



HAMMON V. INDIANA
AND
DAVIS V. WASHINGTON

TALKING POINTS

WHAT IS CRAWFORD?

- *Crawford v. Washington* was a 2004 United States Supreme Court decision that reformulated the standard for determining when the admission of hearsay statements in criminal cases was permitted under the Confrontation Clause of the Sixth Amendment to the United States Constitution.
- The Court’s decision explicitly stated that any evidence which is "testimonial" in nature is not permissible as a hearsay exception unless the actual witness testifies at trial.
- However, in its decision, the Court failed to define the scope of “testimonial”.
- While the *Crawford* case itself was not related to domestic violence, the Court’s decision in this case has had a resounding impact on the prosecution of domestic violence cases across the country.
- On March 20th, the Supreme Court will hear oral arguments in *Hammon v. Indiana* and *Davis v. Washington*, both requiring clarification on the Court’s definition of “testimonial”.
- In *Hammon*, the issue is whether victim statements to police officers investigating at the scene are “testimonial” – in *Davis* the issue is whether victim statements to 911 operators are “testimonial” – both cases involve domestic violence offenses.
- Without clear guidance on what constitutes testimonial evidence, prosecutors are no longer relying on evidence-based prosecution to hold abusers accountable for their crimes.

DAVIS V. WASHINGTON

- Davis was charged with violating a domestic no-contact order after police responded to a 911 call.
- While on the telephone, the victim identified Davis as her assailant and told the operator that Davis had used his fists to beat her; however, the victim did not testify at trial.
- The state submitted the recording of her 911 call as evidence, over the objections of Davis.
- The Washington Supreme Court affirmed, holding that the 911 call in this case was not a "testimonial" statement under *Crawford* because the 911 call is not of the same nature as an in-custody interrogation by police, so is not the functional equivalent of uncross-examined, in-court testimony.

HAMMON V. INDIANA

- Hammon was charged with domestic battery after police responded to a call from the Hammon residence.
- While being questioned, Mrs. Hammon told an officer that her husband had thrown her to the ground and beaten her; however, she did not testify at trial.
- Instead, the officer testified as to what Mrs. Hammon told him.
- Mr. Hammon's attorney objected to this testimony, but it was allowed under the excited utterance exception to the hearsay rule.
- The Indiana Supreme Court affirmed, defining "testimonial" statements as those where a principal motive of either the person making the statement or the person receiving it is to preserve it for future use in legal proceedings.
- In this case, the officer's motives for questioning Mrs. Hammon were to assess and secure the situation; neither the officer nor Mrs. Hammon intended to preserve Mrs. Hammon's statement as future testimony; the statements were not "testimonial" and therefore were admissible under the exception to the hearsay rule.

WHAT IS EVIDENCE-BASED PROSECUTION

- Since the passage of the Violence Against Women Act in 1994, prosecutors in several states have come to recognize the barriers preventing victims from testifying in court and sought alternative means to obtain reliable evidence. The resulting practice of “evidence-based” prosecution ensures that violent abusers are held accountable when their own conduct makes the victim’s testimony impossible to obtain.
- By focusing on gathering other reliable evidence such as 911 tapes, photographs, medical records, spontaneous declarations by the victim to police officers, and general police officer testimony related to the case, prosecutors could build a case criminal against the abuser without relying on victim testimony.

HOW IS CRAWFORD AFFECTING DOMESTIC VIOLENCE CASES?

- Domestic violence accounts for approximately 1/3 of all violent crimes recorded by police.
- The uncertainty around the meaning of *Crawford* has placed the responsibility of prosecuting domestic violence cases on the victim. Prosecutors are dismissing domestic violence cases when victims are unable to testify, judges are overturning previous convictions when a victim did not testify, and prosecutors are exacting extreme punitive measures such as imprisonment to force victims to testify.
 - Last year, 96% of dismissals in Milwaukee occurred because victims did not appear in court.
 - In Alaska, Kansas, California, New York and many other communities, prosecutors have issued arrest warrants and even jailed victims who refused to testify in court or recanted their statements.
- A study by the University of Oregon Law School found that post-*Crawford*:

- 76% of prosecutors polled indicated that after *Crawford*, they were more likely to drop domestic violence charges when a victim refuses to testify or recants her statement.
- More significantly, 65% of prosecutors believe that victims of domestic violence are now at more risk of danger than before the *Crawford* decision.
- Clearly, prosecutors recognize the dangerous impact of the *Crawford* decision, yet feel their hands are tied.
- The Court must provide a clear definition of the scope of “testimonial” evidence.
- We believe a definition can be crafted that will preserve the intentions of the Confrontation Clause and still continue to allow evidence-based prosecution in appropriate cases.
 - Such a definition could include *ex parte* in-court testimony, statements contained in affidavits, depositions, prior testimonies and confessions as reliable forms of testimony.

HOW THIS IMPACTS VICTIMLESS PROSECUTION STATES

- If the Court reverses, it will make it very difficult for prosecutors to proceed with evidence-based prosecution and victim testimony will be required at trial in order to proceed with cases unless prosecutors can show the victim’s absence is a direct result of the defendant’s wrongdoing, which is very difficult to establish because prosecutors must show the defendant clearly intended to prevent the witness from testifying. Indeed, in many cases it is the *past abuse* and not post-charge conduct that intimidates battered women, and the case law makes it difficult to target that sort of conduct as witness intimidation.
- A reversal may also create incentives for prosecutors wrongly to sanction battered women for refusing to testify, increasing the use of coercive or punitive measures used against victims.

WHAT PREVENTS VICTIMS FROM TESTIFYING

- The original intent of the Confrontation Clause was to prohibit the government from preventing witness testimony on behalf of the accused. What is happening in domestic violence cases is the complete opposite. The accused batterers are using intimidation and a variety of other tactics to keep victims out of the court room and prevent them from testifying.
- It is estimated that battered women recant or refuse to cooperate with the prosecution approximately 80-90% of the time.
- This occurs because many victims fear participation in the judicial process for several reasons:
 - fear for their safety and that of their children
 - the risk of losing their children
 - loss of financial support or employment
 - revictimization and trauma through the judicial process
- The net effect of all these obstacles is that battered women are far more likely to avoid participation in criminal trials or recant their accusations than any other crime victims.
- Without evidence-based prosecution, too many cases would be impossible to prosecute, reversing decades of progress in addressing domestic violence as a crime.

OUR POSITION

- The outcomes of *Davis* and *Hammon* will determine the State's ability to prosecute domestic violence, hold batterers accountable, and provide protection to victims and their children.
- We ask the Court to affirm lower court rulings in both cases and to clearly define the scope of testimonial evidence.
- We believe a definition can be crafted that will preserve the intentions of the Confrontation Clause and still continue to allow evidence-based prosecution in appropriate cases.