering crime details.<sup>94</sup>

Even when prosecutors do file charges, victims with cognitive or mental disabilities face challenges in the courtroom. First, the competency of victims to testify as witnesses may be challenged in court. Second, testifying in court presents real challenges for victims with cognitive or developmental disabilities. Third, the U.S. Supreme Court decision in *Crawford v. Washington*, which limits the kinds of out-of-court statements allowed into evidence, has hampered the ability of prosecutors to prove their cases.

#### A. COMPETENCY CHALLENGES

Although the competency of an adult to testify is presumed, a witness’s ability to testify in court may be challenged. Witness testimony is governed by rules of evidence, statutes and case law. A court decides preliminary questions concerning the qualification of a person to be a witness.<sup>95</sup> Courts across the United States use a two-part test to determine witness competency. In general, a person has capacity to be a witness if he or she (1) understands the obligation of taking an oath and (2) is able to give a reasonably accurate account of what he or she has observed and heard regarding the issue about which he or she is being questioned.<sup>96</sup> Understanding the oath is interpreted as primarily an understanding of the need to tell the truth.<sup>97</sup> In order to give a reasonably accurate account, a witness must be able to “receive, remember and narrate impressions.”<sup>98</sup> Typically the party challenging the witness’s competency has the burden

of proof.<sup>99</sup> Because witness competency is a matter of trial court discretion, a trial judge's finding as to this issue will not be reversed absent a clear abuse of discretion.<sup>100</sup>

In addition, some state statutes create exceptions to the general presumption of competency. In Minnesota, for example, people "of sufficient understanding" may testify in a criminal proceeding unless an exception applies.<sup>101</sup> One exception is that "[p]ersons of unsound mind . . . at the time of their production for examination are not competent witnesses if they lack capacity to remember or to relate truthfully facts respecting which they are examined."<sup>102</sup> Further, Minnesota law provides that if a minor or a person "apparently of weak intellect, is produced as a witness, the court may examine the infant or witness to ascertain capacity, and whether the person understands the nature and obligations of an oath, and the court may inquire of any person what peculiar ceremonies the person deems most obligatory in taking an oath."<sup>103</sup>

In a 2006 case in Minnesota, a defendant was charged with six counts of criminal sexual conduct against two persons with what the court termed "mild mental retardation."<sup>104</sup> One victim, identified as S.S.R., was described as blind and mildly mentally retarded.<sup>105</sup> A second victim, identified as E.M.H., was considered mildly to moderately mentally retarded with a diagnosis of Down Syndrome.<sup>106</sup> Defense counsel requested a competency hearing to determine whether the complainants were competent to testify.<sup>107</sup> In a brief following the hearing, defense counsel challenged the competency of E.M.H. and included in its brief excerpts from cross examination of E.M.H. during the competency hearing:

Q: Can you tell me what the truth is?

A: I don't know.

Q: What does it mean when you say that somebody is telling the truth?

A: Yes.<sup>108</sup>

Later in the cross examination came the following exchange:

Q: What does it mean to you if I say somebody is telling a lie?

A: Bad.

Q: Why is that bad?

A: Maybe yes or no. I don't know.

Q: Did somebody tell you that's bad?

A: Maybe.<sup>109</sup>

“From these exchanges, it is clear that EMH does not understand the need to tell the truth,” counsel wrote. “It is questionable whether she understands the word truth means at all.”<sup>110</sup>

The court found S.S.R. competent to be a witness.<sup>111</sup> It found E.M.H. not competent.<sup>112</sup> In a memorandum attached to the order, the court noted that E.M.H. had “a very difficult time communicating” and that based on the evidence received from E.M.H. and other witnesses who testified at the hearings, E.M.H. does not understand the importance of telling the truth.<sup>113</sup>

“It is doubtful that E.M.H. can reliably discern the difference between T.V. and movie characters and real life facts and circumstances. She shows too much susceptibility to being led and influenced by others as she is and has been asked to relate events surrounding this case.”<sup>114</sup> As a result, the court dismissed charges of third-degree criminal sexual conduct, fourth-degree criminal sexual conduct, and fifth-degree non-consensual sexual contact in which E.M.H. was the alleged victim and allowed charges in which S.S.R. was the alleged victim to continue.<sup>115</sup> A jury on December 5, 2006, acquitted Paulson of charges of the remaining charges of criminal sexual conduct.<sup>116</sup>

Disqualifications based on mental capacity are considered rare.<sup>117</sup> Competency hearings, however, may be problematic for persons with cognitive or developmental disabilities for two

reasons. First, persons with disabilities may communicate differently than the general population does, but competency hearings such as the one referenced from the above Minnesota case use language and communication familiar to the rest of the population. A witness who communicates differently, however, may still know the difference between a truth and a lie and be capable of providing facts of which he or she has personal knowledge. For children, another class of persons who are particularly vulnerable to competency hearings, researchers have developed materials to determine whether a child witness understands a truth and a lie and understands the importance of telling the truth.<sup>118</sup> Persons with cognitive or developmental disabilities are not afforded the same research or benefits. Second, competency in general may be confused with other doctrines of evidence,<sup>119</sup> and competency is “steeped in political and social prejudice.”<sup>120</sup> Persons with cognitive or developmental disabilities face difficulties not only because of the historical background of competency and its overlap with other doctrines, but because sometimes they use different methods of communication than the population at large.

