DOMESTIC VIOLENCE AND THE CONFRONTATION CLAUSE: THE CASE FOR A PROMPT POST-ARREST CONFRONTATION HEARING

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INTRODUCTION

Enshrined in the Bill of Rights is the accused's right to cross-examine the witnesses against him, a right so important to the Founding Fathers that they made it an integral right under the Sixth Amendment.[1] The right to cross-examine is

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[1] U.S. CONST. amend. VI (stating in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"). However, the "rights conferred by the Confrontation Clause are not absolute and may give way to other important interests." Coy v. Iowa, 487 U.S. 1012, 1015 (1988) (allowing for two minors allegedly sexually assaulted by the defendant to testify by video so as not to be subject to him "face to face"). *See* Trammel v. United States, 445 U.S. 40, 43-44 (1980); Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1316 (2010) (citing Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 317 (2005)). *See also* Lindsay Hoopes, Note,

implicitly recognized in Rule 602,[2] and in the hearsay rules set forth in article 8.[3] In the years leading up to the 2004 Supreme Court decision in *Crawford v. Washington*,[4] a prosecutor could pursue a domestic violence case and introduce the prior accusatory testimonial statement of the victim even if the victim refused to appear at trial, declined to testify at trial, retracted a prior statement made to police, or claimed lack of memory about the events described in her prior statement. Introduction of a prior statement was permissible if the victim was unavailable, and the statement bore "adequate indicia of reliability" as indicated by falling within a "firmly rooted hearsay exception" or satisfied "particularized guarantees of trustworthiness."[5] In *Crawford,* the Supreme Court overruled *Ohio v. Roberts*,[6] holding that admission of a prior victim statement complied with the Confrontation Clause only if the victim was unavailable, and the defendant had a "prior opportunity to cross-examine."[7] Critics of *Crawford* claimed that it initiated an "open season" on domestic violence victims by giving the defendant spouse an irresistible motive to escape justice by intimidating, threatening, or even killing the victim prior to the victim being becoming subject to cross-examination at trial.[8]

The Right to a Fair Trial and the Confrontation Clause: Overruling Crawford *to Rebalance the U.S. Criminal Justice Equilibrium*, 32 HASTINGS INT'L & COMP. L. REV. 305, 306 (2009) (stating "the modern concept of the right to a fair trial, common throughout much of the international community, was adopted and modeled after the U.S. Constitution's Sixth Amendment") (citing Frank R. Hermann & S.J. Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 485-86 (1994) (noting that the Roman view that "it is better that the crime of a guilty person remain unpunished than that an innocent person be convicted" and that compatible law required "a defendant had the opportunity for a personal encounter with the accuser"); Jarot Hunt Scarbrough, Comment, *The Swinging Pendulum of Confrontation Clause Jurisprudence: Was* Michigan v. Bryant *a Response to the Inequitable Outcomes in* Crawford, Davis, *and* Giles*?*, 36 AM. J. TRIAL ADVOC. 153, 157 (2012) (stating that confrontation dates back to Roman times and was adopted by the English, followed by the Founding Fathers and the Supreme Court in *Ohio v. Roberts*) (citing Crawford v. Washington, 541 U.S. 36, 43 (2004)); Recent Cases, *Sixth Amendment—Witness Confrontation—Forfeiture by Wrongdoing Doctrine*, 122 HARV. L. REV. 336, 344-45 (2008) (stating, at the time, interested persons, spouses, children, atheists, and convicted felons were barred from testifying against the accused) (citing Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1113 (1999) and citing Transcript of Oral Argument at 9, Giles v. California, 554 U.S. 353 (2008), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-6053.pdf (stating that at founding, a case such as *Giles* could not have been heard)).

[2] FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

[3] FED. R. EVID. 801(c) ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."). *See* Buel, *supra* note 1, at 1313 n.90 (citing, as examples of FED. R. EVID. 804(b)(6), United States v. Thevis, 665 F.2d 616, 627-33 (5th Cir. 1982) (victim's testimony was permitted pre-*Crawford* when one of the counts charged against defendant was murder of the victim), and United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985) (pre-*Crawford*, defendant lost the right to cross-examine the undercover agent whom he killed during his arrest)). *See also* Carver v. United States, 164 U.S. 694, 697 (1897); Carver v. United States, 160 U.S. 553, 554 (1896) (noting that not all dying declarations are necessarily reliable).

[4] Crawford v. Washington, 541 U.S. 36, 42 (2004).

[5] Ohio v. Roberts, 448 U.S. 56, 57 (1980).

[6] 448 U.S. 56.

[7] *Crawford*, 541 U.S. at 36.

[8] Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747 (2005).

Although prosecutors have attempted to protect witnesses by relying on Rule 804(6), which purports to provide for admission of victim's statements at trial where the prosecutor can prove that the defendant caused the victim's unavailability, these efforts have proved mostly illusory. This is because the rule requires the prosecutor to prove separately that the defendant caused the unavailability of the witness, a task that is often as challenging as proving the elements of the underlying case.

It has been noted that the cause of justice pays a high price for insuring the right to physically confront a witness at trial—which may take place months or even years after the arrest of the defendant—because it provides the accused with ample time to intimidate or threaten potential witnesses against him.[9] Defendants in domestic violence cases quickly realize that without a testifying witness at trial, the case against him must be dismissed no matter how hideous the crime of which he is charged.[10] Witness tampering appears to work in favor of perpetrators, particularly in domestic violence cases, because 80-90% of victims do not cooperate with prosecutors in domestic violence cases.[11] These cases include instances in which a witness mysteriously disappears prior to trial, declines to testify, or refuses to cooperate with the prosecution.[12] This has proved to be of particular concern in domestic violence cases in which a battered spouse declined to testify for a variety of reasons, including purported lack of memory,[13] a fear of retribution either admitted or suspected,[14] a plea for understanding from the

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[9] Buel, *supra* note 1, at 1363 (citing Boyd v. Indiana, 866 N.E.2d 855, 858 (Ind. Ct. App. 2007) ("[The defendant] may not take advantage of [the victim]'s inability to testify, which was the natural consequence of his own misconduct—murdering her.")).

[10] *Id.* at 1304-05 (stating that "victims are too frightened to testify about both the initial crime and subsequent witness tampering"). This argument works under the assumption that prior statements will be inadmissible if a victim is too frightened to testify about witness tampering, which would allow admission of the prior statements under the forfeiture doctrine. Buel further relies upon *People v. Santiago* to argue that victims understand the seriousness of threats due to prior harm. People v. Santiago, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, at *31-32 (N.Y. Sup. Ct. Apr. 7, 2003).

[11] *Id.* at 1305 (citing Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 (1996) (citing Telephone Interview with Candace Heisler, Supervising Assistant District Attorney of the San Francisco District Attorney's Office (Sept. 29, 1995)).

[12] People v. Henderson, 705 N.Y.S.2d 589, 590 (N.Y. App. Div. 1999) (finding that the defendant's attempt to cause the victim to fear him was sufficient evidence of victim tampering, intimidation, and criminal solicitation). *See* State v. Charger, 611 N.W.2d 221, 228 (S.D. 2000) (attempting to convince a witness to withhold information is sufficient to qualify as tampering); Navarro v. State, 810 S.W.2d 432, 437 (Tex. Crim. App. 1991) (tampering occurred by attempted bribery in exchange for altering testimony).

[13] De Sanctis, *supra* note 11, at 367 (citing Telephone Interview with Candace Heisler, Supervising Assistant District Attorney, San Francisco District Attorney's Office (Sept. 29, 1995)). Victims may start out an investigation as uncooperative with prosecutors, or may later recant or prove reluctant fully to cooperate. *See also* California v. Green, 399 U.S. 149, 167-68 (1970) (stating that witness "claimed a loss of memory"). Although this case does not involve a situation of domestic violence, it sets a standard that statements from a preliminary hearing may be used in place of forgotten information or an uncooperative witness.

[14] Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. L. REV. 19, 20 (1999).

prosecutor of a victim's desire to preserve the family unit,[15] or a claim that the defendant has changed his ways and propensity for violence and is unlikely to repeat his crime.[16]

It is the aim of this article to propose a more effective means of eliminating a defendant's motive to intimidate or harm domestic violence victims who may be witnesses against the defendant at trial by providing defendants in domestic violence cases with the right to cross-examine a complaining witness at a confrontation hearing convened promptly after the defendant's arrest. Such a procedure would both comply with the *Crawford* requirement of a "prior opportunity to cross-examine" while reducing the time in which a defendant can devise means of making the victim unavailable for trial.

While the thrust of this article is to focus primarily on the confrontation requirement as it affects domestic violence victims, the requirement affects a far broader class of victims as well. [17] For example, on June 23, 1985, Air India Flight 182 carrying 329 people to London blew up mid-flight, tossing screaming passengers, including many women and children, into the air at 31,000 feet where they endured a horrifying death either during the fall or when hitting the ocean below.[18] The man accused of planting the bomb was charged with murder in a Canadian Court.[19] Unfortunately, the prosecution's star witness, Tara Singh Hayer, who had made prior statements implicating the defendant and was prepared to testify at the trial, was assassinated by gunshot before the trial.[20] As a result, Tara Singh Hayer's prior statement was held inadmissible and the defendant

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[15] De Sanctis, *supra* note 11, at 368 (citing Bettina Boxall & Frederick Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse*, L.A. TIMES, July 11, 1994, at A1). Some prosecutors will follow the wishes of victim-witnesses and avoid pursuing cases in which the victim will not cooperate due to interest in preserving the family unit.

