REPORT: A ROUNDTABLE ON THE IMPACT OF *CRAWFORD* ON PROSECUTION OF DOMESTIC VIOLENCE

A partnership of the Battered Women's Justice Project, Inc., the National Council of Juvenile and Family Court Judges, and the U.S. Department of Justice Office on Violence Against Women

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I. INTRODUCTION

Cindy Dyer, JD, Director of the Office on Violence Against Women and former prosecutor, convened this one-day roundtable discussion to explore the impact of the U.S. Supreme Court decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), and progeny, on the prosecution of perpetrators of violence against women. A multi-disciplinary assembly of judges, advocates, attorneys, prosecutors and other professionals were hand-picked to contribute their individual professional expertise, practical knowledge of the field, and experience with the criminal justice system response to domestic violence victims. Participants and facilitators assessed the expansive effect of *Crawford* and its progeny, expressed the voice of victims and professionals not in attendance, and formulated solutions to assuage the negative repercussions of the decision and capitalize on its catalytic potential for an improved, innovative, and zealous criminal justice response to violence against women.

As a result of this discussion, facilitators hoped to:

- Identify the impact of the *Crawford* decision on the prosecution of misdemeanor and felony domestic violence cases;
- Navigate the pros and cons of any solutions practitioners have formulated to assuage the impact; and
- Develop a multi-level, multi-disciplinary plan of action for the effective prosecution of violence against women in a post-*Crawford* world.

II. OVERVIEW OF *CRAWFORD* AND POST-*CRAWFORD* DEVELOPMENTS

Jennifer Long, JD, provided an analysis of the facts and holdings of *Crawford v. Washington*, 124 S. Ct 1354 (2004) and *Davis v. Washington*, 126 S. Ct. 2266 (2006) (consolidated with *Hammon v. Indiana*). Ms. Long commenced the review noting that despite the depth of knowledge and expertise present in the room, generally, those who do not struggle every day with the evidentiary challenges that have arisen as a result of *Crawford* may not realize its impact on practitioners.

A. Crawford: Facts

- Not a domestic violence case
- Attempted murder and assault case
- Witness was wife of defendant
- Defendant claimed self-defense
- Defendant invoked spousal privilege; wife could not testify
- State introduced wife's recorded statement to police to refute self-defense claim
- Defendant argued that the admission of evidence = violation of his 6th Amendment right to confrontation of witnesses against him in a criminal case since his wife would not testify

- Trial court found statement to have "sufficient indicia of reliability" and admitted the statement
- State Supreme Court upheld the conviction

B. Crawford: Holding

- Testimonial hearsay is admissible only when:
  - Prosecution shows the declarant is unavailable (legal definition of *unavailability* applies); **and**
  - There was a prior opportunity to cross-examine the declarant.

C. Davis and *Hammon: Facts*

Davis: Facts	*Hammon*: Facts
DV case Victim called 911 Identified husband and described assault State introduced 911 tape of call Court admitted tape into evidence	DV case Police arrived and wife described how husband assaulted her Victim/wife was on front steps and husband was inside the house when police arrived Wife did not testify Officers testified to victim/wife's statements Trial court admitted statements under "excited utterance" exception to hearsay rule

Issue left unresolved by Crawford: What is testimonial?

D. Davis and *Hammon: Holding*

Statements are testimonial, and therefore trigger the *Crawford* analysis (i.e. unavailability plus prior opportunity for cross-examination) if:

- Circumstances objectively indicate there was no ongoing emergency during statement
- Primary purpose of the interrogation is to aid prosecution

Statements are NON-TESTIMONIAL when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency.

As a result of *Davis*, if a victim gives a statement to a law enforcement officer, and the primary purpose of the victim's statement is not to obtain assistance in an ongoing emergency, then the statement is testimonial. If the witness will not/can not testify, the witness must be legally unavailable and the defendant must have had a prior opportunity to cross-examine the witness.

* The Supreme Court did not define whether 911 is equivalent to law enforcement for purposes of determining whether a statement is testimonial.

E. Crawford & Post-Crawford Developments: Discussion

1. *CRAWFORD*: WHAT DOES IT ALL MEAN?