## B. TESTIFYING IN COURT

Assuming a case reaches the courtroom, and a witness with a disability is competent to testify, victims with developmental or cognitive disabilities face a host of other problems relating to credibility. The testimony of a witness usually involves evidence in chief, cross examination, and possibly re-examination.<sup>121</sup> When the prosecution presents its evidence in chief, it asks the witness questions to provide a “relatively open account” of what happened.<sup>122</sup> Leading questions, which suggest by their words the answer to the question, are not prohibited, but they are supposed to be rare.<sup>123</sup> The open nature of direct testimony means that persons with cognitive disabilities should be able to provide statements with accurate details relating to the crime.<sup>124</sup>

Cross examination, however, is troublesome. On cross examination, opposing counsel typically use leading questions, which suggest the answers. Studies show that questioning strategies on cross-examination may confuse witnesses with or without disabilities, and that witnesses may not give relevant answers because they are unsure what the question means.<sup>125</sup> Additionally, lawyers may ask questions using complex words and phrases or legal terminology. Children and adults from the general population were much less accurate when questions were asked using the kind of language that lawyers prefer than when they were asked questions using ordinary language.<sup>126</sup> Persons with cognitive or developmental disabilities, however, are especially likely to be confused. Repeated questioning causes stress, and over time a person with cognitive disabilities may try to appease the questioner and change his or her story, undermining credibility.<sup>127</sup> Persons with learning disabilities, for example, have well documented problems with remembering names, numbers and times and dates, which may be highlighted during cross examination.<sup>128</sup>

Additionally, a high percentage of perpetrators are care providers or family members, meaning a victim who testifies in court must speak against someone who is familiar to him or her, which adds a layer of stress to any victim, whether developmentally disabled or not. The practical difficulties in testifying, coupled with the emotional difficulty of testifying against someone who is well known to the victim, make testifying particularly difficult for crime victims with cognitive or developmental disabilities.

### *C. CRAWFORD*

Given these difficulties, prosecutors found ways to use hearsay evidence in the courtroom, through both court decisions and state laws enacted to allow out-of-court statements

in certain kinds of cases. A recent line of United States Supreme Court cases, however, has reduced their usability.

The issue turns on the interpretation of the Confrontation Clause, which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>129</sup> In the 1980 *Ohio v. Roberts* decision, the Court held that prior testimony given by an unavailable declarant is not a violation of the Confrontation Clause if a two-step test is met.<sup>130</sup> First, the prosecution must show that a declarant is unavailable.<sup>131</sup> Second, if that declarant is unavailable to testify, the prosecution must show that the hearsay testimony sought to be admitted had sufficient "indicia of reliability."<sup>132</sup> As a result, out-of-court statements by persons with cognitive or developmental disabilities who were unavailable, if shown to be reliable, could be admitted as a hearsay exception. Sufficient reliability could be inferred in a case if the evidence falls within a "firmly rooted" hearsay exception, or if the prosecution made a "showing of particularized guarantee of trustworthiness."<sup>133</sup> Over the years, courts found that most common hearsay exceptions were "firmly rooted," including prior testimony.<sup>134</sup> States also enacted laws creating a hearsay exceptions for certain cases, such as for children who are victims of sexual or physical assault.<sup>135</sup>

Unfortunately for victims, parts these provisions may now be constitutionally suspect after the United States Supreme Court in 2004 addressed witness confrontation in *Crawford v. Washington*.<sup>136</sup> *Crawford* held that testimonial statements by witnesses who do not appear at trial may not be admitted unless the witness is unavailable and there has been a prior opportunity for cross examination.<sup>137</sup> *Crawford*, according to Professor Eileen Scallen, has made the statute at least partly constitutionally suspect.<sup>138</sup> *Crawford* does not allow testimonial statements for unavailable witnesses unless the defendant has had a chance to cross examine the witness.

Statements about abuse made in response to “structured questioning by law enforcement officials is clearly testimonial under Crawford.”<sup>139</sup> Uncertain is whether statements made to professionals such as doctors, teachers and social workers who are obligated to report abuse are testimonial statements.<sup>140</sup> The result is that if there is doubt about a witness’s competency, it is to be resolved in favor of having the witness testify.<sup>141</sup> That may be an unpalatable result to victims with cognitive or disabilities, who already face credibility problems due to misperceptions and difficulty testifying in court.

## V. BREAKING THE BARRIERS

From the initial reporting of a crime through trial, many problems that crime victims with cognitive or developmental disabilities face come from perceptions that they unable to relate truthfully and accurately what happened, to speak convincingly on the witness stand, and to hold up under cross examination by defense attorneys. This problem is one of credibility and misperception. As discussed supra, bringing in admissible hearsay evidence rather putting the witness on the stand is one way to overcome the issue, but it has been curtailed by *Crawford*. The result, then, is that victims with cognitive or developmental disabilities must take the stand if at all possible. Because it is so important that victims take the stand, advocates and those involved in the criminal justice process need to collaborate on ways to boost the credibility of victims with cognitive or developmental disabilities and provide more support as they navigate a complex and confusing system.