[16] Buel, *supra* note 1, at 1324 (arguing that "but for" a defendant's tampering, the case would not be procedurally blocked and noting that the federal crime victims' bill of rights affords victims "the right to be reasonably protected from the accused offender") (citing 42 U.S.C. § 10606(b)(2) (repealed 2004)). *See also* Nancee Alexa Barth, Comment, *"I'd Grab at Anything. And I'd Forget." Domestic Violence Victim Testimony After* Davis v. Washington, 41 J. MARSHALL L. REV. 937, 944 (2008) (stating that one fifth of domestic violence victims do not want the abuser arrested and that such victims may be more fearful of the consequences of holding the abuser accountable than remaining in the relationship).

[17] *See* United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998); United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996); United States v. Stone, 960 F.2d 148 (4th Cir. 1992); United States v. Mastrangelo, 561 F. Supp. 1114 (E.D.N.Y. 1983).

[18] B.N. KIRPAL, REPORT OF THE COURT INVESTIGATING ACCIDENT TO AIR INDIA BOEING 747 AIRCRAFT VT-EFO, "KANISHKA" ON 23 JUNE 1985, HIGH COURT OF DELHI 1-2, 64, 158-71 (1986), https://archive.org/details/ReportOfTheCourtInvestigatingAccidentToAirIndia747On23rdJune1985.

[19] *Malik, Bagri Not Guilty in Air India Bombings*, CBC (Mar. 16, 2005), http://www.cbc.ca/news/canada/british-columbia/malik-bagri-not-guilty-in-air-india-bombings-1.546764.

[20] Kim Bolan, *Tara Singh Hayer Murder Probe Still Active, 11 Years Later*, VANCOUVER SUN (Nov. 18, 2009), http://web.archive.org/web/20100312001949/http://www.vancouversun.com/news/Tara+Singh+Hayer+murder+probe+still+active+years+later/2238518/story.html.

charged with the murder of 329 men, women, and children escaped with only minor charges.[21]

Part I and Part II of this article discuss the consequences of *Crawford v. Washington*[22] for domestic violence victims and detail the problem of domestic violence in America, including the current prosecution strategies and challenges in domestic violence cases. Part III reviews the evolution of confrontation law jurisprudence. Part IV sets forth a proposed *Crawford*-compliant procedure that also protects domestic violence victims. Part V addresses anticipated objections to the prompt-post arrest confrontation hearing.

I. *CRAWFORD*'S CONSEQUENCES FOR DOMESTIC VIOLENCE VICTIMS

Domestic violence continues to be an epidemic facing our nation today.[23] Over 20% of all the violent victimizations between 2003 and 2012 were attributable to domestic violence, with the greatest percentage being intimate partner violence.[24] In addition, nearly one in three women and one in four men experience physical violence by an intimate partner at some point in their life.[25] Though recent evidence has shown a drop in the occurrence of domestic violence,[26] the numbers are still alarming,[27] and are likely much higher because some claim that as many as half of the occurrences go unreported.[28]

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[21] R. v. Malik & Bagri, 2005 B.C.S.C. 350 (Can.) (B.C.), http://www.courts.gov.bc.ca/jdb-txt/sc/05/03/2005bcsc0350.htm.

[22] Crawford v. Washington, 541 U.S. 36 (2004).

[23] Barth, *supra* note 16, at 939-40 (quoting Planned Parenthood of S. Pa. v. Casey, 505 U.S. 833, 888 (1992) ("Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because battering is not usually reported until it reaches life-threatening proportions) the actual number of families affected . . . . In fact, researchers estimate that one of every two women will be battered at some time in their life . . . .")).

[24] JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUSTICE, NCJ 244697, NONFATAL DOMESTIC VIOLENCE, 2003-2012, at 1 (2014), http://www.bjs.gov/content/pub/pdf/ndv0312.pdf. The following is a breakdown of violent victimizations under domestic violence: 15% by intimate partners, 4% by immediate family members, and 2% by other relatives.

[25] Matthew J. Breidling et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, CTRS. FOR DISEASE CONTROL & PREVENTION (2014), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1_e. An estimated 31.5% of women and 27.5% of men experience physical violence by an intimate partner. *Id.*

[26] SHANNON CATALANO, BUREAU OF JUSTICE STATISTICS, NCJ 239203, INTIMATE PARTNER VIOLENCE: ATTRIBUTES OF VICTIMIZATION, 1993-2010, at 1 (2013), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4801 (reporting that there was a 72% decrease in serious intimate partner violence for females and a 64% decrease in serious intimate partner violence for males between 1994 and 2011).

[27] *See* Buel, *supra* note 1, at 1329 (citing JAMES ALLAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 41, 43, 79-80 (2007), http://www.bjs.gov/content/pub/pdf/htius.pdf.). Recent data shows that the number of women murdered by an intimate partner has stayed the same for the last two decades.

[28] Raeder, *supra* note 1, at 326 (citing CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, NCJ 178247, INTIMATE PARTNER VIOLENCE 1 (2000), http://www.popcenter.org/problems/domestic_violence/PDFs/Rennison%26Welchans_2000.pdf). *See also "Mary Kay's Truth About Abuse" Survey Links Economic Downturn to National Increase in Domestic Violence*, MARY KAY

According to the Centers for Disease Control and Prevention, there are four main types of intimate partner violence: physical, sexual, stalking, and psychological that includes both verbal and non-verbal mental or emotional abuse.[29] Due to the nature of domestic violence, the harm is often not readily apparent, often consisting of unseen emotional and psychological symptoms, including depression, panic attacks, and flashbacks.[30]

A. State Interest in Domestic Violence Prosecution

Although the majority of the victims of domestic violence are young, multi-racial, non-Hispanic women, domestic violence is boundless[31] and is a growing public health concern with enormous economic costs.[32] In 1995, it was estimated that intimate partner violence cost the nation over $5.8 billion each year with the majority being attributable to medical and mental health costs and the remaining in lost productivity.[33] Updating these figures to only 2003, the number jumps to a staggering $8.3 billion.[34]

Due to its significant societal impact, there should be a substantial interest in addressing the domestic violence epidemic,[35] which includes successfully prosecuting domestic violence cases.[36] The societal benefits of domestic violence prosecution are two-fold: prosecution is an outward manifestation of the states'

(2009), http://esuite.qa.marykay.com/en-US/About-Mary-Kay/PressRoom/PressReleases/Pages/mary-kays-truth-about-abuse-survey-links-economic-downturn-to-national-increase-in-domestic-violence.aspx. A survey of 600 domestic violence shelters across the United States revealed a staggering 75% increase in female abuse victims since 2008, which may correlate to an economic downturn. *Id.*

[29] DEP'T OF HEALTH & HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 5 (2003), http://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf.

[30] *Id.*

[31] Jennifer E. Truman & Rachel E. Morgan, *Domestic Violence Accounted for About a Fifth of All Violent Victimizations Between 2003 and 2012*, U.S. DEP'T OF JUSTICE (2014), http://www.bjs.gov/content/pub/press/ndv0312pr.cfm. Overall, 76% of domestic violence was against females and 24% against males. *Id.* In addition, domestic violence is highest in the 18- to 24-age range. *Id.* Finally, for victims age 12 and over, multiracial, non-Hispanics had the highest rate of domestic violence (16.5 victimizations/1000 persons). *Id.* The following is a breakdown of rates of domestic violence for other ethnicities: blacks had 4.7 victimizations/1000 persons; whites had 3.9 victimizations/1000 persons, Hispanics had 2.8 victimizations/1000 persons; and other non-Hispanics had 2.3 victimizations/1000 persons. *Id.*

[32] DEP'T OF HEALTH & HUMAN SERVS., *supra* note 29, at 13-19.

[33] *See Intimate Partner Violence: Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 3, 2015), http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html.

[34] Wendy Max et al., *The Economic Toll of Intimate Partner Violence Against Women in the United States*, 19 VIOLENCE & VICTIMS 259, 259 (2004).

[35] *See* Andrew King-Ries, Crawford v. Washington*: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 307 (2005) (citing Heather Fleniken Cochran, Note, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 TEX. J. WOMEN & L. 89, 95 n.38 (1997) (arguing that the harm flowing from an incident of domestic violence extends beyond the victim to the children of the household (who may also be victims and is more likely to continue the cycle of abuse later in life) and also the community at large)).

[36] *See* Thekla Hansen-Young, *Considering the Constitutionality of a Confrontation Clause Exception for Domestic Violence Victims*, 14 BUFF. WOMEN'S L.J. 81, 89 (2006) (arguing the state has an interest in protecting the well-being of women, the most likely domestic violence victims).

seriousness to address the domestic violence epidemic and successful prosecution decreases the chances of victim re-abuse.[37]

Recognizing the substantial interest in curtailing domestic violence, the justice system has undergone a major reform in the past forty years.[38] The most recent wave of reform focuses on implementing mandatory intervention procedures for domestic violence cases, including mandatory arrest and "no-drop" policies.[39] While it is evident that these mandatory intervention policies have increased the number of domestic violence cases that enter the justice system,[40] the ultimate success of the policies is debatable because if the arrested offender is not prosecuted and convicted, the victim will likely not be in a safer position.[41]

B. Prosecutorial Challenges in Domestic Violence Cases

Domestic violence prosecutions have inherent challenges, most notably, the high prevalence of the victim's recantation or sheer refusal to testify.[42] There are normally very few witnesses to domestic violence incidents and the defendant, who is often shielded by the Fifth Amendment privilege, is the only witness, other than the victim, to hear the victim's statements. [43] As such, the victim's participation in

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[37] *Id.* at 90.

