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The Nation; Justices May Further Restrict Domestic Violence Testimony

By David G. Savage, Times Staff Writer

Washington, DC – The Supreme Court appears poised to make it far harder to prosecute cases of domestic violence when victims are unwilling or unable to testify in court.

Today, the high court will hear the appeals of two men who were convicted of assaulting women based, in one case, on a recorded 911 call, and in the other, on a police officer's testimony of what the victim told him.

Over the last two decades, prosecutors in domestic violence and child abuse cases have relied heavily on testimony by police officers and counselors who interviewed the alleged victims when they could not or would not appear in court.

But those prosecutions have a formidable foe in Justice Antonin Scalia. He insists the Constitution guarantees all defendants a right to confront their accusers in court, and sees no basis for an exception in cases of domestic violence or child abuse.

Two years ago, Scalia wrote an opinion for the court that all but barred the use of out-of-court statements at trials when the witness is unavailable to testify.

The only sure test of whether "testimonial statements" are reliable, Scalia concluded, "is the one the Constitution actually prescribes: confrontation." The 6th Amendment, he noted, says: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

His opinion in that case, *Crawford vs. Washington*, sent a bolt through prosecution units across the nation.

"It had a huge impact," said Victoria Adams of the Los Angeles County district attorney's family violence division. "In most of our cases, the victims are reluctant or afraid to testify."

Since the *Crawford* decision, she said, prosecutors have relied more on recorded 911 calls and on "spontaneous" statements given to police at a crime scene. The theory is that these statements – which some refer to as "cries for help" – are uniquely revealing and distinct from formal testimony and, therefore, should be allowed in court.

But the Supreme Court appears ready to close that option in the pair of cases to be heard today. Scalia spoke for a 7-2 majority in the *Crawford* case, and the two dissenters – Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor – are now gone as Rehnquist has since died and O'Connor retired.

The National Network to End Domestic Violence and several women's rights groups filed a brief that warned the court about the potential impact of requiring in-court testimony in all cases.

"This would make it very difficult, if not impossible, to prosecute the vast majority of domestic violence cases," said law professor Joan S. Meier of George Washington University, who helped write the group's brief. The victims are "traumatized and terrorized by the defendants themselves, and they can threaten them so they don't testify," she said.

One study found that many such witnesses received threats that their children would be kidnapped if they testified, she said.

Prosecutors in 27 states, including California, have joined with the Bush administration in urging the court to permit the use of 911 tapes and crime scene statements in domestic violence cases. In most states, trial judges permit the use of spontaneous statements given to a police officer at a crime scene. Other states specifically allow the use of "excited utterances," such as a call to a 911 operator.

In briefs filed with the court, civil libertarians and criminal defense lawyers urged the justices to uphold the confrontation right set out in the Constitution.

In 1980, the high court opened the door to using "hearsay" statements in court when they were judged to be reliable. A tape recording of an accuser's words, for example, would be considered reliable.

But shortly after joining the court in 1986, Scalia disagreed and began arguing that the 6th Amendment required a "face-to-face confrontation" in court when a witness accused a person of a crime. He dissented whenever the justices upheld special rules that allowed children who were said to have suffered sexual abuse to testify behind screens or on closed-circuit television.

Liberal justices, including John Paul Stevens, and conservative Clarence Thomas, who joined the court in 1991, agreed with this view. By 2004, Scalia had built a large majority for his opinion in the *Crawford* case.

"In this country, we haven't allowed people to be prosecuted based just on what someone said to a cop on the street," said University of Michigan law professor Richard D. Friedman, who is representing one of the two men whose cases are being heard. "There is not a domestic-violence exception to the Constitution."

Friedman has proposed that the court adopt a simple rule: that a statement made to a police officer or government agent accusing someone of a crime is "testimonial" and cannot be used in court unless the accuser appears to be cross-examined.

In *Crawford vs. Washington*, the court overturned the assault conviction of a man who was found guilty based on his wife's recorded statement at a police station. Scalia said such "testimonial statements" could not be used against a defendant if the witness refused to testify, but he did not say what defined a testimonial statement.

The court agreed to hear the two cases to resolve that question.

In the first case to be heard today, a recorded call to a 911 operator near Seattle provided the testimony that convicted Adrian Davis of violating a restraining order. “He’s here jumpin’ on me again,” a woman later identified as Michelle McCottry told the operator in 2001. Her ex-boyfriend was there, she said, and “he’s using his fists.”

She didn’t appear at the trial, but a prosecutor played the tape for the jury. “She left her testimony on the day this happened,” the prosecutor said. “It is right here in her voice.” The defense lawyer objected, saying Davis had a right to cross-examine the witness in court.

The Washington state Supreme Court upheld Davis’ conviction and said that an emergency report or an “excited utterance” was different from the “testimonial statements” Scalia referred to in his *Crawford* opinion.

The second case began when two police officers responded to a domestic disturbance call in Peru, Ind., in 2003. At first, Amy Hammon appeared too scared to talk. But when one officer took her to the front porch, she said her husband, in a rage, had thrown furniture and a lamp at her and had shoved her into the broken glass on the floor.

She, too, did not testify, but based on the officer’s account of her words, Hershel Hammon was convicted of domestic battery. The Indiana Supreme Court upheld the conviction and said the crime scene report was not a testimonial statement.

Adams, the prosecutor in Los Angeles County, said it would be a significant setback if the high court barred the use of recorded 911 calls. “Since *Crawford*, we have been successful using those calls. Many such cases “come to the attention of law enforcement through a 911 call,” she said.

One remaining option – and one objected to by women’s rights advocates – is to subpoena the victim, or even to arrest her, to force her to testify.

“We can arrest the victim, but we also hate to re-victimize the victim. There is no easy answer to that,” Adams said. “Regardless of what happens, we will do whatever we can. The job has been tougher after *Crawford*, but we will prosecute these cases.”

After hearing arguments in *Davis vs. Washington* and *Hammon vs. Indiana*, the justices will meet behind closed doors and decide on each case. Announcement of the rulings is expected by June.

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