### A. TAKING THE STAND

Because of the potential difficulty in testifying, and the misperceptions of about the credibility and competency of crime victims with cognitive or developmental disabilities, testifying in court is unpalatable for many persons with cognitive or developmental disabilities.

One obvious way to deal with this is to bring in hearsay evidence, such as the kind of evidence allowed in the statutes discussed *supra*. As also discussed *supra*, *Crawford* prohibits the introduction of some hearsay evidence that would have been admissible under the court's previous interpretations of the Confrontation Clause.

Scallen offers a step-by-step analysis to determine how to apply the Confrontation Clause to hearsay evidence post-*Crawford*. Testimonial statements include affidavits, stationhouse police interrogations and nonemergency investigatory statements taken by law enforcement officials.<sup>142</sup> If statements are non-testimonial, they are not barred by the Confrontation Clause and may be admissible if a hearsay exception applies.<sup>143</sup> If the statement is testimonial, the declarant must testify for the evidence to be admitted in most cases. If the declarant is unavailable to testify, the evidence may not be admitted unless defense counsel had a prior opportunity to cross-examine the declarant, the statement was a dying declaration, or the accused tried to prevent the witness from testifying.<sup>144</sup>

Often, the testimony that will best prove a case comes from stationhouse police interrogations, and nonemergency investigatory statements. Thus, in many cases in which crime victim with a cognitive or developmental disability can testify, the testimony that will best prove the case is not admissible – unless the victim testifies. Putting the witness on the stand allows the admissibility of a range of evidence that *Crawford* put out of reach. The result of *Crawford*, Scallen writes, is this: “Simply put, to avoid Confrontation Clause problems, prosecutors and judges must work to do everything possible to put the declarant . . . on the witness stand whenever possible.”<sup>145</sup>

The importance of testifying adds a layer of importance to challenges to competency hearings. Due to communication problems that persons with disabilities may have, it is vital that

a person asking questions to determine competency be competent themselves. In the transcript excerpts provided in the Minnesota competency hearing case, the proposed witness was asked “Can you tell me what the truth is?”<sup>146</sup> Philosophers have wrestled with this question for thousands of years and not come up with a succinct answer, yet courts expect the victim of a traumatic crime who also has a cognitive or developmental disability to do so.

Children without disabilities also face questions about their competency to testify in court. Scholars and others have recognized that traditional competency questioning may not work for all children and have developed competency assessments designed to take into account that “even children who have not learned labels for true and false statements are rejecting false statements.”<sup>147</sup> Under one such assessment, a competency examiner gives a child two tasks.<sup>148</sup> One task is designed to determine whether the child “understands that the words “truth” means “statements that correspond to reality”<sup>149</sup> and “lie” refers to “statements that fail to correspond to reality.”<sup>150</sup> Children are asked to determine truth vs. lies by looking at pictures of objects and being asked, “LISTEN to what these boys say about [the object]. One of them will tell a LIE and one will tell the TRUTH, and YOU’LL tell ME which boy tells the TRUTH.”<sup>151</sup> The second task is a morality test that determines whether a child understands the consequences of telling a lie, such as whether the child will get in trouble for telling a lie.<sup>152</sup>

The competency tests for children show that there are reliable alternative ways to determine competency than asking philosophical questions about the meaning of truth. Research has not shown competency tests developed specifically for witnesses with cognitive or developmental disabilities. If there are such tests available, courts should use them. If there are no such methods available, they should be developed if possible. Even if specific alternative tests are not used, judges and questioners during competency hearings should be aware of how to

interview persons with developmental or cognitive disabilities, and be careful to ask questions that will determine whether the witness actually knows the difference between truth and a lie and the importance of telling the truth. By doing this, judges will ensure that victims who are competent to testify will not be barred from justice by communication problems. Because witness testimony is so important to a case, and often unavoidable after *Crawford*, the solution to improving the outcomes for crime victims with disabilities must start well before a case reaches the courtroom. Ensuring that a victim with cognitive or developmental disabilities is able to testify in court is only the first step, however. Advocates and criminal justice professionals must also work to better support victims with cognitive or developmental disabilities as they move through the criminal justice system. Doing so will boost these victims' ability to testify and could improve their credibility.

#### B. A UNIFORM SYSTEM OF SUPPORT

States commonly have enacted laws supporting victims of crime. In Alabama, for example, law enforcement agencies are required to provide victims with information about the availability of emergency and crisis services, victims' compensation benefits, the steps involved in a prosecution, rights given to crime victims, and other information.<sup>153</sup> It does not include information specifically for persons with disabilities. In Pennsylvania, crime victims have the right to information about services and to other information about the procedure and status of the alleged perpetrator.<sup>154</sup> Crime victims in Pennsylvania also have the right to be accompanied at criminal and juvenile proceedings by a family member, victim advocate or other supportive person.<sup>155</sup> Like Alabama, however, the statute does not specifically mention persons with disabilities.