The *Crawford* decision in 1994 focused on the right of a criminal defendant to confront witnesses against him. The intent of this right, as enshrined in the 6th Amendment, is fairness for criminal defendants. Justice Scalia in the Crawford decision did not provide any guidance as to the definition of testimonial. The Court simply determined that when prosecutors seek to introduce statements that are hearsay, and the declarant does not testify, prosecutors must now overcome two additional hurdles, i.e., the declarant is legally unavailable and there has been a prior opportunity for cross-examination. Then, if the statement is not excluded by *Crawford*, prosecutors must still argue that the statement falls under a hearsay exception in order for the statement to be admissible.

Justice Scalia's decision to leave certain key terms undefined –"testimonial," "interrogation," and "confrontation" – has resulted in a 600-page outline of caselaw across the country and a nation of befuddled criminal justice system professionals. Prosecutors in jurisdictions where it was already difficult to admit hearsay, who had developed finely tuned methods of doing so, now found themselves jumping through additional hoops with no direction. Prosecutors who already avoided pursuing convictions in domestic violence cases with reticent witnesses now had a perfect excuse not to bother.

"It is so important to recognize that people don't get it—people are throwing out Crawford as frequently as they throw out HIPAA[1] as a roadblock. The ramifications go so far beyond the prosecutorial context. Nurses are talking about it all the time and don't really know what it means."[2]

According to roundtable participants, the ruling in *Crawford* and progeny had a chilling effect on judges, prosecutors, and even law enforcement. Further, many defense attorneys recognized its efficacy as a stalemate tactic and proceeded to pose the *Crawford* objection as a matter of course. In fact, some defense attorneys argued it was their ethical duty, as a zealous advocate for their clients, to do so.

Ms. Long noted that the court's concern in *Crawford* was a reasonable one: the court wanted to ensure the fair treatment of defendants. Arguably, the prosecution did violate the defendant's 6th Amendment right in *Crawford* by introducing a statement made to law enforcement that: (1) was taken well after the alleged crime occurred; and (2) read like a

[1] Health Insurance Portability and Accountability Act ["HIPAA"] was enacted in 1996 and caused sweeping changes in most healthcare transaction and administrative information systems and focused on protection of confidentiality and security of health data.

[2] Throughout this document, participant comments will appear in italics.

deposition, not a typical statement to police. However, the aftermath has been widespread misapprehension of when and how prosecutors should argue that *Crawford* does NOT apply.

2. *CRAWFORD* DOES NOT APPLY:

- In civil cases
- To defendant's own statements
- If witness testifies
- To hearsay statements that are non-testimonial
- To dying declarations and business records
- If a victim testifies but legitimately "freezes" on the stand or forgets certain things

3. THE *DAVIS* RULING: WHAT DOES IT MEAN?

In the *Davis* ruling, the Supreme Court provided a little more clarification to decipher when a hearsay statement is testimonial. The court differentiated casual or off-handed remarks from formal statements given to government agents. The court also distinguished "truly excited utterances," both to governmental and non-governmental agents, from statements made to law enforcement when an emergency is no longer in progress. The prosecutors must set forth the analysis to the court. In her presentation, Ms. Long delineated the following factors to guide the inquiry of whether a statement is testimonial:

- To whom was the statement made?
- Who initiated the statement?
- Where?
- Why?
- What was the statement?
- What was the result of the statement?[3]

4. WHAT ABOUT HYBRID STATEMENTS?

"Hybrid statements" are hearsay statements that contain both testimonial and non-testimonial components that create a significant challenge for judges and prosecutors. According to the facilitators, the default reaction is often to exclude the entire statement. However, as with any other evidence, prosecutors can seek to admit the portion of the statements that are not excluded by *Crawford*. It is common, particularly with 911 calls, that a declarant will initially report information in a panic or while still in a state of emergency. Upon further questioning by the operator, the "interrogation" may devolve into a format that is arguably testimonial. In these cases, the court may admit the excited or "emergency" portion, but must exclude the rest of the statement.