[38] Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case But Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 196-98 (2008) (citing State v. Pettie, 80 N.C. 367, 368 (N.C. 1879) ("It is settled law of this state that the courts will not invade the domestic form or interfere with the right of a husband to control or govern his family . . . ."); State v. Oliver, 70 N.C. 60, 61-62 (N.C. 1874) ("It is better to draw the curtains, shut out the public gaze, and leave the parties to forget and forgive."); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 9-13 (1999)). Historically, there was minimal intervention for domestic violence because it was considered a private matter within the family. Starting in the 1970's and into the 1980's, spurred by the Women's Rights Movement, many states started to adopt criminal and civil remedies for domestic violence. *Id.* at 196-97. Although the majority of states codified the criminality of domestic violence, these reforms did not mandate that the justice system take any action. *Id.*

[39] Kohn, *supra* note 38, at 199. Jurisdictions adopting a mandatory arrest policy statutorily command their police officers to make arrests when probable cause is found in a domestic violence cases. *Id.* Similarly, in "no-drop" jurisdictions, the discretion of the prosecutor is eliminated because policy mandates that all charged domestic violence cases be pursued. *Id.*

[40] *Id.* (citing Renee Romkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 YALE J. L. & FEMINISM 265, 265 (2001)).

[41] *See id.* at 237 (arguing that for a mandatory arrest policy to be beneficial to the victim, a jurisdiction needs to have the resources to handle the likely increase in caseload).

[42] *See* Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 281 (2006) (citing People v. Brown, 94 P.3d 574, 576 (Cal. 2004) (reporting approximately 80% of domestic violence victims do not cooperate with the prosecutor's efforts in prosecuting the abusers)). *See also* Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 S. CAL. L. REV. 213, 236 (2005) (citing Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 139 n.108 (1991) (reporting that 96% of domestic violence victims in some jurisdictions refuse to cooperate with the prosecution)).

[43] *See* Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 7 (2002) (citing Donna M. Matthews, *Making the Crucial Connection: A Proposed Threat Hearsay Exception*, 27 GOLDEN GATE U. L. REV. 117, 138 (1997)).

the prosecution against the abuser is paramount and can prevent a case from being dismissed.[44]

The controlling and violent nature of domestic violence leads many victims to recant.[45] Victims are often threatened with further violence from their abusers during prosecution,[46] or alternatively, met with extreme flattery to encourage recantation.[47] In addition to the threat of violence and intimidation, there are other reasons for victim recantation: financial dependence on the defendant, pressure from friends and family, love for the defendant and a hope that he or she will improve, and having children with the defendant.[48]

Due to the high likelihood that the victim witness will be "unavailable" because of recantation or refusal to testify, it is not uncommon for domestic violence prosecutions to be carried out without the victim.[49] Pre-*Crawford*, these so-called "victimless prosecutions" relied heavily on many forms of hearsay, including victim statements made to 911 operators and police.[50] However, with current uncertainty surrounding the admissibility of the non-testifying victim's statements, *Crawford* may have the unfortunate impact of reversing the nation's long and hard fought battle of domestic violence reform.[51]

*C. Prosecutorial Challenges Compounded Post-*Crawford

The Supreme Court's decision in *Crawford* further magnified the inherent challenges facing domestic violence prosecution and threatened the ability of the government to pursue "victimless" prosecutions successfully.[52] First, victims are less likely to report the abuse because of the legal obstacles that await them, including threats of and actual imprisonment for refusal to cooperate with the

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[44] *See* Percival, *supra* note 42, at 236 (citing Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L.J. 1041, 1047 (2000)).

[45] *See Brown*, 94 P.3d at 577-78. The intimate and strong emotional relationship between the abuser and victim creates a sense of loyalty that the victim affords the abuser. *Id.* at 575. This loyalty causes the victim to protect the abuser by recanting the statement or refusing to testify. *Id.*

[46] *See* Lininger, *supra* note 8, at 769 (citing Randall Fritzler & Lenore Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, 37 CT. REV. 28, 33 (2000) (reporting that one study found that over half of the victims of domestic abuse are threatened with retaliatory abuse)).

[47] *Id.* at 751-52.

[48] *Id.*

[49] King-Ries, *supra* note 35, at 301. "Victimless" prosecution is also known as evidence-based prosecution. *Id.*

[50] *Id.*; *see also* Lininger, *supra* note 8, at 820 (reporting that before *Crawford*, a majority of district attorney offices in California, Oregon, and Washington reported that their offices relied on hearsay in over 50% of domestic violence cases).

[51] *See* Percival, *supra* note 42, at 217 (citing Nathan Max, *Domestic Violence on Decline*, PRESS ENTERPRISE (Riverside, Cal.), Dec. 21, 2004 at A1).

[52] *See id.* at 216-17 (citing Wendy N. Davis, *Hearsay, Gone Tomorrow?: Domestic Violence Cases at Issue as Judges Consider which Evidence to Allow*, A.B.A. J., Sept. 12, 2004, at 22, 24 (observing that since *Crawford*, there has been much confusion in the lower courts on how to successfully prosecute domestic violence cases, resulting in many dropped cases)).

prosecution.[53] Prosecutors recognize the importance of the victim participation and may take extreme measures to ensure it.[54] In addition, some abusers use their awareness of the increased likelihood of a case being dismissed when victims fail to testify to dissuade their victims from contacting the police in the first place.[55]

Second, because abusers recognize the importance of the victim testimony at trial, they are incentivized to taunt, scare, and otherwise intimidate their victims to ensure recantation or their "unavailability" for trial.[56] Witness tampering, such as this, is prolific and extremely damaging in domestic violence cases, both to the success of the prosecution and the harm to the victim.[57] Lastly, prosecutorial resources and overall judicial economy are threatened with the enhanced confrontation protection that *Crawford* provides.[58] Domestic violence defendants are now more likely to go to trial versus take a plea deal, as they did much more readily pre-*Crawford*.[59]

Domestic violence prosecution has shouldered the brunt of the impact felt by *Crawford* and its progeny.[60] The uncertainty of the admissibility of the non-testifying victim's statement has made it essential for the prosecution to have victim participation. However, many domestic violence offenders recognize this importance and use it to their benefit. Thus, without the victim, many more domestic violence cases are dropped.[61]

II. PROSECUTORIAL STRATEGIES

In light of such practical concerns for both witnesses and victims, prosecutors have pressed for ways in which the actual "physical" component of the Confrontation Clause might be dispensed with.[62] Accordingly, as the notion of

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[53] *Id.* at 241. Victims with knowledge of the criminal justice system will be less trustful of prosecutors and fear of their own prosecution for refusal to testify could prevent domestic violence victims from coming forward because of adverse implications on later child custody or family court proceedings.

[54] *Id.*

[55] Buel, *supra* note 1, at 1331 (reporting that some abusers actually explain to their victims that the case is likely to be dropped if they do not appear in court).

[56] Lininger, *supra* note 42, at 300 (citing Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 459 (2006)).

[57] Buel, *supra* note 1, at 1323-33 (citing Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(D)(1)(A) to Protect Domestic Violence Victims in a Post-*Crawford *World*, 27 PACE L. REV. 199, 217 (2007)). Witness tampering is the "most common crime committed by batterers;" however, it is rarely prosecuted. *Id.* at 1322.

[58] Lininger, *supra* note 42, at 297.

[59] *Id.* (citing Lininger, *supra* note 8, at 820). A study of district attorney's offices in Oregon, Washington, and California found that 59% of domestic violence defendants are less likely to plead guilty post-*Crawford*. *Id.*

[60] Percival, *supra* note 42, at 216.

[61] Lininger, *supra* note 8, at 820. Jurisdictions in Oregon, Washington, and California are dismissing around 75% of charges. Percival, *supra* note 42, at 217. In addition, as a result of the *Crawford* decision, one jurisdiction has dismissed up to a dozen domestic violence cases a day because of the victim's refusal to participate in the prosecution. Lininger, *supra* note 8, at 772.

[62] Mattox v. United States, 156 U.S. 237, 243 (1895) (opining that "general rules of the law of this

physical confrontation gradually became equated with the right to cross-examine[63]—a witness who was physically in the courtroom during a trial was obviously available for cross-examination—a legal evolution occurred in which cross-examination rather than physical presence became the keystone of compliance with the Confrontation Clause.[64] However, further evolution resulted in the substitution of "inherent reliability" for the right of cross-examination itself—presumably on the theory that cross-examination was only required for less than reliable testimony, but not for out of court statements that were "inherently reliable." This process culminated in the case of *Ohio v. Roberts* in which the Supreme Court set forth two basic requirements for admitting uncross-examined prior statements into evidence against an accused: (1) unavailability of the testifying witness at trial;[65] and (2) a finding of reliability of the out of court

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kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case"). The *Chambers*' Court "recognized that competing interests, if 'closely examined,' . . . may warrant dispensing with confrontation at trial." Ohio v. Roberts, 448 U.S. 56, 64 (1980) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). *See generally* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996); Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843 (2002) (observing that prosecutors ramped up domestic violence charges and no-drop policies in the 1990s in response to "monumental" societal obstacles). One might conclude that *Crawford* responded by reasserting the origins of the Confrontation Clause in a stricter sense and that the Court in *Giles* similarly tempered hearsay rule exemptions by denying the forfeiture by wrongdoing exception when the defendant's intent was not addressed by the court. *See* Giles v. California, 554 U.S. 353 (2008). Thus, as in O.J. Simpson's trial for the murder of his wife, the murdered victim's journal was excluded. In response, the state enacted section 1370 of the California Code of Evidence, which would admit witnesses' statements to police but which was usurped by *Crawford*. CAL. EVID. CODE § 1370 (1997). *See* Melissa Moody, *Domestic Violence Victims: Applying the "Testimonial Statements" Test in* Crawford, 11 WM. & MARY J. WOMEN & L. 387, 397 n.59 (2005). Thereafter, the Court in *Davis v. Washington* and *Michigan v. Bryant* limited the admissibility of 911 calls for unavailable witnesses. *See* Davis v. Washington, 547 U.S. 813, 826-28 (2006); Michigan v. Bryant, 562 U.S. 344, 361-78 (2011). *See also* Percival, *supra* note 42, at 234 n.118 (noting that an interview with the Head Deputy of the L.A. County District Attorney reported post-*Crawford* threats to arrest domestic violence victims in order to secure testimony). Therefore, the current relationship of domestic violence cases within the realm of criminal procedure, where the rights of victims are at odds with those of the defendant, is tenuous and arguably unjust. While a court should effect all of a defendant's constitutional rights, including that of confrontation, it is irrational to expect domestic violence victims, frequently the only witnesses to the crime, to confront their abusers, particularly when they are deceased or in danger. *See, e.g.*, LENORE WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS, 42-45, 55-70 (1989) (explaining the cycle of domestic violence).