In Minnesota, laws protecting victims of crimes have been on the books since 1974,<sup>156</sup> although they are not aimed specifically at persons with disabilities. For example, victims of certain crimes have the right to be accompanied by a supportive person at court proceedings.<sup>157</sup> Additionally, the state Crime Victim Services Unit has five grant programs that use state and federal funds for support and advocacy services for crime victims.<sup>158</sup> The programs support battered women's programs, sexual assault programs, general crime victims programs, abused crime victims programs, abused children programs, and emergency grant programs that meet the emergency needs of victims.<sup>159</sup> There are no grant programs listed for support and advocacy services for crime victims who have cognitive or developmental disabilities. States need to incorporate provisions specifically for persons with cognitive or developmental disabilities in their statutes providing rights to victims of crimes. Given that persons with cognitive or developmental disabilities are more vulnerable to crime, have less access to the criminal justice system, and face unwarranted suspicion about their credibility to testify, support programs for victims with cognitive or developmental disabilities are essential.

Advocates for persons with disabilities, judges, attorneys, police officers, court personnel and others in the criminal justice system need to come together to form a uniform approach to providing support for persons with cognitive or developmental disabilities. Because the problems persons with cognitive or developmental disabilities face in the courtroom are partly a matter of perception, partly a matter of lack of education, and partly a matter of constitutional rights afforded to criminal defendants, no single county approach or single law change will right the wrongs people with these impairments face in the criminal justice system. To truly serve the needs of crime victims with cognitive or developmental disabilities, a statewide initiatives are

necessary. Stakeholders need to come together to create uniform supports and procedures for crime victims with cognitive or developmental disabilities.

A task force for victims of crime with cognitive or developmental disabilities should consider requiring the state to provide advocates to assist a crime victim with cognitive or developmental disabilities throughout the process. Some scholars suggest such advocates should have some training in criminal justice to help the victim understand the process.<sup>160</sup> An advocate could serve as a liaison between the victim and police investigators and assist police in using questioning techniques that increase the accuracy of the information provided.<sup>161</sup> In doing so, they could steer police clear of some kinds of questioning that could lead to unintentionally false testimony.<sup>162</sup> Should the state not require advocates, advocacy groups for persons with developmental or cognitive disabilities should consider creating their own network of trained advocates. By increasing police knowledge of the special needs of crime victims with disabilities, and increasing the reliability of the information gained from interviews, the case gets a stronger start and more chances for a successful end result.

The advocate would then serve as a liaison between the prosecutor's office and the victim when the case moves from investigation to the courts.<sup>163</sup> County attorney's offices and district attorney's offices frequently employ victim coordinators, but these staff members may be aware of the special needs of persons with cognitive or developmental disabilities.<sup>164</sup> The advocate would also make sure the victim understands the court proceedings and advise the court of the victim's ability to cooperate.<sup>165</sup> Having such an advocate would help crime victims with cognitive or developmental disabilities in a process that is daunting even for persons without disabilities. It could also boost the victim's reliability of information and, ultimately, perhaps, his or her credibility with authorities and fact finders in court.

Additionally, the task force should also consider the following:

- requiring mandatory training for law enforcement agencies on the special needs of persons with cognitive or developmental disabilities.
- using specialized techniques in competency hearings if necessary, or at the least being cognizant of the questions it asks of potential witnesses.
- allowing frequent breaks on the witness stand if necessary.<sup>166</sup>
- providing more leeway to prosecutors in allowing more leading questions than usual.<sup>167</sup>
- training to ensure that witnesses who can communicate through the use of symbols or characters instead of speech are able to do so, while still providing opportunities for cross examination.<sup>168</sup>

These changes and others can be made to increase the accessibility of the justice system to crime victims with disabilities without infringing on the constitutional rights of the accused. To be effective, the changes must be consistent and uniform. By providing these supports to persons with cognitive or developmental disabilities, states may increase the access of the criminal justice system to persons with cognitive or developmental disabilities. They may also increase the credibility of crime victims with disabilities if professionals throughout the criminal justice system are aware of and trained in the particular vulnerabilities and needs of crime victims with cognitive or developmental disabilities. Ultimately, the goal is more victims with cognitive or developmental disabilities on the stand, providing credible testimony.

## VI. CONCLUSION

Persons with cognitive or developmental disabilities face barriers to justice almost from the moment a crime is committed against them. They are more likely to be victims of crime and less likely to report it. They face barriers during the initial stages of investigation because myriad

state agencies conduct civil investigations alongside or before criminal investigations, sometimes with little information available about how the two kinds of investigations interact. When police become involved, persons with cognitive or developmental disabilities may have difficulty communicating with police, either because police are not trained to communicate with them or because police have misperceptions about persons with developmental disabilities

When a case does make it to a prosecutor's desk, the prosecutor has the task of determining whether a case is prosecutable, a determination that depends in part on the perceived credibility and competency of the witness. Because persons with developmental disabilities and cognitive impairments are perceived to lack credibility, and because in some cases they are found to be incompetent to testify, convictions may be more difficult. Adding to the difficulty is *Crawford*, which prohibits the use of testimonial evidence unless the witness also testifies. As a result, the deck is stacked against persons with disabilities in the criminal justice process.