[3] See Attachment 1: Roundtable Slides, no. 15

5. "FORFEITURE" AND BEST PRACTICES FOR OVERCOMING LIMITATIONS IMPOSED BY THE *CRAWFORD* DECISION.

Many prosecutors who have experience with the unique challenges domestic violence cases pose have hoped that use of the "forfeiture by wrongdoing" exception to the hearsay rule might assuage some of the additional hurdles *Crawford* has created.[4] Basically, this rule precludes a party from benefiting from his own malfeasance of preventing a witness from testifying so that harmful evidence against him is rendered inadmissible. Those familiar with battering and the use of rulemaking and coercion against battered women can see the similarity between such tactics and tactics utilized in typical witness tampering cases. In some circumstances, the forfeiture by wrongdoing rule is a valuable tool for holding batterers accountable for criminal actions when they have tampered with their victims/witnesses. However, many questions remain unanswered in practice: (1) What do you have to show to prove forfeiture by wrongdoing; and (2) Where do you get the information to prove it?

In order to show a defendant forfeited his right to confrontation, prosecutors must show evidence, including hearsay evidence, that the defendant's actions caused the witness/victim to be unavailable. These forfeiture hearings can include any evidence, including that of prior abuse, testimony from friends, family, advocates, prior records or evidence of dropped charges. Many participants at the roundtable commented that, in an effort to find evidence to prove the defendant's forfeiture, victims may face further victimization by the criminal justice system. For instance, is it in the interest of victim safety that advocates testify about the experiences of the victim? While advocates are in a position to provide a great deal of essential evidence to the criminal justice system, information that may benefit the prosecution, what is the impact on the battered woman? What is the impact on public perception of the role of advocates?

"Do we want law enforcement peeking around even more into the lives of battered women who may already fear the criminal justice system?"

The facilitator identified some ways that prosecutors have effectively gathered information to prove forfeiture by wrongdoing, including subpoenaing tapes of prisoner phone calls and visitor logs, and improving all documentation between the criminal justice system and witnesses. Calls and letters to victims can often substantiate allegations of intimidation or control.

Many fear that garnering evidence of bad behavior alone will not prove forfeiture by wrongdoing, however, with the pending decision in *Giles v. California*.[5] *Giles* may impose an additional step on prosecutors: they must show defendant's wrongdoing against the victim/witness AND show the wrongdoing was committed with the intent to prevent the victim/witness to testify.

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[4] Federal Rule of Evidence 804(b)(6) states that a party cannot exclude a hearsay statement from an unavailable declarant if the party engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

[5] *Giles v. California* was decided after the creation of this report and is available at 128 S. Ct. 2678 (2008).

With the fate of forfeiture by wrongdoing still unknown and the impact of *Crawford* still in flux, Ms. Long stressed the importance of support, honest communication, and a coordinated community response system for victims of domestic violence. Law enforcement must look to more varied sources of information and collect better evidence. Advocates must educate victims and encourage their cooperation with the criminal justice system in a manner that preserves safety first. Prosecutors must remain abreast of the ever changing landscape post-*Crawford* and remain dedicated to prosecuting these increasingly difficult cases.[6]

III. WHAT HAS BEEN THE IMPACT OF *CRAWFORD*?

"This room is filled with the smartest people I know and we don't understand Crawford. Battered women do not understand Crawford. There is no universal battered woman, but they all want justice – whatever that is to them. Battered women are just trying to outrun the train…"

Facilitators led a brainstorm with roundtable participants to identify the impact of the *Crawford* decision and its progeny. Facilitators, with agreement of participants, then categorized the impact as follows:

A. Impact for Battered Women

"I was just at a forum where a sexual assault victim, the mother of a drunk driving victim, and the wife of a murdered police officer spoke about their experiences. When they got to the criminal justice system, they were re-victimized. You would be mad to go through this system. It's I want to get something from you, victim. We spend so much time getting them to do what we want, and the finish line isn't all that fantastic."

Participants agreed that a major impact for victims has been increased pressure to testify in criminal proceedings against their batterers. In some circumstances, the pressure manifests as courts issuing bench warrants for victims and victims facing arrest for refusal to testify. At times, it is Child Protective Services that pressures victims to testify with the threat of losing their children.