[63] *Roberts*, 448 U.S. at 63-64 (quoting *Mattox*, 156 U.S. at 242-43 ("[T]he Clause envisions 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'")).

[64] The Court in *California v. Green* stated that face-to-face confrontation "forms the core of the values furthered by the Confrontation Clause." California v. Green, 399 U.S. 149, 157 (1970). Cross-examination, however, is "a primary interest secured by [the Confrontation Clause]." *Roberts*, 448 U.S. at 63 (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

[65] *Roberts*, 448 U.S. at 65 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968); Motes v. United States, 178 U.S. 719 (1900)).

statement, which in turn could be satisfied by it meeting the requirements of a firmly rooted hearsay exception,[66] or other indicia of reliability.[67]

In 2004, the Supreme Court abruptly put a stop to the evolution of the law of confrontation along the lines of *Roberts* in *Crawford v. Washington*.[68] Rejecting the entire notion that any mere "indicia of reliability"[69] could ever serve as a constitutional substitute for the basic right of cross-examination itself,[70] the Court stated clearly that "[t]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless . . . the defendant had had a prior opportunity for cross examination."[71] Significant in this quote is the word "prior," suggesting that the cross-examination necessary to comply with confrontation need not be at the trial itself, but could be performed by the defendant prior to trial. Indeed, as early as in the case of *California v. Green* in 1970, the Supreme Court rejected the notion that the availability of cross-examination of a witness *prior* to trial would not satisfy the Confrontation Clause.[72] Rather, according to the Court, what was important in terms of the Confrontation Clause, was not the timing of the cross examination, but rather whether the cross-examination, whenever conducted, challenged "whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended message is adequately conveyed by the language he employed."[73]

Indeed, there is evidence that the most effective cross-examination is that which is conducted very soon after the events to which the witness testifies.[74] A

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[66] *Roberts*, 448 U.S. at 66 (quoting *Mattox*, 156 U.S. at 244 ("[H]earsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'").

[67] *Mancusi*, 408 U.S. at 213 ("The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the statement.' It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability' . . . ." (internal citations omitted)).

[68] Crawford v. Washington, 541 U.S. 36 (2004).

[69] *Id.* at 60.

[70] *Id.*

[71] *Id.* at 54.

[72] California v. Green, 399 U.S. 149, 165 (1970) ("For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.").

[73] Ohio v. Roberts, 448 U.S. 56, 71 (1980) (citing David Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378 (1972)). The *Roberts* Court looked to the principal purpose of cross-examination being satisfied in order to comport with the Confrontation Clause. *Id.*

[74] Elizabeth F. Loftus et al., *Semantic Integration of Verbal Information Into a Visual Memory*, 4 J. EXPERIMENTAL PSYCHOL. 19, 19, 24-25 (1978) (cited in Maria S. Zaragoza et al., *Misinformation*

cross examination conducted at the trial itself, which may take place many months, or even years, after the event to which the witness testifies, is less likely to be effective given that the witness may have honest lapses of memory, or in the case of a witness inclined to prevaricate or lie, have considerable time to get his story straight or make it more bulletproof.[75]

In this regard, it may be useful to note that in criminal cases, there is generally no proceeding similar to the taking of depositions in civil cases in which a witness's statement may be preserved long before the trial,[76] and discovery is strictly limited.[77] Indeed, a defense counsel in a criminal case generally has no right to even interview prosecution witnesses before trial,[78] and savvy prosecutors are often quite adept at insuring that their witnesses' statements remain oral and, thus, are not available in written form to defense counsel, under even a typical prosecutor's generous "open file" policy.[79] It is true that preliminary hearings in felony cases may give a defense counsel an opportunity to cross-examine a prosecution witness, but given the low burden of proof in such hearings and the dubious chance to win the case at that stage, the defense uses this "opportunity for

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Effects and the Suggestibility of Eyewitness Memory, *in* DO JUSTICE AND LET THE SKY FALL: ELIZABETH F. LOFTUS AND HER CONTRIBUTIONS TO SCIENCE, LAW, AND ACADEMIC FREEDOM 35-63 (Maryanne Gary & Harlene Hayne eds., 2006)).

[75] Domestic violence victims may refresh their memory by their prior written statements though their memory need not be perfect so as to result in conviction. *See* State v. Widder, No. 21383, 2003 WL 21697868, at *3 (Ohio Ct. App. July 23, 2003). *See also* Smith v. State, 684 S.E.2d 354 (Ga. Ct. App. 2009) (victims of aggravated assault were treated as hostile witnesses by prosecutor due to their lack of memory). In one case of incest, a thirteen year old did not testify about molestation that occurred when she was nine years old and had trouble remembering upon multiple depositions what had in fact occurred, and the Supreme Court of Florida found that the state's discovery deposition evidentiary rule was insufficient to meet the *Crawford* confrontation standard because the defendant was not present and could not cross-examine her. State v. Contreras, 979 So. 2d 896 (Fla. 2008). Otherwise, according to one expert, a domestic violence "victim might come to court and either minimize what occurred or deny that any physical contact took place. The vast majority of victims are reluctant to testify against their abusers. The victim might also have selective memory when testifying or lie under oath to help the abuser." People v. Moore, No. B181862, 2006 WL 990374, at *7 (Cal. Ct. App. Apr. 17, 2006).

[76] Affidavits are functional witnesses, thus absent a showing that the affiant is unavailable to testify at trial or there was a prior opportunity to cross-examine them, the Confrontation Clause would be violated by an affidavit's admission not accompanied by the affiant. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009) (stating, "the sky will not fall" under this holding as the states had served as laboratories).

[77] Discovery, while neither a constitutional right nor available except by motion, is subject to FED. R. CRIM. P. 16 (stating repeatedly, "upon a defendant's request, the government must disclose . . ." relevant discovery) and the *Brady* rule. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (stating "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment . . .").

[78] Defense counsel is limited to the witness list per FED. R. CRIM. P. 16(a)(1)(G) and FED R. EVID. 702.

[79] Discovery is not constitutionally founded, though the *Brady* rule requires divulgence of exculpatory or mitigating evidence to comply with the defendant's due process right to a fair trial and jurisdictional rules, including court rules and professional conduct rules adopted by states, require disclosure of certain information during discovery. *Brady*, 373 U.S. at 87. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2011) (stating that prosecutors are subject to discipline for abusive investigatory practices and discovery abuses).

cross-examination" less often for purposes of actually impeaching or discrediting a witness—and thus alerting both the witness and prosecutor to counsel's cross-examination techniques likely to be used at trial. Instead, its use is as a substitute for a deposition in which the primary motive for cross-examination is not to discredit or impeach the witness, but rather to garner information and pin down the witness's testimony.[80] Even where a defense counsel is prepared to pull out all the stops in discrediting a witness in hopes of gaining dismissal, the lapse of as much as thirty days from the event to which the witness if testifying detracts from the effectiveness of the cross-examination. Furthermore, the prosecution is not obligated to call all of his witnesses at the preliminary hearing, and may not do so if he is confident that a single witness will be sufficient to show probable cause. Of course, there is no opportunity for the defense to cross-examine a witness in a grand jury proceeding, or to cross-examine any of the prosecution's future witnesses.[81]

III. *CRAWFORD* AND THE RESURRECTION OF THE PHYSICAL COMPONENT OF CONFRONTATION

*A. Pre-*Crawford *Confrontation Law:* Ohio v. Roberts

The Confrontation Clause of the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[82] Long before the current Confrontation Clause was written, an accused had the right to confront his witness.[83] The Confrontation Clause stems from English common law, where live testimony was traditional.[84] In *Ohio v. Roberts*, the Court incorporated the hearsay rules of evidence into the

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[80] Although the Constitution guarantees that the states hold neither a grand jury indictment nor a preliminary hearing, the Fourth Amendment requires a determination of probable cause within 48 hours of a defendant's custody. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 45 (1991).

[81] Grand jury proceedings occur without judge where the interested prosecutor and the jurors themselves play a quasi-judicial role, the proceedings are sealed, and the defendant neither has representation nor is typically permitted to be aware of the proceeding's existence. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."). Grand juries follow FED. R. CRIM. P. 6. Their purpose is "to determine whether there is sufficient evidence to justify a formal accusation against a person" and to "stand between the government and the person being investigated by the government" thus ensuring innocent persons are not subject to trial specifically should not be "an instrument of private prejudice, vengeance, or malice." Judicial Conference of the United States, *Model Grand Jury Charge*, paras. 19-20 (Mar. 2005), http://cldc.org/wp-content/uploads/2012/10/model-gj-charge.pdf (stating that, "[o]rdinarily, neither the person being investigated by the government nor any witnesses on behalf of that person will testify before the Grand Jury" and "witnesses are not permitted to have a lawyer present with them in the Grand Jury room"). *See also* DeCamp v. Douglas Cty. Franklin Grand Jury, 987 F.2d 1047, 1050 n.2 (8th Cir. 1991) (reiterating that grand jurors play a quasi-judicial role and also stating that grand jurors, as a discretionary instrument, possess absolute immunity as protection from reprisal or intimidation).