Action to solve these problems is needed. Persons with disabilities are entitled to the same protections under the law as persons without disabilities, and they are not receiving it. This is particularly problematic given that they are more likely to be crime victims than the general population. To start, judges need to conduct competency hearings carefully. Second, a statewide initiative designed to provide support throughout the criminal justice process is a start at remedying the injustice. For several decades, victims' rights movements have been addressing the needs of crimes against vulnerable groups, such as women. It is time for persons with cognitive or developmental disabilities to join them.

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<sup>1</sup> The Chippewa County Attorney's Office was provided a copy of an investigation by the Minnesota Department of Health Office of Health Facility Complaints. Office of Health Facility Complaints, Minn. Dep't of Health, Report No., No. H5259006, at 8 (Nov. 21, 2008) [hereinafter Luther Haven], *available at* <http://www.health.state.mn.us/divs/fpc/ohfcinfo/filecomp.htm> (last accessed April 21, 2010).

<sup>2</sup> *Id.* at 7.

<sup>3</sup> Warren Wolfe, *At Montevideo Nursing Home, Reports of Abuse*, STAR TRIBUNE (Minneapolis), Dec. 11, 2008, at B1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* Months later, the aide was charged. *See* Warren Wolfe, *Nursing Home Scrambles after Signs Surface of Sex Assaults; Officials Detail Steps Taken by Cerenity Bethesda in South St. Paul to Protect Residents*, STAR TRIBUNE (Minneapolis), March 24, 2009, at B1.

<sup>8</sup> ROBERT D. DINERSTEIN, PARTICIPATION OF PEOPLE WITH MENTAL RETARDATION IN COURT PROCEEDINGS: CONSENT, CAPACITY, AND ACCOMMODATION 45 (1999), *reprinted in* MARY CATHERINE ROPER & KELLY J. ACE, ASSISTING VICTIMS AND WITNESSES WITH DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM (2002).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 46.

<sup>11</sup> *Id.* at 46

<sup>12</sup> The act ordered a study of crimes against persons with disabilities for use in developing strategies to reduce the incidence of those crimes. Crime Victims with Disabilities Awareness

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Act, Pub. L. No. 105-301, 112 Stat. 2838 (1998) (amended 2000). It was later incorporated into a statute governing the Bureau of Justice Statistics. *See* 42 U.S.C.A. § 3732 (West, Westlaw through May 2010).

<sup>13</sup> Joan Petersilia, *Invisible Victims: Violence Against Persons with Developmental Disabilities*, 27 HUM. RTS. 9, 9 (2000). No major cases arguing this point have appeared. Persons with developmental or cognitive disabilities, however, may consider filing lawsuits under the Americans with Disabilities Act. Title II of the ADA provides in part that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C.A. § 12132 (West, Westlaw through May 2010).

Persons with cognitive or developmental disabilities may argue that the criminal justice system has denied them the opportunity to participate in court systems by failing to properly investigate and prosecute their cases. They may argue that they have given services that is not equal to that afforded others and that they have been provided a service that is not as effective in affording equal opportunity to obtain the same result by neglecting to provide supports that allow people with developmental or cognitive disabilities to fully participate and understand the court proceedings.

<sup>14</sup> Petersilia, *supra* note 13, at 9.

<sup>15</sup> *Id.*

<sup>16</sup> 42 U.S.C.A. § 15002(8) (West, Westlaw through May 2010). Major life activities are self-care, receptive and expressive language, learning, mobility, self direction, capacity for independent living and economic self-sufficiency. § 15002(8).

<sup>17</sup> Petersilia, *supra* note 13, at 9.

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<sup>18</sup> MARY CATHERINE ROPER & KELLY J. ACE, ASSISTING VICTIMS AND WITNESSES WITH DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM: A CURRICULUM FOR LAWYERS 6 (2002).

<sup>19</sup> *Id.*

<sup>20</sup> Cognitive Disability Resources, University of Illinois at Urbana-Champaign, [http://www.counselingcenter.illinois.edu/?page\\_id=136](http://www.counselingcenter.illinois.edu/?page_id=136) (last accessed September 20, 2010).

<sup>21</sup> Cognitive Disabilities, WebAIM, <http://webaim.org/articles/cognitive/> (last accessed September 20, 2010). WebAIM is a project of the Center for Persons with Disabilities at Utah State University in Logan, Utah. WebAIM Services, Center for Persons with Disabilities at Utah State University, <http://www.cpdusu.org/projects/webaim/> (last accessed September 20, 2010).

<sup>22</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMES AGAINST PEOPLE WITH DISABILITIES, 2007 at 1 (2009). The study was mandated by the Crime Victims with Disabilities Awareness Act. *Id.* at 7.

<sup>23</sup> The survey defined a disability as defined as a longstanding sensory, physical, mental or emotional condition that makes it difficult for a person to perform daily living activities. *Id.* at 1.

<sup>24</sup> *Id.* at 2-4. A 1992 article by Ruth Luckasson noted that the National Crime Survey is the largest and most complete survey of rates of victimization, is federally funded, and considered authoritative by policymakers. Ruth Luckasson, *People with Mental Retardation as Victims of Crime*, in THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 209, 210 (Ronald W. Conley et. al. eds., 1992). Luckasson lamented that at that time, the National Crime Survey did not provide information on people with mental retardation. *Id.* She also noted a potential shortcoming of such data because the National Crime Survey depends on first-person reports and descriptions provided by individuals who are capable and willing to report what happened

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to them. *Id.* at 211. “Unfortunately, many victims with disabilities do not have the skills or opportunity to respond to surveyors.” *Id.* at 211.

