

RECENT DEVELOPMENT

***GREEN V. STATE: OUT-OF-COURT STATEMENTS
CONTAINED IN A SEXUAL ASSAULT FORENSIC
EXAMINER'S REPORT ARE TESTIMONIAL IN NATURE
AND INADMISSIBLE ABSENT THE DEFENDANT'S
OPPORTUNITY TO CROSS-EXAMINE THE PERSON WHO
PREPARED THE REPORT.***

By: Mahesh Subramanian

The Court of Special Appeals of Maryland held that statements contained within a sexual assault forensic examiner (“SAFE”) nurse’s report, whether factual or otherwise, are inadmissible if the SAFE nurse who prepared the report is unavailable to testify at trial. *Green v. State*, 199 Md. App. 386, 22 A.3d 941 (2011). Further, the confrontation clause of the Sixth Amendment guarantees a criminal defendant the opportunity to cross-examine the person who prepared the report. *Id.* at 411, 22 A.3d at 956.

On January 6, 2008, Anthony Lafonte Green (“Green”) arranged to meet the victim, Ms. G., at an unoccupied home. Once there, the two smoked marijuana and Green propositioned Ms. G. to have sexual intercourse with him for \$200. After she refused, Green pointed a gun at her, made her take her clothes off, and forced her to perform oral sex on him. After she complied, Green commanded Ms. G. to get on her hands and knees as he held a knife to her rectum. After a fight, Ms. G. escaped through a window and eventually told police that Green cut her legs with a knife and stabbed her in the stomach. Two police officers accompanied Ms. G. to the Washington Hospital Center, where she was examined and eventually discharged. A third officer then arranged for Ms. G. to undergo a separate examination by a SAFE nurse at Prince George’s Hospital.

At trial, the SAFE nurse was unavailable to testify so the trial court admitted, over the defendant’s objection, a redacted version of the results of the SAFE nurse’s report. The jury convicted Green of third and fourth degree sexual offense, second degree assault, and reckless endangerment. On appeal, Green argued to the Court of Special Appeals of Maryland that his Sixth Amendment right to confront witnesses against him was violated when the trial court admitted the SAFE nurse’s report because she was unavailable to testify at trial.

The Court of Special Appeals of Maryland noted that the confrontation clause of the Sixth Amendment generally protects a criminal defendant from the government’s use of statements made outside

the courtroom as evidence at trial without calling the witness to testify. *Green*, 199 Md. App. at 399, 22 A.3d at 949 (citing *Crawford v. Washington*, 541 U.S. 36, 43 (2004)). The court highlighted, however, that “non-testimonial” out-of-court statements are admissible as an exception to the general rule. *Green*, 199 Md. App. at 399, 22 A.3d at 949 (citing *Crawford*, 541 U.S. at 59). Although the *Crawford* Court did not provide a definition of “testimonial,” statements made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial do fall within the “core class of testimonial statements” described in *Crawford*. *Green*, 199 Md. App. at 400, 22 A.3d at 949.

Prior to its conclusion, the court emphasized the duties of a SAFE nurse as set out in the Code of Maryland Regulations (“COMAR”). *Green*, 199 Md. App. at 401, 22 A.3d at 950 (citing MD. CODE REGS. 10.27.21.04A (2011)). Some of the enumerated responsibilities include gathering, preserving, and documenting forensic evidence in connection with physical, sexual, or domestic assaults, maintaining the evidentiary chain of custody, and testifying at trial. *Green*, 199 Md. App. at 401, 22 A.3d at 950 (citing MD. CODE REGS. 10.27.21.04A (2011)). The court also highlighted the fact that prior to the SAFE nurse’s examination, Ms. G. underwent a physical examination at the Washington Hospital Center. *Green*, 199 Md. App. at 401, 22 A.3d at 950. Furthermore, two police officers testified that they specifically sought out the SAFE nurse and asked her to examine the victim to collect evidence for the criminal investigation. *Id.* at 402, 22 A.3d at 950-51.