[82] U.S. CONST. amend. VI.

[83] *See* Crawford v. Washington, 541 U.S. 36, 43 (2004).

[84] *Id.*

principle of confrontation, and set forth a test which upheld the admissibility of prior uncross-examined statements if: (1) the witness was not available; and (2) the statements met "indicia of reliability" by falling within a firmly rooted hearsay exception.[85]

In *Roberts*, the accused was charged with forging a check and possessing stolen credit cards.[86] He argued that the victim's daughter gave him the credit cards and allowed him to use the checkbook.[87] In a preliminary hearing, the witness stated that she did not provide Roberts with the credit cards or access to the checkbooks.[88] She later absconded, and, despite the efforts of her parents and the prosecuting attorney, could not be available at trial as a witness.[89] The question eventually presented to the Supreme Court was whether testimony from a witness, the victims' daughter, should be admitted as evidence.[90] The constitutional question behind this issue is whether the admission of this prior testimony would violate the Confrontation Clause.[91] Taken literally, the Confrontation Clause would exclude every statement in which the prosecuting witness did not *physically* confront the accused.[92] The *Roberts* Court reasoned that the Confrontation Clause was meant to exclude some hearsay evidence, but "competing interests . . . may warrant with dispensing with confrontation at trial."[93] The interpretation of the Clause in this case regards the instance when witnesses are unavailable for direct confrontation at trial.[94]

Relying on a compilation of prior Supreme Court holdings, the *Roberts* Court reasoned that exceptions should exist[95] to the strict reading of the Clause,[96] and should allow trustworthy hearsay from unavailable witnesses.[97] The Court held that witness statements are admissible if that witness is unavailable at trial[98] and the statements "bear adequate indicia of reliability."[99] Furthermore, the Court

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[85] Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).

[86] *Id.* at 58.

[87] *Id.* at 59.

[88] *Id.* at 58.

[89] *Id.* at 59-60.

[90] *Id.* at 58.

[91] *Id.* at 62.

[92] Christine Holst, Note, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599, 1601 (2010).

[93] *Roberts*, 448 U.S. at 64. These competing interests are set forward in a non-exhaustive way by the *Roberts* Court. *Id.* at 64-65. The mobility of the public demands some concessions from the judiciary. Witnesses may move, become unavailable, or refuse to testify after making a preliminary statement.

[94] *Id.* at 58.

[95] *Id.* at 65. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) ("[G]eneral rules . . . must occasionally give way to considerations of public policy and the necessities of the case.").

[96] *Roberts*, 448 U.S. at 65; *see* Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

[97] *Roberts*, 448 U.S. at 65.

[98] *Id.* at 65-66 ("The prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."); *see also* Mancusi v. Stubbs, 408 U.S. 204 (1972).

[99] *Roberts*, 448 U.S. at 66.

directly connected the Confrontation Clause to hearsay exceptions by stating that reliability is established if the statement fits within a hearsay exception.[100] Even in instances outside of hearsay exceptions, evidence can be admitted if it is clearly trustworthy as a matter of law.[101] The *Roberts* Court decided to leave the question of the opportunity for or actual cross-examination for a later date.

The Supreme Court in *Roberts*, however, did make some interesting statements regarding testimony and confrontation at preliminary hearings.[102] In *Roberts*, the defendant extensively cross-examined the relevant witness, but prior rulings hinted at the fact that the opportunity for cross-examination would suffice for Confrontation Clause challenges.[103] In contrast, the *Crawford* Court examined *California v. Green*, in which evidence was permitted in trial after the defendant had the opportunity to cross-examine the witness during a preliminary hearing, but did not choose to do so.[104] Under this test reliability and an opportunity for cross-examination satisfied the Confrontation Clause.[105]

The Supreme Court created a new standard in *Crawford*.[106] Before *Crawford*, the courts allowed evidence that passed the reliability test, created in *Roberts*.[107] This test was satisfied if the witness was unavailable to testify for any reason, and his or her statements were reliable as a matter of law.[108] A reasonable litmus test for the success of a test like the *Roberts* test is whether the test is reliable and predictable. *Crawford* appeared before the Supreme Court solely due to the unpredictability of the *Roberts* test.

B. Crawford v. Washington: *Addressing Unpredictability of the* Roberts *Test*

The facts in *Crawford v. Washington*[109] perfectly demonstrated the problems with the *Roberts* test.[110] In *Crawford*, the prosecution tried to admit evidence, in the form of statements to the police, from the defendant's wife.[111] This evidence consisted of statements made to the police after an altercation between her husband and another man.[112] Applying the *Roberts* test, the Washington State Superior

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[100] *See id.*

[101] *See id.* at 70; *see also Mancusi*, 408 U.S. at 213.

[102] *See Roberts*, 448 U.S. at 70.

[103] Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure:* Crawford*'s Birth Did Not Require that* Roberts *Had to Die*, 2 J.L. & POL'Y 685, 687 (2007). Roberts extensively cross-examined his adverse witness during a preliminary hearing.

[104] Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004); *see* California v. Green, 399 U.S. 149 (1970).

[105] *Crawford*, 541 U.S. at 59 n.9.

[106] *Id.* at 68-69.

[107] *Roberts*, 448 U.S. at 66.

[108] *Id.*

[109] *Crawford*, 541 U.S. 36.

[110] *See id.* at 36.

[111] *Id.* at 38.

[112] *Id.*

Court allowed the evidence, and Crawford was convicted of first-degree assault.[113] In the court's view, the statements had "particularized guarantees of trustworthiness," and thus had the required "indicia of reliability" of the *Roberts* test.[114] Crawford appealed the allowance of his wife's statements to the police, and the Washington Court of Appeals reversed.[115] This court applied a nine-factor test to examine the trustworthiness of the statements,[116] and reasoned that the statement contradicted one made previously.[117] The Washington Court of Appeals held that the statement did not have "particularized guarantees of trustworthiness."[118] On review, the Washington Supreme Court reversed and reinstated the trial court's verdict.[119] The Washington Supreme Court held that the statements did not fall within hearsay exceptions, but did have guarantees of trustworthiness.[120] Furthermore, the court held that the statements were trustworthy under a rationale similar to the justification for reversal in the appellate court.[121] The witness's statements were similar to those made by the defendant; thus, they were deemed reliable.[122] This reliability exists even though the statements contradicted regarding the most important facts of the event in question. All three lower courts applied the facts of the case to the test, and ended with conflicting results.[123] The court also noted each result could be acceptable under the *Roberts* test.[124] The Supreme Court allowed for the creation of a new approach to the Confrontation Clause that was both reliable and predictable.

Coincidentally, the Supreme Court took a textual approach to its reinvigoration of the Confrontation Clause. The first question presented by Justice Scalia in the Supreme Court's opinion "is whether this [case] complied with the Sixth Amendment's guarantee that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'"[125] The historical approach to the Confrontation Clause relies on the confrontation itself as the guarantor of trustworthiness,[126] with confrontation coming in the vein of cross-

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113 *Id.* at 41.

114 *Id.* at 40.

115 *Id.* at 41.

116 *Id.*

117 *Id.*

118 *Id.* at 40.

119 *Id.*

120 *Id.* at 41.

121 *Id.*

122 *Id.*

123 *See id.*

124 *Id.*

125 *Id.* at 38; U.S. CONST. amend. VI.

126 *See* Maryland v. Craig, 497 U.S. 836, 845-46 (1990). Although the *Craig* Court appealed to history with the statement of confrontation being the guarantor of trustworthiness, the Court found an exception for alleged child abuse victims. *Id.* Like the *Roberts* Court that dispensed with face-to-face confrontation for practical and policy reasons, the *Craig* Court allowed closed-circuit televisions to serve as the vehicle for testimony during trial. *Id.* at 855-56. This approach, unlike the absent witness in *Roberts*, affords the jury the opportunity to see and examine the witness, albeit from a closed-circuit

examination.[127] The historical motivations for the Sixth Amendment include in large part this reimagining of the Confrontation Clause.[128] This application of the Confrontation Clause allows for some flexibility as to statements and witness appearances in court, but it is not as broad as the *Roberts* test. Witnesses that are unavailable to appear in court may have their statements admitted,[129] but only if they were previously subjected to cross-examination or their statements were non-testimonial.[130]

Although the Supreme Court clarified the Confrontation Clause in *Crawford* by eradicating the *Roberts* indicia of reliability test, it created a new ambiguity for cases that would involve the Confrontation Clause. The *Crawford* Court created a spectrum for the testimonial vis-à-vis non-testimonial scale, without establishing a test to determine whether a specific statement or piece of evidence fell under either title. The Court left this ambiguity for later courts to fill in as public policy and the facts of a particular case necessitate.[131] The *Crawford* rule does not allow testimonial statements to be used as evidence without the opportunity for cross-examination.[132] The Supreme Court noted that it would not state the test for a testimonial statement,[133] but reasoned that the facts of the case before the Court certainly satisfied any future test that the nature of the statements were testimonial.[134] The witness made statements to the police after the conclusion of the events.[135] This witness certainly knew that her statements would be utilized in the proceedings of the predictable criminal trial.[136] Thus, the *Crawford* Court gives one example of a testimonial statement: one made to the police.[137]

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feed. The *Craig* Court believed that the use of a closed-circuit feed satisfied the goals of both the contact portion of the Confrontation Clause and the policy goals of protecting vulnerable witnesses. *Id.* at 855-57.

[127] *See* California v. Green, 399 U.S. 149, 165 (1970). The defendant in this case was under oath, represented by counsel, and was available for cross-examination. *Id.* The court reasoned that his statements met the criteria for suitable confrontation if he was unavailable for trial. *Id.*

[128] *Crawford*, 541 U.S. at 50.