<sup>25</sup> Luckasson wrote in 1992 that “it is fair to assume that the actual rates of victimization of people with mental retardation are much higher than those reported in current crime surveys. Luckasson, *supra* note 23, at 21.

<sup>26</sup> DICK SOBSEY, *VIOLENCE AND ABUSE IN THE LIVES OF PEOPLE WITH DISABILITIES: THE END OF SILENT ACCEPTANCE?* 67 (1994).

<sup>27</sup> *Id.* at 67. Other researchers reported frequently finding known or previously histories of sexual abuse among women with developmental disabilities who had been referred for help with behavior problems. *Id.* at 67.

<sup>28</sup> *Id.* at 73.

<sup>29</sup> Petersilia, *supra* note 13, at 9-10. The study was for the Office on Child Abuse and Neglect, by Scott B. Crosse, Elyse Kaye, and Alexander C. Ratnofsky (1993). *Id.*

<sup>30</sup> BUREAU OF JUSTICE STATISTICS, *supra* note 20, at 7.

<sup>31</sup> *Id.*

<sup>32</sup> Petersilia, *supra* note 13, at 9.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Petersilia, *supra* note 13, at 9.

<sup>38</sup> *Id.*

<sup>39</sup> SOBSEY, *supra* note 26, at 89.

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<sup>40</sup> SOBSEY, *supra* note 26, at 90-91.

<sup>41</sup> DINERSTEIN, *supra* note 8, at 45.

<sup>42</sup> Petersilia, *supra* note 13, at 10.

<sup>43</sup> ROPER & KELLY, *supra* note 18, at 10.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Petersilia, *supra* note 13, at 9.

<sup>47</sup> ROPER AND KELLY, *supra* note 18, at 10.

<sup>48</sup> *Id.*

<sup>49</sup> Luther Haven, *supra* note 1, at 1.

<sup>50</sup> The alleged abuse went on for months and was not reported to a supervisor until July 2008.

*See* Wolfe, *supra* note 3.

<sup>51</sup> Luther Haven, *supra* note 1, at 2.

<sup>52</sup> Luther Haven, *supra* note 1, at 5.

<sup>53</sup> Luther Haven, *supra* note 1, at 5.

<sup>54</sup> Petersilia, *supra* note 13, at 2.

<sup>55</sup> *Id.*

<sup>56</sup> Florida, for example, requires physicians and medical personnel, health professionals, spiritual practitioners, nursing home and adult day care center staff, criminal justice employees, inspectors of public lodging, advocacy council members and bank employees to report suspected abuse. Fla. Stat. § 415.1034

<sup>57</sup> For example, during the course of an investigation into suspected abuse, neglect or exploitation of a vulnerable adult, Florida's Adult Protective Services Department must report to

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law enforcement and the state attorney if it suspects that “a second party” has committed the offense. Fla. Stat. § 415.104(1) (2009) The statute also requires Adult Protective Services and law enforcement to cooperate to allow the criminal investigation to proceed concurrently with the protective investigation. Fla. Stat. § 415.104(1).

<sup>58</sup> Under Iowa law, a person who has legal responsibility for the support of a dependent adult and fails to do commits a class D felony. IOWA CODE 726.8. A person who has custody of a dependent person and knowingly or recklessly exposes that person to a danger, or who abandons that person knowing the person will be exposed to danger commits a class “C” felony. IOWA CODE 726.3.

<sup>59</sup> “A mandated reporter who has reason to believe that a vulnerable adult is being or has been maltreated, or who has knowledge that a vulnerable adult has sustained a physical injury which is not reasonably explained shall immediately report the information to the common entry point.” Minn. Stat. § 626.557 (West, Westlaw through 2010 Regular Session, Chapters 180 through 200 and 202 through 214). A mandated reporter includes a professional who provides social services, law enforcement, education, care of vulnerable adults, an employee of a vocational rehabilitation facility, or a medical examiner. Minn. Stat. § 626.5572 subdiv. 16 (West, Westlaw through 2010 Regular Session, Chapters 180 through 200 and 202 through 214).

<sup>60</sup> Minn. Stat. § 626.5572 subdiv. 21.

<sup>61</sup> Vulnerable Adult Lead Agency Jurisdiction Chart (unpublished manuscript provided by Professor Kim Dayton, William Mitchell College of Law, on file with author).

<sup>62</sup> *Id.*

<sup>63</sup> Telephone interview with Roberta Opheim, Ombudsman, Minn. Ombudsman for Mental Health and Developmental Disabilities (Friday, April 16, 2010). Notes on file with author. The

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Ombudsman assists with concerns or complaints about services, questions about rights, access to appropriate services, and general questions about services for persons with mental disabilities.

State of Minn. Office of the Ombudsman for Mental Health and Developmental Disabilities, <http://ombudmhdd.state.mn.us/about/whatis.htm> (last visited April 24, 2010). The Ombudsman also receives reports of death or serious injury of clients and serves as a civil commitment resource and training center. *Id.*

<sup>64</sup> Minn. Dep't of Health Office of Health Facility Complaints, <http://www.health.state.mn.us/divs/fpc/ohfcinfo/filecomp.htm> (last accessed April 21, 2010).