Institutionally, victims may realize a false sense of security with criminal justice system intervention. While it may take a victim several attempts to muster the strength and courage to involve the criminal justice system in her personal life, afterwards, she may feel disappointed with the outcome. She may face harassment, invasion of privacy, betrayal of trust, loss of her children, and even prosecution.

"Only 1 in 10 cases are reported and then half are actually prosecuted. Why would you want to use this system?"

The conversation about how best to obtain victim testimony and how best to prosecute perpetrators of domestic violence in light of *Crawford* and progeny sparked debate over a fundamental question: what is the value of criminal justice intervention for battered women?

[6] For additional information, see Attachment 1: Roundtable Slides

More directly, to what end are we, as players in the system, pushing our agenda on unwilling recipients? How much additional harm do we cause?

In the 1970's, when battered women's advocates fought to criminalize intimate partner violence, they did so to protect women, but also to demand change and a societal expression of values: this is a crime; this is not acceptable. Enmeshed in this expression is the assumption that criminal justice intervention will empower battered women and improve their lives. What we now know is that many battered women do not want to see their batterers prosecuted for a host of personal, cultural, social, psychological and economic reasons. We know that very often the response fails and battered women are in more danger with intervention than without. We know that in some cases, the known risk of the batterer's abuse is not as threatening as the unknown risks associated with the loss of his financial support or with the potential backlash of his prosecution. We know that in some communities, the prosecution of a batterer could result in his family and friends punishing the victim and her children.

We also know that there is no universal battered woman and that some women want criminal justice system intervention. We know that in some cases, a victim may simply "need a ride" to the courthouse or she may need to refuse to testify publicly for her own safety, but may still want the state to proceed to prosecute her batterer. We say that a victim knows more about her safety than anyone else and then also stress the need to hold batterers accountable. We urge judges and prosecutors to respect victim autonomy yet hold them responsible for public safety and for the safety of children in homes with violent batterers. These tensions have always existed, but we are forced to re-examine them as *Crawford* and its progeny beg victim cooperation with the criminal justice system more than ever.

"*Can the criminal justice system be a vehicle for victim empowerment and should it be? I think it should—but we are a long way from it and prosecutors and judges are the people who can make it happen. It requires listening to victims. For judges, it involves taking risks, because there will come a day where we will have to do what they ask. We have to—at some point—have trust in victims. It's difficult and not part of the "CYA" plan. But Crawford has the potential to set us back on that path."*

B. Impact for Advocates

Is the role of the advocate individual advocacy or system change? The *Crawford* decision has exacerbated a tension between the role of an advocate as beholden to individual battered women versus as an information sharer and utility for the criminal justice system. If victims refuse to testify, and prosecutors wish to find evidence of forfeiture by wrongdoing, or simply other evidence to buttress the case against a batterer, an advocate is in prime position to provide the needed information. This, in turn, could jeopardize victim safety and have a chilling effect on an individual victim's help-seeking behavior, as well as public perception of the advocate's obligations.

Participants agreed that the propriety of collaboration with the criminal justice system is a vexation for advocates. As one participant noted, confidentiality is used well at times and at

other times it is not. There is much more accurate and voluminous information available when stakeholders collaborate. The collaboration, in many instances, would mitigate the negative impact of *Crawford* for victims because the victim's testimony could be less essential.

However, the role of the advocate, as some participants stressed, is to facilitate the victim's informed decision-making and safety-planning. It is not to speak for the criminal justice system. It is to speak for the victim—in her own words, not the words one might wish she voiced. The *Crawford* decision, in a positive way, has reinforced the value of community intervention and support. Where victims may not wish to testify, some advocates have seen the community galvanize to provide evidence to prosecutors in her stead. Advocates reported that some communities, who have experienced backlash with system intervention, have chosen instead to hold perpetrators accountable for their unacceptable violence within the community, rather than through the criminal justice system.

The roundtable participants noted that there is real value in having both advocates embedded in the system and also independent advocates. System-based advocates should assist victims to navigate the criminal justice system, explain processes, and provide updates on the progress of cases. Independent advocates are essential because they serve as the confidential support system and also assist with triaging of services.