[129] *Id.* at 59.

[130] *See* Sheckles v. State, 24 N.E.3d 978 (Ind. Ct. App. 2015). The trial court admitted video evidence regarding an alleged drug purchase. *Id.* at 987. The Indiana Court of Appeals held that the admission of this video evidence was non-testimonial, but even testimonial video or photographic evidence could be admitted with the opportunity for cross-examination. *Id.*

[131] *Crawford*, 541 U.S. at 68.

[132] *Id.* at 68-69.

[133] *Id.* at 68.

[134] *See also* State v. DeLeon, 341 P.3d 315, 333-35 (Wash. Ct. App. 2014). The defendants did not have the opportunity to cross-examine the testimony regarding gang documentation forms. *Id.* These forms, however, were found to be non-testimonial because the individual did not act as a witness against the defendant. *Id.*

[135] *Crawford*, 541 U.S. at 38.

[136] *See* State v. Payne, 104 A.3d 142, 163 (Md. Ct. App. 2014) (further discussing the *Crawford* approach to deciding an issue of whether evidence is testimonial). Testimonial evidence included police interrogations and statements made before the court. *Id.* at 164. Furthermore, wiretapped conversations are non-testimonial, therefore their inclusion did not violate the defendant's Confrontation rights. *Id.*

[137] *Crawford*, 541 U.S. at 56, 66 (discussing an example of a generally non-testimonial statement, a business record). *Cf.* Kirksey v. Alabama, CR-09-1091, 2014 WL 7236987, at *32 (Ala. Crim. App.

*C. Post-*Crawford *Confrontation Law*

As to *Crawford*'s progeny, those cases set forward the factors that make statements testimonial in nature. Statements are deemed testimonial when the person making them has a reason to believe that the statements would or could appear as testimony in a courtroom.[138] Since the tactics of using hearsay exceptions and the indicia of reliability were necessarily abandoned after the *Crawford* ruling, prosecutors had to find a new way to use witness testimony outside of the standard trial appearance. Many tried to expand the category of non-testimonial statements, since the only testimonial statement afforded was a statement made to the police.[139] The *Crawford* holding only applied the Confrontation Clause to testimonial statements.[140] Non-testimonial statements were still examined under hearsay rules,[141] with possibly even less of a barrier than the *Roberts* test.

In addition to defining "testimony" for application in a Confrontation Clause analysis, one later case also shifted the ambiguity from the term "testimony" to "emergency."[142] In *Davis v. Washington*, the Supreme Court created a loophole for statements that a witness could reasonably believe would end up as evidence in court.[143] Under this new rule, statements made in emergency situations are regarded as non-testimonial.[144] The *Davis* Court reasoned that people in those circumstances do not act as witnesses,[145] since their statements allow law enforcement to meet an ongoing emergency.[146] The Court further noted that

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Dec. 19, 2014). A business record-type document can be testimonial if the author acts as a witness against the alleged perpetrator. In this case, the record was inadmissible because the document was testimonial and the defendant had no opportunity for the requisite cross-examination. *Kirksey*, 2014 WL 7236987, at *31-32.

138 *Crawford*, 541 U.S. at 51.

139 *Id.* at 68.

140 *Id.*

141 *Id.*

142 G. Kristian Miccio, *What's Truth Got to Do with It? A Deontological Critique and Response to Tom Lininger's Article Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 39, 43 (2007) (citing Lininger, *supra* note 42, at 280). Although many court opinions treat the Confrontation Clause as a truth-seeking enterprise, the justice system is adversarial in nature, and confrontation fits within that paradigm. The Confrontation Clause guarantees an opportunity to undermine a prosecutor's case, be it with the truth or by injection of reasonable doubt into any potential jurors.

143 Davis v. Washington, 547 U.S. 813 (2006).

144 *Id.* at 828. In *Davis*, a domestic violence victim called 911 during the attack. *Id.* at 817. She identified her attacker to the 911 operator, and the prosecution used this information during trial. *Id.* The identification was during the scope of an emergency. *Id.* at 828. In this line of cases, it thus incentivized treating a period of emergency as a long length of time, because more evidence could be presented in court. In fact, evidence during a single interaction can change from testimonial to non-testimonial.

145 *Id.*

146 *Id.*; *see also* United States v. Liera-Morales, 759 F.3d 1105, 1109-10 (9th Cir. 2014). This case regarding an ongoing hostage situation also falls within the emergency doctrine established by the *Davis* Court. The primary purpose of the call was to allow agents to respond to the hostage situation, even though the provided information also included statements about past events. *Id.* The court reasoned that these statements, even though not solely current, were made with the intention of resolving the hostage

statements could become testimonial during the course of an interaction between law enforcement and potential witnesses.[147] Thus, this holding refines the only example given in *Crawford*, providing a non-testimonial exception to statements made to the police. Although the focus of the analysis still remains with the testimonial nature of statements, many cases after *Davis* relied on statements made during the course of an emergency.[148] The emergency doctrine also applies in situations in which the witness is not the individual facing the emergency.[149]

Furthermore, a new approach to using statements that would not normally pass under the *Crawford* test is the use of the doctrine of forfeiture by wrongdoing. After *Crawford*, testimonial statements that had not been subjected to cross-examination would be admitted under two exceptions, dying declarations and forfeiture by wrongdoing.[150] Dying declarations have routinely been admitted under Confrontation Clause challenges.[151] In addition, testimonial statements may be admitted if the defendant, by his or her own wrongdoing, forfeited the right to confronting the witnesses against them.[152] The forfeiture by wrongdoing doctrine may allow many statements made by domestic violence victims, due to the fact that the acts in question could be construed to entail the required specific intent to

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crisis. *Id.*

147 *Davis*, 547 U.S. at 828.

148 *See* State v. Hill, 336 P.3d 1283, 1289 (Ariz. Ct. App. 2014). Although many cases rely on the declaration of evidence as non-testimonial through the emergency situation doctrine, many useful pieces of evidence can fall under the exception for medical examinations. In this case, a medical professional performed an exam after the victim was assaulted. *Id.* at 1285. Although the court reasoned that the situation was no longer a pressing emergency, the general justification behind the emergency situation doctrine still applied. *Id.* at 1288-89. (The medical professional desired to gain information relevant to the exam and the patient's health.) Thus, this non-testimonial sphere of evidence includes many sources during the course of a normal investigation.

149 *See* State v. Falkins, 146 So. 3d 838, 848 (La. Ct. App. 2014). In this case, three separate callers made 911 calls during the course of an attempted break-in. *Id.* The first call came from an individual inside the apartment, who happened to be the defendant's girlfriend. *Id.* The second call came from the apartment security worker, who saw the defendant trying to kick open the door to an apartment. *Id.* The third call came from the victim's sister, who also happened to be inside the apartment. *Id.* The court held that all three calls fell under the emergency doctrine, because the information given to the 911 operator was intended to aid in the resolution of an ongoing emergency. *Id.* at 848-49. The court reasoned that the information was presented as an account of current events, not as a statement of the past that would qualify the statements as testimonial. *Id.* Although the first and third callers were indisputably facing an ongoing emergency, the apartment security guard was not in immediate danger or an integral figure in the emergency in question. *Id.* Nonetheless, the security guard's statements were allowed into evidence as non-testimonial statements outside the *Crawford* requirements for further confrontation.

150 Michael Vargas, *Prosecuting Domestic Violence After* Giles*: Why a Categorical Approach to the Forfeiture Doctrine Threatens Female Autonomy*, 20 DUKE J. GENDER L. & POL'Y 173, 173 (2012).

151 Crawford v. Washington, 541 U.S. 36, 55 n.6 (2004).

152 Brittain v. State, 766 S.E.2d 106, 112 (Ga. Ct. App. 2014). An abduction victim, and also a witness to the murder of her husband, went missing during the scope of the investigation into the named defendant. *Id.* at 108-10. Her calls to friends immediately after she escaped her abductor, as well as her 911 call upon arriving safely at the nearest payphone, were allowed as evidence without the question of whether those calls were testimonial or non-testimonial evidence. *Id.* at 111 n.15. The court followed the precedent of the forfeiture doctrine and reasoned that the conduct of the defendant eliminated his Confrontation rights. *Id.* at 113.

alienate witnesses.[153] There are many challenges to this approach to prosecuting domestic violence cases. In effect, the defendant would be held guilty of the acts for which he or she is on trial to admit evidence.[154]

Recently, the Supreme Court further discussed *Crawford* and the Confrontation Clause in light of testimonial and non-testimonial statements.[155] The question in *Ohio v. Clark* was whether statements made by a three-year-old child were testimonial in nature, therefore implicating the Confrontation Clause under *Crawford*.[156] The lower courts disagreed on whether the statements made to a teacher regarding abuse at home were testimonial.[157] In holding that the statements did not implicate the Confrontation Clause, the Supreme Court noted the relevant factors for consideration. Statements made by children, especially children as young as the abused in this case, "rarely, if ever, implicate the Confrontation Clause,"[158] because children, and the witness in this case, cannot have the purpose of making statements for future use in a criminal proceeding.[159] In addition, the teacher who received and acted upon the statements was not a law enforcement officer, and did not have the primary goal of responding to the current situation for the safety of the child.[160] *Crawford* provided a new template for the Confrontation Clause, with the Supreme Court and lower courts defining the necessary terms for its current application.

IV. A PROPOSED *CRAWFORD*-COMPLIANT PROCEDURE: THE PROMPT POST-ARREST CONFRONTATION HEARING

Two facts, thus, demonstrate the appropriateness of an alternative *Crawford*-compliant approach, which will serve to address the concerns of witness safety, particularly in domestic violence cases: the most productive cross-examination is likely to be the one closest in time to the events to which the witness will testify, and the specific recognition in *Crawford* and *Green* that the opportunity to cross-examine "prior" to trial satisfies the Confrontation Clause.[161]

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153 Vargas, *supra* note 150, at 175.

