Appendix 5A

Training Memo—Implications of *Crawford* and *Davis* for Prosecution of Domestic Abuse Cases

Even if the victim is unavailable for trial, prosecutors should strive to prove a domestic assault case, in way that is victim-centered but not victim-dependent. Prosecution can proceed while at the same time minimizing the victim's need to confront the offender.

One strategy that can help accomplish this goal is the use of exceptions to the hearsay rule, such as excited utterances, to admit into evidence the statements of the unavailable victim. In 2004, the United States Supreme Court issued a decision in *Crawford v. Washington*[1] that limits a prosecutor's ability to have these statements admitted. *Crawford* held that in order to satisfy the Confrontation Clause of the Sixth Amendment of the U.S. Constitution the statement is admissible only if it is not "testimonial."[2]

The U.S. Supreme Court did not completely define what a testimonial statement is. However, it did indicate that testimonial statements are made in a formal setting or in circumstances in which the declarant (the person making the statement) reasonably believed that the statement would be used later in trial.[3]

Two years later**,** the Supreme Court in *Davis v. Washington* refined the standard for admissibility and held that statements are **"**non-testimonial**"** when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police to meet an ongoing emergency. Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal proceedings.[4] In other words, statements made in the course of

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[1] 541U.S. 36 (2004)

[2] 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.

[3] Crawford, at 51-54.

[4] Davis v. Washington, 126 S. Ct. 2266 (2006)

providing information to officials during an ongoing emergency are non-testimonial, while statements made in order to prove that certain events occurred are testimonial.

The *Davis* decision increases the importance of supporting victims so that they are willing and able to testify. Such support does not include threatening to place a victim in custody to ensure that she or he will be available to testify at trial, or carrying out that threat. Such actions may have serious, negative consequences for a victim's safety and well-being. However, in appropriate cases it may be advisable to send a patrol officer or investigator to the victim's residence to facilitate the victim's appearance at trial. *Davis* also increases the importance of 911's documentation of the nature of the emergency and request for assistance, and police documentation of statements made initially at the scene while the emergent situation is continuing.

Because the victim's availability at trial in domestic abuse cases is a continuing challenge, prosecutors should be prepared to assess each case in light of applicable case law and where appropriate, argue that the victim's statements are non-testimonial and thus admissible. 911 calls and initial statements at the scene will be primarily for the purpose of assessing an emergency, and securing the safety of the victim and the responding police officers. Admissibility of these statements will enhance the likelihood of successful prosecution. Concurrent with assessing whether statements are testimonial, prosecutors should also be evaluating the circumstances of each case where the victim has become unavailable to assess whether the defendant caused the unavailability and thus forfeited his right to confront the witness (see *Appendix 5B: Training Memo—The Implications of Forfeiture by Wrongdoing for Prosecution of Domestic Abuse Cases*).

Many defendants are on probation when they commit a new domestic assault.[5] Given the prosecution difficulties post-*Davis*, in some cases a probation violation hearing may provide a more successful vehicle for holding defendants accountable for their behavior. The Sixth Amendment Confrontation Clause does not apply to violation hearings. Evidence that may not be admissible pursuant to

[5] Matthew Du Rose, et al., Bureau of Justice Statistics, FAMILY VIOLENCE STATISTICS, NCJ 207846 (June 2005), at 47 (finding that at the time of most recent arrest for family assault, 38.2% of defendants had a criminal justice status including 27.9% who were on probation and 4.4 % who were on parole).

Davis in a new prosecution for the new offense should be admissible in the violation hearing.[6] Another advantage of pursuing a violation of already-imposed conditions of probation is that it is likely to be a much faster process than prosecuting a new charge. Swift consequences for prohibited behavior may be a more effective deterrent than a long-delayed new prosecution. Also, it is well settled that double jeopardy does not attach to revocation hearings and thus there is no bar to proceeding with a revocation hearing and also prosecution for the same conduct.[7] Revocation of probation or parole is considered a continuation of the original prosecution and a reinstatement of the original sentence rather than punishment of the more recent misconduct.[8] The purpose of the violation hearing is to determine whether the conditions of probation have been violated, not to convict the defendant of a new crime and thus double jeopardy does not apply.

Recommendations for practice

- ❒ Inform the victim of the risks and benefits of testifying, and the risks and benefits of not testifying.
- ❒ Do not threaten to or place a victim in custody in ensure witness availability. In appropriate cases consider sending a patrol officer or investigator to the victim's residence to facilitate the victim's appearance at trial.
- ❒ In the event the victim is reluctant to participate, consider the victim's safety in addition to the other goals of prosecution.

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[6] The majority view in the federal courts and most state courts have held that *Crawford* and the Sixth Amendment do not apply to revocation hearings. *See* Tom Lininger, *Reconceptualizing Confrontation After Davis,* 85 Tex. L. Rev 311 n.222 (2006).

With respect to requirements for revocation hearings under the Due Process Clause, the United States Supreme Court has permitted the prosecution to introduce reliable hearsay where necessary in the interests of justice. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

[7] Several circuits have held that the Double Jeopardy Clause does not apply to parole or probation revocation proceedings. *See e.g.* Jonas v. Wainwright, 779 F.2d 1576, 1577 (11th Cir. 1986); Thompson v. Reivitz, 746 F.2d 397, 399 (7th Cir. 1984), *cert. denied,* 471 U.S. 1103 (1985); United States v. Whitney, 649 F.2d 296,298 (5th Cir. 1981); Dunn v. California Dep't of Corrections, 401 F.2d 340,342 (9th Cir. 1968). Additionally, the United States Supreme Court has held that a probation revocation hearing is not a stage in the criminal prosecution of an individual. *See* Morrissey at 480.

[8] *See* State v. McKenzie, 542 N.W.2d 616, 620 (Minn. 1996).

- ❒ If the victim is unavailable for trial, evaluate the contents of the 911 call and the description of the scene and circumstances in the police reports to determine if a good faith argument may be made that victim statements to law enforcement are non-testimonial

- ❒ Work in partnership with advocates to support victims through the prosecution process and increase the likelihood that victims will be willing and able to testify at trial.

- ❒ Review police reports, 911 calls, interviews, statements and the medical condition of the victim to assess whether the circumstances objectively indicate that the primary purpose of the 911 response and the questions at the scene were to enable police assistance to meet an ongoing emergency.

- ❒ Increase use of violation hearings when new offense presents evidentiary difficulties and proceeding with the probation violation will enhance offender accountability and victim safety.

- ❒ Supervising attorneys should review random files in which the victim did not appear at trial to determine if a *Crawford* review occurred and if elements were appropriately assessed.

- ❒ In cases where the defendant was on probation when new offense occurred, supervising attorneys should review files in collaboration with probation to determine if probation violations are increasingly being brought forward and utilized to hold defendant's accountable for their actions.

- ❒ Train 911 operators in safety-oriented responses.

- ❒ Train responding police officers on the decisions in *Crawford* and *Davis* and how those decisions affect police actions.

- ❒ Train probation officers on the increased importance of bringing forward probation violations.

Case Law

- Crawford v. Washington, 541 U.S. 36 (2004)
- Davis v. Washington, 126 S. Ct. 2266 (2006)
- State v. Wright, 726 N.W.2d 464 (Minn. 2007)
- State v. Warsame, 735 N.W.2d 684 (Minn. 2007)