<sup>65</sup> Author compiled statistics by reviewing resolved complaints for individual categories from January 1, 2009 to December 31, 2009. Office of Health Facility Complaints, Minn. Dep't of Health, <http://www.health.state.mn.us/divs/fpc/directory/surveyapp/provcompselect.cfm> (last accessed April 24, 2010).

<sup>66</sup> Office of Health Facility Complaints, Minn. Dep't of Health, Report No. HG209006, at 1 (June 11, 2009) [hereinafter DCI Douglas], *available at* <http://www.health.state.mn.us/divs/fpc/ohfcinfo/filecomp.htm> (last accessed April 21, 2010).

<sup>67</sup> Office of Health Facility Complaints, Minn. Dep't of Health, Report No. HL00998008, at 3 (June 29, 2009) [hereinafter Mounds Park Residence], *available at* <http://www.health.state.mn.us/divs/fpc/ohfcinfo/filecomp.htm> (last accessed April 21, 2010).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Telephone interview with Roberta Opheim, *supra* note 57.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

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<sup>73</sup> DINERSTEIN, *supra* note 8, at 51.

<sup>74</sup> Luckasson, *supra* note 23, at 211.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Mark Kebbell, et. al., *Witnesses with learning disabilities in court: Full report of research activities and results 1* (2001), <http://www.library.nhs.uk/learningdisabilities/ViewResource.aspx?resID=187925&tabID=290> (last accessed March 17, 2010).

<sup>79</sup> DINERSTEIN, *supra* note 8, at 51.

<sup>80</sup> Telephone interview with Roberta Opheim, *supra* note 57.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Petersilia, *supra* note 13, at 2.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 10.

<sup>87</sup> DINERSTEIN, *supra* note 8, at 46.

<sup>88</sup> Every person is competent to be a witness except as otherwise provided in these rules. Fed. R. Evid. 601. “Neither feeble-mindedness not insanity renders a witness incompetent or disqualified.” *U.S. v. Odom*, 736 F.2d 104, 112 (4th Cir. 1984).

<sup>89</sup> Kebbell et. al., *supra* note 73, at 1.

<sup>90</sup> *Id.*

<sup>91</sup> Telephone interview with Roberta Opheim, *supra* note 57.

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<sup>92</sup> *Id.*

<sup>93</sup> Petersilia, *supra* note 13, at 10.

<sup>94</sup> *Id.*

<sup>95</sup> Fed. R. Ev. 104(a). In making its determination it is not bound by the rules of evidence except those with respect to privileges. *Id.*

<sup>96</sup> See 81 AM. JUR. 2d *Witnesses* § 161; *U.S. v. Lightly*, 677 F. 2d 1027, 1028 (C. A. Va. 1982) (“Every witness is presumed competent to testify . . . unless it can be shown that [1] the witness does not have personal knowledge of the matters about which he is to testify, that he does not have the capacity to recall, or [2] that he does not understand the duty to testify truthfully.”)

<sup>97</sup> See *U.S. v. Benn*, 476 F.2d 1127, 1131 (D.C. Cir. 1973) (“Competency depends upon the witness' capacity to observe, remember, and narrate as well as an understanding of the duty to tell the truth.”).

<sup>98</sup> See 81 AM. JUR. 2d *Witnesses* § 161

<sup>99</sup> 27 Fed. Prac. & Proc. Evid. § 6010 (2nd ed.)

<sup>100</sup> *Ellington v. Great Northern Railway Co.*, 100 N.W. 218, 220 (1904)

<sup>101</sup> Minn. Stat. § 595.01 subdiv. 1 (West, Westlaw through 2010 Regular Session, Chapters 180 through 200 and 202 through 214).

<sup>102</sup> Minn. Stat. § 595.02 subdiv. 1(f) (West, Westlaw through 2010 Regular Session, Chapters 180 through 200 and 202 through 214).

<sup>103</sup> Minn. Stat. § 595.06 (West, Westlaw through 2010 Regular Session, Chapters 180 through 200 and 202 through 214).

<sup>104</sup> Defense Memorandum at 1, *State of Minnesota v. Jody Ray Paulson*, No. K6-05-1330 (Minn. Aug. 18, 2006).

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<sup>105</sup> Complaint at 1, *State of Minnesota v. Jody Ray Paulson*, No. K6-05-1330 (Minn. Aug. 9, 2005).

<sup>106</sup> Complaint, *supra* note 101, at 2.

<sup>107</sup> Defense Memorandum, *supra* note 100, at 1.

<sup>108</sup> *Id.* at 2.

<sup>109</sup> *Id.* at 3.

<sup>110</sup> *Id.* at 3.

<sup>111</sup> Findings and Order at 1, *State of Minnesota v. Jody Ray Paulson*, No. K6-05-1330 (Minn. Sept. 13, 2006).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 3.

<sup>114</sup> *Id.* at 3.

<sup>115</sup> *Id.* at 2.