154 *Id.* at 180.

155 Ohio v. Clark, 135 S. Ct. 2173 (2015).

156 *Id.* at 2177.

157 *Id.* at 2178 ("Clark moved to exclude testimony about L.P.'s out-of-court statements under the Confrontation Clause. The trial court denied the motion, ruling that L.P.'s responses were not testimonial statements covered by the Sixth Amendment . . . . Clark appealed his conviction, and a state appellate court reversed on the ground that the introduction of L.P.'s out-of-court statements violated the Confrontation Clause. In a 4–to–3 decision, the Supreme Court of Ohio affirmed. It held that, under this Court's Confrontation Clause decisions, L.P.'s statements qualified as testimonial because the primary purpose of the teachers' questioning 'was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution.'" (internal citations omitted)).

158 *Id.* at 2182.

159 *Id.* at 2181.

160 *Id.* at 2182 ("It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality.").

161 Crawford v. Washington, 541 U.S. 36, 54 (2004) (finding that the confrontation clause could be satisfied if the witness was "unavailable to testify, and the defendant had had a prior opportunity for

In the aftermath of *Crawford v. Washington*[162] and *Davis v. Washington*,[163] prosecutors are anxious to protect their witnesses from intimidation, coercion, or wrongdoing to prevent their appearance in court. Thus, they have resorted to three main legal strategies: (1) making the case to the court that the uncross-examined, out of court statement they want to introduce is not "testimonial,"[164] citing the *Crawford* principle that non-testimonial statements are excluded from application of the Confrontation Clause;[165] (2) offering evidence to the court purporting to show that the defendant "engaged in conduct designed to prevent the witness from testifying," citing the 2008 Supreme Court case of *Giles v. California*; [166] or (3) in the rare cases to which it applies, the Dying Declaration,[167] citing *Crawford*'s

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cross-examination"); California v. Green, 399 U.S. 149, 166 (1970) ("'[T]here may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable . . . .,'" as support of a conclusion that "respondent had every opportunity to cross-examine [the defendant] as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, [defendant's] statement would . . . have been admissible at trial even in [defendant's] absence if [defendant] had been actually unavailable, despite good faith efforts of the State to produce him. That being the case, [the Court does] not think a different result should follow where the witness is actually produced." (citing Barber v. Page, 390 U.S. 719, 725-26 (1968)). Courts have held that prior testimony from preliminary hearings or probable cause hearings were admissible in later trial under the confrontation clause. State v. Crocker, 852 A.2d 762 (Conn. App. Ct. 2004). Such was echoed in an unpublished California case, which overcame the objection that "[defendant] did not have adequate opportunity to cross-examine this witness" by stating that "[defendant] had an opportunity to cross-examine [the witness] at the preliminary hearing about the 'facts and circumstances' of the incident." People v. Sharpe, B169924, 2004 WL 1771481, at *4 (Cal. Ct. App. Aug. 9, 2004). Even preliminary hearings where the attorney differed from that representing the defendant at trial did not disqualify cross-examination because the defendant was the common denominator, according to one unpublished Michigan case. People v. Tincher, Nos. 246891-92, 2004 WL 1460687, at *3 (Mich. Ct. App. June 29, 2004).

[162] *Crawford*, 541 U.S. 36.

[163] Davis v. Washington, 547 U.S. 813 (2006).

[164] Michigan v. Bryant, 562 U.S. 344, 361 (2011) (defining as outside the scope of the confrontation clause those responses to interrogations intended to diffuse an ongoing emergency which presumably lacks the testimonial purpose that would prescribe defendant's subjection to "the crucible of cross-examination").

[165] *Id.*

[166] *Giles*' denial of forfeiture by wrongdoing is resolved by European courts as stating that, though the accused may be innocent until proven guilty, the victims may be presumed to be actual victims rather than alleged victims until proven otherwise such that alleged defendant is separated from alleged accused. Giles v. California, 554 U.S. 353, 358-64 (2008).

[167] Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1426 (2010) (citing Shepard v. United States, 290 U.S. 96, 104 (1933) (declarations are not necessarily reliable anyway though they may possess vital information); Mattox v. United States, 156 U.S. 237 (1895); Mattox v. United States, 146 U.S. 140 (1892); Price v. State, 98 P. 447, 454 (Okla. Crim. App. 1908), *abrogated by* Simpson v. State, 876 P.2d 690 (Okla. Crim. App. 1994) (stating "[e]xperience teaches us that men do not always speak the truth in the presence of certain death"); King v. Woodcock, 168 Eng. Rep. 352, 354 (K.B. 1790) (finding admissible a dying wife's declaration that her husband beat her, causing severe injuries). *See* Richard D. Friedman, *Adjusting to* Crawford: *High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 12 (2004) (noting denial of a legitimate claim by an accused who wrongfully caused a witness to be unavailable at trial). *See also* Jack Achiezer Guggenheim, Essay, *The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine, and Now, the Supreme Court*, 87 KY. L.J. 417, 418 (1999) (noting the gall of the accused who killed someone then demanded the dead victim testify against him).

acknowledgement that this particular hearsay exception, being "sui generis," has a rock solid common law pedigree.[168]

Unfortunately for the cause of intimidated witnesses and victims of domestic violence, none of these prosecutorial strategies has adequately addressed the problems created by *Crawford*. Concededly, much data is unavailable regarding the exercise of prosecutorial discretion not to prosecute domestic violence cases, or whether the decision not to prosecute in an individual case can be attributed to heightened confrontation standards imposed by *Crawford* in the aftermath of the demise of *Roberts*.

As predicted by those who concurred in *Crawford* and foresaw in the new "testimonial" test a new litigation flashpoint just as problematic and arbitrary in application as the old "indicia of reliability" test of *Roberts*,[169] the "testimonial" test remains in legal flux and its definition is still largely unrefined.[170] There are two doctrines that allow admission of testimonial statements, forfeiture by wrongdoing and dying declarations. The requirements for asserting the forfeiture by wrongdoing standard have been set so high in *Giles* that most prosecutors attempt to admit the evidence by arguing that the statements were non-testimonial.[171] Dying declarations, while presumably qualifying for exemption from application of confrontation, rest primarily on dictum by the Supreme Court,[172] and are applicable in only a very narrow set of circumstances.[173]

The alternative *Crawford*-compliant approach for protecting witnesses and victims consists in the following two primary elements:

1. A small courtroom located conveniently near a police station should be constructed or set aside, and a private defense counsel or public defender

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168 Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004).

169 *Id.* at 75. (Rehnquist, J., concurring).

170 State v. Stahl, 855 N.E.2d 834, 840 (Ohio 2006) ("The court in *Crawford* expressly declined to define testimonial, but it did give three examples of formulations for testimonial statements that historical analysis supports. The first deems testimonial all *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. The second includes all extrajudicial statements contained in formalized testimonial matters, such as affidavits, depositions, prior testimony, or confessions. And the third includes statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (internal quotation marks and citations omitted)).

171 *See* James F. Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing:* Davis v. Washington *and the Necessity of the Defendant's Intent to Intimidate the Witness*, 15 J.L. & POL'Y 863, 893-94 (2007) (citing United States v. Williamson, 792 F. Supp. 805, 810 (M.D. Ga. 1992), *aff'd*, 981 F.2d 1262 (11th Cir. 1992), *rev'd on other grounds*, 512 U.S. 594 (1994); State v. Washington, 521 N.W.2d 35, 42 (Minn. 1994); State v. Romero, 133 P.3d 842, 856 (N.M. Ct. App. 2006)). When a living witness refuses to testify, questions of intent apply to the decision not to cooperate. *Id.* Also, any intimidation must occur concurrently with the decision not to cooperate with prosecutors or with the litigation process. *Id.*

172 Kirby v. United States, 174 U.S. 47, 61 (1899).

173 *See* Flanagan, *supra* note 171, at 888-90. This limited exception requires that the decedent satisfy a test of knowledge and acceptance of death before the exception applies.

retained on 24-hour call to represent an accused who has been arrested and brought to the police station for booking. In addition, a magistrate must also be on call. A system of notifying the prosecutor's office of an impending hearing could also be implemented, though the prosecutor's presence, though advisable, would be optional and not required.

2. Immediately upon either the termination of an interview with an arrested assault or domestic violence suspect, but before release or remand to jail pending a bond hearing, the defense counsel on call should be appointed to represent the defendant. Then, the victim should be asked to appear at the hearing, preferably within hours of the suspect's arrest, but in any case as soon as practical, to make his or her statement under oath and subject to open-ended cross-examination by the defense counsel. If the defendant wishes to call his own attorney for purposes of the confrontation hearing, this request should be granted if chosen counsel can appear promptly. In addition, if the suspect declines to participate in the hearing, he may choose to waive his right to cross-examination in writing.

The proposed procedure satisfies not only the *Crawford* requirement of "prior" opportunity for cross-examination, but also provides the opportunity for more effective cross-examination by a defense counsel since the witness-victim would be testifying while the events to which she is testifying are still fresh in her mind. The possible objection that the appointed counsel does not have sufficient time to prepare for cross-examination (by for example, researching the victim's criminal record) is adequately addressed by Rule 806.[174] In any case, the same objection could be made to permitting the opportunity for cross-examination at a preliminary hearing to satisfy the requirement for prior opportunity to cross-examine, but that argument has already been posed and rejected by the Supreme Court in *Green*.[175] Thus, if the defense learns after the confrontation hearing that the witness or victim has been convicted of a felony or made prior inconsistent statements, the defense would have an opportunity at trial to introduce any additional impeaching evidence it has even if the declarant does not testify at trial.[176]

It should also be noted that "unavailability" would continue to be a requirement under the proposed procedure.[177] However, the paramount feature of the proposed procedure is that there would no longer be any incentive for a suspect to intimidate or harass a witness, or engage in conduct that would cause the witness-victim's unavailability.[178] The procedure would be particularly helpful in

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[174] FED. R. EVID. 806.

