

## Appendix 3E

**Training Memo—Implications of *Crawford* and Forfeiture  
by Wrongdoing for the Police Response to  
Domestic Violence*****Crawford and Davis decisions***

In 2004, the United States Supreme Court issued a decision in *Crawford v. Washington* that made significant changes in how a prosecutor can use statements from a victim if the victim is not able to testify at a trial.<sup>1</sup> Few victims are in a position to simply walk into a courtroom and say, “This is what happened. This is what he did and how he did it.” Such a move could result in far more harmful consequences that significantly outweigh the value of the help the victim might receive from a conviction. As a result, many victims do not appear at trial to testify. While prosecutors can still get a victim’s statements to police and others admitted into evidence and heard by the jury, *Crawford* made admission of this type of evidence harder.

When police officers understand the basic points of *Crawford* and thoroughly and accurately document statements that occur before an official interview or statement is made, prosecutors are far more likely to get crucial statements admitted into evidence.

The *Crawford* decision held that in order to satisfy the Confrontation Clause of the Sixth Amendment of the U.S. Constitution (i.e., the accused has the right to confront the accuser in court), a testimonial statement may not be admitted unless the statement is subject to cross examination.<sup>2</sup> The U.S. Supreme Court did not completely define what a testimonial statement is; it indicated, however, that **testimonial** statements are made in a formal setting or in circumstances in which the person making the statement, reasonably believed that the statement would be used later in trial.<sup>3</sup>

Two years later, the Supreme Court in *Davis v. Washington* refined the standard for admissibility. The Court held that statements are **non-testimonial** if they are

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<sup>1</sup> 541U.S. 36 (2004)

<sup>2</sup> If the declarant is unavailable for trial, testimonial statements may be admitted if the defendant had a prior opportunity to cross-examine the declarant. *Crawford* 541 U.S. at 68.

<sup>3</sup> *Crawford*, at 51-54.

made in the course of police interrogation when the primary purpose of that interrogation is to meet an ongoing emergency. For example, statements made under the following circumstances are non-testimonial: questions asked by a 911 operator to specifically help respond to an emergency, and interactions between officers and witnesses and suspects as the officers initially secure a scene and offer emergency help. A prosecutor will argue that the testimonial portion of any statement began when the primary purpose of an officer's questioning was to determine if a crime had been committed. As long as officers are responding to emergency conditions and not engaging in interrogation to establish or prove events relevant to a criminal proceeding, the testimony may still be considered by the court as admissible.<sup>4</sup> In other words, statements made in the course of providing information to officials during an ongoing emergency are non-testimonial, while statements made in order to prove that certain events occurred are testimonial.

### ***Doctrine of forfeiture by wrongdoing***

Both the *Crawford* and *Davis* decisions recognize the doctrine of forfeiture by wrongdoing. If the defendant obtains the absence of the witness by wrongdoing, the defendant forfeits the constitutional right to confrontation and the constitutional objection to hearsay statements. In domestic violence cases, the victim/witness is especially vulnerable to threats and intimidation. The *Crawford* and *Davis* decisions, by making the live testimony of the victim at trial even more important than it had been, also increased the significance of the doctrine of forfeiture by wrongdoing.

Recently the U.S. Supreme Court held in *Giles v. California*, 554 U.S. \_\_\_, 128 S. Ct. 2678 (2008), that uncontroverted testimony is not admissible under the forfeiture doctrine without a showing that the defendant intended to prevent a witness from testifying. The Court noted that acts of domestic violence are often intended to dissuade a victim from resorting to outside help, and that a defendant's prior abuse or threats of abuse, intended to dissuade a victim from resorting to outside help, would be highly relevant to determining the intent of a defendant's subsequent act causing the witness's absence, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

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<sup>4</sup> *Davis v. Washington*, 126 S. Ct. 2266 (2006)

When police officers take care to inquire about and document a defendant's threats to the victim for seeking help, prosecutors are more likely to be able to successfully introduce evidence under the forfeiture by wrongdoing doctrine. If a defendant has threatened or coerced a victim so that she or he becomes unavailable to testify, the defendant may forfeit the right to confront the victim or witness in court, thereby allowing into evidence the victim's statements to the officer, even if the victim does not appear.

### ***Implications for practice***

- When responding to a domestic violence call in which harm is immediate or imminent, thoroughly describe the scene and circumstances in your report in specific detail in order to illustrate the urgency of the situation. Include the specific times when the 911 call was placed and when you arrived.
- Be specific about what all witnesses said when you arrived, including the victim.
- Ask specifically whether the defendant has ever made statements to the victim, the victim's children, or the victim's family members threatening harm if the victim seeks help, contacts the police, or participates in the prosecution process. Thoroughly document information regarding any such threats.
- Inquire about and gather letters, voice mails, e-mails, and text messages sent by the defendant both prior and post-arrest that may include threats.
- In collaboration with prosecutors and advocates, follow up with the victim to inquire about post-arrest contact between the defendant and victim and gather evidence of such contact.