"As an advocate, my job is to help a victim. It can have a tangential benefit of helping the prosecutor, but that's not my job."

"All the issues around advocacy and confidentiality are pre-Crawford, but they are intensified now. So does this case change what we wanted the role of advocates to be?"

C. Attitudinal Impact

Throughout the roundtable discussion, many of the concerns raised about the post-*Crawford* landscape have been classified as attitudinal. Participants noted the emotional impact that *Crawford* has had on prosecutors' practice. Practitioners report a certain level of fear that has deterred prosecutors from moving forward in cases with unreliable witnesses. In one instance, a participant discussed a judge who routinely dismisses domestic violence cases where the victim will not/ cannot testify. The ripple effects of the *Crawford* decision have not missed law enforcement, who participants attest seek charges less often if they deem a victim unlikely to testify. Also on the emotional level for law enforcement, some report feeling crippled in their investigations. While once law enforcement were educated to ask many questions and comfort victims, they now fear any sign of composure in victims, or the use of *pro forma* questioning, will result in the statement's exclusion at trial as testimonial hearsay.

"What we know is you can't move forward without the victim. Arrest means nothing but a night in jail."

Some judges have felt a degree of political pressure as a result of this case. In the *Crawford* decision, the Supreme Court admonished judges to a certain degree, implying judges were "activist," and had lax evidentiary oversight and apathy for defendants' rights. Judges do not want this label.

"It's difficult to be a judge because every judge has a microphone. Crawford exposed the political nature of judges, the incompetence of judges. It required judges to work."

On the other hand, some participants saw the impact of *Crawford* as positive. Particularly for judges, the impact of *Crawford* spoke to the need for a renewed dedication on the part of prosecutors to try cases more effectively and for law enforcement to collect evidence differently. In effect, the holding has acted as a catalyst to all the players in the criminal justice system to work a little harder. One judge at the roundtable likened the aftermath of *Crawford* to so many other hurdles that have arisen in domestic violence cases. Why should our response in this case be so different?

"I am hearing your issues, but this is déjà vu with other issues in DV: prosecutors having to try cases better, train police better, bring more resources, stop dismissing misdemeanor cases…We have always figured out ways to go at it. I've seen prosecutors back off because they misread Crawford. So stop putting young attorneys in DV courts and place more seasoned prosecutors there. As a judge, I am the trier of fact—put your best case forward! Maybe one of the impacts is that it forces everyone to be more creative, diligent…raise the level of importance."

D. Legal Impact

Attitudes can be overcome, but many participants at the roundtable reported that the result of these cases, particularly of *Davis*, has been a failure of justice based on a misunderstanding of what it means to be a domestic violence victim in fear of an abuser. In *Hammon*, the Supreme Court determined that statements made to a law enforcement officer from a victim of domestic violence were testimonial because the "ongoing emergency" ended when the police arrived. This, despite the fact that the alleged perpetrator was still in the house. Since the statements were deemed testimonial, the court would not admit them into evidence without the victim to testify.

Participants at the roundtable lamented the decision because of its impact on victimless prosecution of domestic violence offenders—most often propelled forward on the statements told to law enforcement:

"Scalia said since an officer arrived she was no longer in danger. It wasn't Crawford that tanked us—it was Hammon."

One former prosecutor noted that in a domestic violence case, the victim might still be terrified despite the presence of law enforcement. She knows her abuser; she knows his capability. If he is in the next room, or in the next country, she is still scared because eventually he will get to her. But now, these comments to officers are inadmissible in the most dangerous cases: the ones where the victim is too terrified to appear in court, or has been threatened not to appear in court. As one prosecutor noted:

"I have no problem that court is an adversarial system, but it has to be an informed adversarial system and when I have judges saying that since the batterer is in another room she is no longer controlled by him—that is not an informed system. The legal analysis has divorced itself from reality."

However, some judges still see the viability of victimless prosecutions in these cases if judges are knowledgeable about domestic violence, if prosecutors diligently try their cases, and if law enforcement is trained in best practices.