[175] *See* California v. Green, 399 U.S. 149, 165 (1970).

[176] FED. R. EVID. 806.

[177] Ohio v. Roberts, 448 U.S. 56, 77 (1980).

[178] Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal*

those "no-drop"[179] jurisdictions where it is required for a prosecutor to proceed with prosecution of a domestic violence case even where the witness-victim declines for whatever reason to cooperate with the prosecution.

V. RESPONDING TO POTENTIAL OBJECTIONS TO THE PROMTP POST-ARREST CONFRONTATION HEARING

An anticipated objection to the proposed prompt post-arrest confrontation hearing is that the motive of the cross-examiner would not be sufficiently similar to the motive that would be demonstrated at trial for the unavailable witnesses' statements to be used as evidence.[180] If the goals at a preliminary proceeding and subsequent trial are not similar, then the goals of that later examination could not be considered satisfied, and those earlier statements should not be admitted.[181]

In *United States v. DiNapoli*, the nature of the proceedings in which questioning occurred was different, one being a grand jury proceeding and the other being the trial.[182] The precise issue was whether the prosecutors had a similar motive in examining two grand jury witnesses, as they would have, had the opportunity to cross-examine at trial been available.[183] The witnesses testified to the non-existence of a "club" implicated in a RICO proceeding.[184] The government urged that the motive could not be similar because it was the aim of the prosecutors to determine whether there should be further indictments.[185] During the grand jury proceeding, the prosecutors asked whether the witnesses knew of the "club," then pressed the veracity of the witnesses' denials by bringing up the only piece of evidence in the public record.[186] The prosecutor, however, had more evidence that it was unwilling to present before the grand jury.[187] The

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Protection Mandate?, 52 STAN. L. REV. 205, 217-18 (1999) ("[M]any batterers . . . stop harassing their victims" once the incentive is removed." (citing Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1079-80 (1996)).

[179] *See* Robbins, *supra* note 178, at 217 (citing Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 857 (1994)). Even though no-drop jurisdictions have a harder course of inaction, cases are still dropped due to lack of evidence and cooperation. *Id.*

[180] *See Roberts*, 448 U.S. at 71. The *Roberts* Court asserted that the Confrontation Clause was satisfied by the goals and objectives of cross-examination, even if cross-examination itself did not occur at trial. Furthermore, "the principal *purpose* of cross-examination: to challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.'" *Id.* (citing Davenport, *supra* note 73).

[181] *See* United States v. DiNapoli, 8 F.3d 909, 914-15 (2d Cir. 1993).

[182] *Id.* at 909.

[183] *Id.*

[184] *Id.* at 911.

[185] *Id.* at 915.

[186] *Id.* at 911.

[187] *Id.* ("The prosecutor, obviously skeptical of the denials, pressed DeMatteis with a few questions in the nature of cross-examination. However, in order not to reveal the identity of then undisclosed cooperating witnesses or the existence of then undisclosed wiretapped conversations that refuted DeMatteis's denials, the prosecutor refrained from confronting him with the substance of such evidence.

prosecution argued that this difference included dissimilar motives in terms of approach and overall questioning.[188]

The *DiNapoli* Court began its inquiry by clarifying the approach to determine whether a party's motives were substantially similar in the way required by Rule 804(b)(1).[189] Instead of relying upon whether a side takes the same position, the party must have a substantially similar interest in asserting that position or side of an issue.[190] Although grand jury questioning and trial proceedings are markedly different in burdens of proof and general approach to questioning, the *DiNapoli* Court rejected the government's position that a prosecutor would never have the same motive in a trial as a grand jury interrogation.[191] Furthermore, the determination of whether there was a substantially similar motive must be fact specific.[192] Under the proposed solution, the confrontation hearing examination would have the substantially similar motive of discrediting the witness.[193] Although the *DiNapoli* Court, ultimately, held that the motives were not similar enough to allow the statements to be admissible, this decision provides a framework for demonstrating the sufficiently similar motives inherent in the proposed solution.[194]

Another potential objection is that the cross-examiner would not have all of the available information at the time of the examination. Although more evidence would come to light after the initial examination, this lack of a complete record does not affect the proposed use of these statements in a later proceeding.[195] In *United States v. Koon*, there was video evidence that showed the infamous arrest of Rodney King, as well as a taped interview with one of the officers from a state court proceeding.[196] At the time of the interview with Briseno, its key officer

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Instead, the prosecutor called to DeMatteis's attention the substance of only the one relevant wiretapped conversation that had already become public—a tape played at a prior trial." (internal citations omitted)).

188 *Id.* at 914.

189 *Id.* at 912; *see also* FED. R. EVID. 804(b)(1) ("Testimony that: (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination" is not excluded.).

190 *Id.*

191 *Id.* at 914.

192 *Id.*

193 *Id.* at 914-15 ("The proper approach, therefore, in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.").

194 *Id.* at 915.

195 *See* Delaware v. Fensterer, 474 U.S. 15, 20 (1985); United States v. Koon, 34 F.3d 1416, 1427 (9th Cir. 1994), *aff'd in part, rev'd in part*, 518 U.S. 81 (1996); United States v. McClellan, 868 F.2d 210, 215 (7th Cir. 1989); United States v. Salim, 855 F.2d 944, 953–54 (2d Cir. 1988); Thomas v. Cardwell, 626 F.2d 1375, 1386 n.34 (9th Cir. 1980), *cert. denied*, 449 U.S. 1089 (1981).

196 *Koon*, 34 F.3d at 1426-27.

witness [197] at the state court proceeding, the opposing party had the opportunity to and did in fact cross-examine Briseno about his statements.[198] Koon argued that the opportunity to cross-examine was hindered because the Holliday tape (recording King's arrest) was better developed at the time of the later proceeding.[199] Koon specifically argued that the examination of Briseno could have been more complete with the enhanced video, because more information would have changed the questioning.[200] Thus, it was argued that the prior testimony should not be allowed as evidence because the previous cross-examination was completed with information that may have altered the course of the questioning.[201]

The *Koon* Court, however, held that the later availability of important information did not constitute a lack of opportunity of cross-examination at an earlier proceeding.[202] Specifically, having the opportunity to cross-examine is the necessary limit to use of earlier statements as evidence, not taking full advantage of that opportunity.[203] The *Koon* holding applies to this proposed solution because of the inherent lack of a full evidentiary record at the time of the confrontation hearing. The proposed solution, however, provides the necessary opportunity for cross-examination along with the requisite substantial similarity of motives.

CONCLUSION

The Supreme Court decision in *Crawford v. Washington*, holding that prior statements of victims and witnesses are inadmissible at a criminal trial unless the victim is unavailable to testify at trial and the defendant has had a prior opportunity to cross-examine the witness, need not put victims at risk of intimidation, threat, and death if, in accordance with *Crawford*, defendant is accorded an opportunity to cross-examine the victim immediately upon his arrest either at the police station, at

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197 *Id.* at 1426. Briseno was one of the officers involved in the incident. *Id.* He was very vocal regarding his opposition to the tactics in question. *Id.*

198 *Id.* at 1427.

199 *Id.*

200 *Id.*

201 *Id.* at 1426 ("At the state trial, Briseno was cross-examined by all three of his codefendants as well as the prosecutor, who spent part of his time trying to establish Briseno's own culpability."). The video benefited from enhancements after the initial trial, which would have allowed for a more complete line of questioning.

202 *Id.* at 1427 ("The failure of a defendant to discover potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine . . . . often information will surface after a trial that, if known to a defense attorney, would have made the cross-examination of a witness more thorough or even more advantageous to the defendant. Nevertheless, that lack of information does not make the opportunity for cross-examination ineffective even though the cross-examination itself is less than optimal for the defendant." (internal citations omitted)).

203 *Id.* (citing United States v. McClellan, 868 F.2d 210, 215 (7th Cir. 1989) ("[T]he emphasis in [the Rule 804(b)(1)] inquiry is upon the motive underlying the cross-examination rather than the actual exchange that took place."); United States v. Salim, 855 F.2d 944, 953-54 (2d Cir. 1988) (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (under Rule 804(b)(1), the defendant is entitled to "'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'")).

arraignment, or immediately thereafter.[204] Giving the defendant such a prompt opportunity to cross-examine would deprive the defendant of the time needed to arrange, plan, or conspire to intimidate, harass, threaten, bribe, or kill the chief witness against him. It would also provide the defendant with the right to the most effective kind of cross-examination—namely *contemporaneous* cross-examination before the witness has had a chance to revise, reflect, or alter testimony in accordance with possible prosecutorial preparing or coaching. The argument that contemporaneous and immediate cross-examination may be less effective than cross-examination after the cross-examining attorney has had considerable time for investigation and learning additional facts that may be helpful in a later cross-examination has already been rejected by the Ninth Circuit in *Koon*[205] and the Supreme Court in *Green*,[206] and in any case is more than adequately counter-balanced by the advantages to the defendant of the opportunity to cross-examine before the witness can be coached or prepped by the prosecution.

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[204] Crawford v. Washington, 541 U.S. 36 (2004).

[205] *Koon*, 34 F.3d at 1427. *See* Thomas v. Cardwell, 626 F.2d 1375, 1386 n.34 (9th Cir. 1980).

[206] California v. Green, 399 U.S. 149, 165 (1970) ("Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.").