Next, the court analyzed the decision of the Court of Appeals of Maryland in *State v. Snowden*. *Green*, 199 Md. App. at 400, 22 A.3d at 949-50. In *Snowden*, the court determined that statements made to a sexual abuse investigator by three alleged victims of child abuse were testimonial within the definition supplied in *Crawford*. *Id.* (citing *State v. Snowden*, 385 Md. 64, 867 A.2d 314 (2005)). The *Snowden* court concluded that utilizing objective standards, an ordinary person in the declarants’ position would have anticipated that her statements to the sexual abuse investigator would be used to prosecute the defendant. *Green*, 199 Md. App. at 400, 22 A.3d at 949 (citing *Snowden*, 385 Md. at 84-85, 867 A.2d at 326). Therefore, the victims’ statements were testimonial and could not be introduced at trial because defense counsel did not have the opportunity to cross-examine the declarants. *Green*, 199 Md. App. at 400, 22 A.3d at 949 (citing *Snowden*, 385 Md. at 84-85, 867 A.2d at 326). The *Green* court held that similar to the statements made to the sexual abuse investigator in *Snowden*, the statements in the SAFE nurse’s report were testimonial and therefore inadmissible absent the defendant’s opportunity to confront her at trial. *Green*, 199 Md. App. at 400, 22 A.3d at 950.

The court further stated that the redacted version of the SAFE nurse's report was not admissible under Maryland's business records exception to the hearsay rule. *Green*, 199 Md. App. at 404, 22 A.3d at 952. To support its decision, the court distinguished this case from *Rollins v. State*. *Id.* at 403-04, 22 A.3d at 951-52. The court in *Rollins* held that because autopsy reports are required by statute when a death occurs in an unusual or suspicious manner, a redacted copy of an autopsy report is admissible at trial if the author of the report is unavailable to testify. *Green*, 199 Md. App. at 403-04, 22 A.3d at 951-52 (citing *Rollins v. State*, 392 Md. 455, 897 A.2d 821 (2006)). Alternatively, SAFE nurse reports are only prepared when the police suspect criminal sexual abuse. *Green*, 199 Md. App. at 404, 22 A.3d at 951. Therefore, the court concluded that a SAFE nurse is likely to reasonably believe that the statements she makes in her report will be available for use at trial. *Id.* at 404, 22 A.3d at 952.

Even though the report contained routine, descriptive, and objectively ascertained and reliable facts, the court held that redacting only the testimonial portions of the report still denied Green the protections afforded by the Sixth Amendment's confrontation clause. *Green*, 199 Md. App. at 404, 22 A.3d at 952. Relying on the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, the *Green* court explained that the protections of the confrontation clause provide that otherwise reliable evidence should be assessed by "testing in the crucible of cross-examination." *Id.* at 409, 22 A.3d at 954-55 (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009)). The court reasoned that although a report may be reliable because it is generated during the regular course of business, it does not qualify as a business record if its essential purpose is for litigation. *Green*, 199 Md. App. at 404-05, 22 A.3d at 952 (citing *Melendez*, 129 S. Ct. at 2538 (citing *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943))). Accordingly, the court determined that the statements in the SAFE report fell within the "core class" of out-of-court statements described in *Crawford* and excluded from trial by the confrontation clause. *Green*, 199 Md. App. at 411, 22 A.3d at 956. The court ultimately held that the SAFE nurse's report was inadmissible as a business record because the police sent Ms. G. to the Sexual Abuse Center to help develop the State's criminal case. *Id.* at 406, 22 A.3d at 953.

In *Green*, the Court of Special Appeals of Maryland extended the class of inadmissible "testimonial" statements that the confrontation clause excludes from trial. The court's holding maintains a criminal defendant's constitutionally protected right to confront witnesses against him and places the burden upon prosecutors to produce live witness testimony subject to cross-examination at trial. This ruling makes explicit that even the testimony of a co-worker or supervisor does not comport with the

requirements of the confrontation clause if those individuals did not prepare the report. The *Green* court's holding has the potential to cause major ramifications in the ability of law enforcement to prosecute criminal defendants in "cold cases" where the examining nurse or lab technician no longer works in the same field, cannot be located, or is deceased.