"A judge can still find this is not like Hammon or Davis and find there was an ongoing emergency. The prosecutors need to supply me with something so I can say there was still an emergency, even though the cops were there. Just because he stepped out the door doesn't mean the emergency is over."

According to participants, the cases that are most impacted by this decision are the misdemeanors. Misdemeanor cases, typically, have the least amount of evidence, have the lowest level of political importance, and, without victims, take the most time to prosecute effectively. One jurisdiction has begun taking statements from every defendant in every domestic violence case to increase the likelihood of prosecution. Defendants themselves have become one of the most promising sources of evidence post-*Crawford*. Some jurisdictions have

also begun using technology to provide prosecutors with evidence and discovery as expediently as possible, so that prosecutors can prioritize which cases have the best chance of success early on.

One participant said that in her jurisdiction the majority of domestic violence homicides did not have prior domestic violence prosecutions in those relationships. However, where there had been a prosecution in the same relationship prior to the homicide, they were misdemeanors, not felonies. She has heard similar findings from other jurisdictions. The *Crawford* decision necessitated that prosecutors reallocate limited resources to misdemeanor cases due to the increased difficulty of evidenced-based prosecution. Participants commented that, as a result of the strained resources, prosecutors really need an effective, safe method to prioritize cases; one that includes some contextual assessment of a batterer's risk and potential lethality.

Crawford and its progeny also have an impact on cases that utilize psychological reports or other forensic and scientific evidence. These reports, which often rely on a composite of research and interviews of collateral sources, may no longer satisfy the Confrontation Clause unless each source is available to testify. As an example, in a case where the defense claims insanity, the psychological evaluator might interview several people and consult numerous sources to develop his assessment. It is now likely that all of those sources must be available to testify or the report could be inadmissible.

E. Impact Discussion: Points of Consensus

- *Crawford* shed a light on the deficiencies that have always existed in the criminal justice system
- The criminal justice system is not a panacea for domestic violence, but one leg of an effective response
- *Crawford* does not mean we should start arresting battered women to coerce them to testify in court
- *Crawford* does not mean we should abrogate advocate confidentiality
- There is no universal battered woman
- Conviction of a batterer is not always the best outcome for battered women
- *Crawford* has had an impact on resources and the scarcity of resources compels an effective, safe system for prioritizing cases and assessing batterers.

IV. DEVELOPING SOLUTIONS: CASE STUDY

Julia calls 911 and tells the dispatcher that her husband has just hit her and that he's been drinking and yelling at her all night. The dispatcher hears a man in the background, yelling at the caller and threatening " to make it worth her while" if she is talking to the police. When police officers respond, the husband is not in the home. Julia says that her husband, Oscar, grabbed the phone from her, slammed it against the wall and left it in his truck. The officers complete their investigation and report. The police report includes a short statement from Julia that "things have been so much better since he had stopped drinking." According to the report, Julia came home late from work, and her husband immediately began yelling at her and wanting to know where she had been; that she could tell he had been drinking beer again; and, when she tried to go to the bedroom, he blocked the doorway and hit her face and then pushed her to the floor. One of the officers did take photographs of Julia, whose face was slightly

reddened and swollen on her left side. The report also includes a statement from Julia that "she should not have called the cops, it wasn't so bad this time."

Oscar is located the next day at his workplace and arrested. He refuses to make any statements to police. Arraignment takes place two weeks after his arrest. After arraignment, the victim/witness coordinator contacts Julia regarding the trial date. Julia tells the coordinator that the defendant has been contacting her about the case. When asked to describe the contact, Julia says that her husband has called her a few times and told her how sorry he is about their argument, that he is back in AA classes and that if they can work past this, maybe he'll be able to take her on a "real" honeymoon.

Two weeks before the trial, victim/witness coordinator contacts Julia about scheduling her testimony. Julia says that she is not coming to trial and that she will not testify. When asked what happened, Julia only says that she should never have called the police, that the whole situation was a big misunderstanding and that the charges have never gone this far before. When the victim/witness coordinator tries to ask about further contact with her husband, Julia tells coordinator that they "are working things out" and hangs up the phone.