<sup>116</sup> Register of Actions, First Judicial District, State of Minnesota, No. 25-K6-05-001330, *available at* <http://www.mncourts.gov/default.aspx?page=1927> (last accessed April 23, 2010).

<sup>117</sup> Fed. R. Evid. 601, Advisory Committee Notes, 1972 proposed rules.

<sup>118</sup> *See* Thomas D. Lyon & Karen J. Saywitz, *Qualifying Children to Take the Oath: Materials for Interviewing Professionals* (May 2000), <http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=thomaslyon> (as cited by Eileen Scallen *Coping with Crawford: Confrontation of children and other challenging witnesses*, 35 *Wm. Mitchell. L. Rev.* 1558, 1561 (2009)).

<sup>119</sup> When some courts or commentators talk about a witness testifying ‘reliably’ or ‘correctly,’ in all likelihood, they are not talking about competency but rather whether the witness has personal

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knowledge of the facts about which they will testify.” Eileen Scallen *Coping with Crawford: Confrontation of children and other challenging witnesses*. 35 WM. MITCHELL. L. REV. 1558, 1582 (2009).

<sup>120</sup> *Id.* Parties, spouses of parties, accomplices, persons with an interest in litigation, convicted felons, children and atheists were all at one time considered incompetent. 3 Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE § 6:2, at 1 (3d ed 2008). The designation meant they could not take the witness stand to testify about any subject, no matter how reliable or knowledgeable the individual was about the facts. Scallen, *supra* note 114, at 1582.

<sup>121</sup> Kebbell et al., *supra* note 73, at 3.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 4.

<sup>126</sup> *Id.* at 4.

<sup>127</sup> Petersilia, *supra* note 13, at 10.

<sup>128</sup> Kebbell et al., *supra* note 73, at 4.

<sup>129</sup> U.S. Const. amend. VI.

<sup>130</sup> 448 U.S. 56

<sup>131</sup> *Id.* at 66.

<sup>132</sup> *Id.* at 66.

<sup>133</sup> *Id.* at 66.

<sup>134</sup> Scallen, *supra* note 114, at 1561.

<sup>135</sup> For example, the Ohio Rules of Evidence 807 allows out-of-court statements by children

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under twelve years old describing sexual acts involved in the child or describing acts of violence against the child if certain conditions are met. A New York statute allows the use of a two-way, closed-circuit television for a child witness who would be likely to suffer serious mental or emotional harm if they were required to testify in open court. McKinney's CPL § 65.10 (2010). A Minnesota statute provides a hearsay exception for some kinds of out-of-court statements in which a person who is “mentally impaired” describes acts of sexual contact or penetration or physical abuse. Minn. Stat. Ann. § 595.02 subdiv. 3 (West, Westlaw through 2010 Regular Session, Chapters 180 through 200 and 202 through 214). This provision applies if (a) the court finds that the evidence is reliable, (b) the court finds that the mentally impaired person either testifies at the proceedings or is unavailable and there is corroborative evidence of the act, and (c) counsel notifies the adverse party in advance of the proceeding. Minn. Stat. Ann. § 595.02 subdiv. 3(a)-(b).

<sup>136</sup> 541 U.S. 36 (2004).

<sup>137</sup> *Id.* at 68.

<sup>138</sup> *Id.* at 1586.

<sup>139</sup> *Id.* at 1586.

<sup>140</sup> *Id.* at 1586.

<sup>141</sup> *Id.* at 1586.

<sup>142</sup> Scallen, *supra* note 114, at 1573-1574.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1575.

<sup>146</sup> Defense Memorandum, *supra* note 100, at 2.

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<sup>147</sup> Scallen, *supra* note 114, at 1587-1589.

<sup>148</sup> Lyon and Saywitz, *supra* note 113, at 2.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 3.

<sup>152</sup> *Id.* at 2.

<sup>153</sup> Ala. Code 1975 § 15-23-62 (West 2010).

<sup>154</sup> See 18 P.S. § 11.201 (West 2010). The statute gives crime victims the right to (1) receive basic information about services, (2) be notified of criminal proceedings relating to their case, (3) comment on potential plea agreements, reduction or dismissal of charges, (4) comment prior to sentencing and dispositional hearings and prior to post-sentencing release hearings, (5) the restitution, compensation and the return of property seized as evidence, (6) receive notice when a defendant is released from a correctional or other facility.

<sup>155</sup> 18 P.S. § 11.201 (3)

<sup>156</sup> REBECCA PIRIUS & JUDITH SOLLAR, CRIME VICTIM LAWS IN MINNESOTA 22 (2007), <http://www.house.leg.state.mn.us/hrd/pubs/crimvict.pdf>.

<sup>157</sup> Minn. Stat. § 631.046 subdiv. 1 (West, Westlaw through 2010 Regular Session, Chapters 180 through 200 and 202 through 214).

<sup>158</sup> PIRIUS & SOLLAR, *supra* note 150, at 18.

<sup>159</sup> *Id.*

<sup>160</sup> DINERSTEIN, *supra* note 8, at 51.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 52.

<sup>165</sup> *Id.* at 51.

<sup>166</sup> *Id.* at 53.

<sup>167</sup> *Id.* at 53.

<sup>168</sup> *Id.* at 53.