Having requested a copy of Oscar's criminal history, the prosecutor sees that he has been arrested two other times in the last 18 months for domestic assault, although both charges were dismissed. Oscar also has a prior conviction for driving under the influence from two years ago. Prosecutor's office issues a subpoena for Julia to appear at trial, which is served upon her. Julia does not show for trial at her appointed time to testify.

Participants were asked to analyze the facts of the case and develop solutions with attention to the following concerns:

- Effect on victim and child safety
- Offender accountability
- The effort to change norms that support domestic violence

Initially, participants overwhelmingly stated they would prosecute a case with these facts and did not see a substantial impediment to proving the case in light of the evidentiary hurdles *Crawford* poses.

"Can use the 911 call and evidence of the injury and not push on the victim's comment to the police."

"Even without trying to prove he forfeited his right to confrontation, you could get in her statement to 911 because it is non-testimonial."

Participants stated that they would prosecute Oscar because he is a repeat offender and is harassing her. Nothing in the fact pattern led participants to feel Oscar might change his behavior on his own, and there was a sentiment that prosecution might be the catalyst for him to change. Further, participants felt they *could* prosecute this case, even without the victim, and their ability to do so was a huge factor.

The concept that participants should prosecute because they *can* stimulated a discussion on the purpose, benefit, and harm of prosecution. A judge/participant reminded others that Julia might have more information than anyone about what she needs to remain safe, and that forcing a prosecution could have the opposite effect. Others noted that he would get very little time, if any, in their jurisdictions and this also would increase the risk of harm to Julia.

While participants agreed they would not arrest the victim, some stated they would send an investigator to her to ensure her safety and "offer her a ride" to court. One former prosecutor noted that she would often encourage victims when on the witness stand to say whatever would keep them safe. At that point, since the victim was present, there would no longer be a *Crawford* issue. Others had concerns about this tactic, and suggested that to appear in court at all could, in some cases, prove highly dangerous for victims.

"Crawford does not mean hauling in all the victims."

Participants also agreed that what Julia needs most are resources and advocacy. Julia might have, in fact, agreed to testify if she had a knowledgeable advocate to guide her through the process.

This was not a case that alarmed participants enough to staunchly advocate prosecution. Some facts that would have increased the concern for participants were: presence of firearms, presence of children, if the batterer was a law enforcement officer, and any of the known lethality factors.

V. *CRAWFORD*: SOLUTIONS

Throughout the roundtable, participants, by consensus, identified the following solutions to improve the criminal justice system response to domestic violence in light of the *Crawford* decision and its progeny:

- The system and the community must improve communication with victims
- We must mobilize the community to provide interventions, such as the restorative justice model
- We must continue to educate and motivate all system players
- We must seek the input of those we wish to help: "Nothing for us, without us."
- We must provide resources and support to battered women
- We must retain and clarify the role of independent, confidential advocates
- We must educate victims, advocates, law enforcement, judges, and prosecutors on *Crawford*
- We must develop a method to assess and prioritize cases

VI. NEXT STEPS

What do we do from here?

- Improve judicial education on *Crawford*
- Continue to educate prosecutors on *Crawford*
- Conduct a training for prosecutors on the decision-making process, evaluate the outcome, and develop a tool to replicate the findings
- Support and engage in the continuing conversations on contextual analysis of domestic violence cases and the development of a practical tool

- Participate in the development of an electronic tool to perform the *Crawford* analysis for prosecutors
- Improve collaboration between the criminal justice system and community based groups that focus on immigrant populations and communities of color, access to housing, economic justice, and the mobilization of supportive men

All participants agreed to continue these conversations and to participate in any follow-up endeavors that might arise as a result of this discussion.

VI. APPENDIX

1. Roundtable Slides

2. Roundtable Agenda

3. Memo: *Current Impact of Crawford on Local Prosecutors*

4. Excerpts Related to Post-*Crawford* Domestic Violence Prosecution Issues from the El Paso County, Colorado Institutional Safety and Accountability Audit Report (August 2007)

5. Enhancing Responses to Domestic Violence: Promising Practices from the Judicial Oversight Demonstration Initiative: *Prosecuting Witness Tampering, Bail Jumping, and Battering from Behind Bars*