DOMESTIC VIOLENCE AND THE CONFRONTATION CLAUSE: THE CASE FOR A PROMPT POST-ARREST CONFRONTATION HEARING

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ABSTRACT: Prior to the Supreme Court’s 2004 decision in case of Crawford v. Washington, a prosecutor could pursue a domestic violence case and introduce the prior accusatory testimonial statement of the victim even where the victim refused to appear at trial, declined to testify at trial, retracted a prior statement made to police, or claimed lack of memory as to the events described in her prior statement if: 1) the victim was unavailable, and 2) the statement bore ‘adequate indicia of reliability’ as indicated by falling within a ‘firmly rooted hearsay exception’, or satisfied ‘particularized guarantees of trustworthiness’. Ohio v. Roberts 441 U.S. 56. The Supreme Court in Crawford overruled Roberts by ruling that admission of a prior victim statement complied with the Confrontation Clause only if: 1) the victim was unavailable, and 2) the defendant had a ‘prior opportunity to cross-examine.’ Critics of Crawford claimed that it opened up an ‘open season’ on domestic violence and other victims by giving the defendant spouse an irresistible motive to escape justice by intimidating, threatening, or even killing the victim prior to being subject to cross-examination. Prosecutor’s attempts to protect witnesses by relying on FRE 804(6) which purported to provide for admission of prior victim’s statements where defendant threatened or killed a witness proved illusory, not least because it required the prosecutor to prove separately that defendant caused the death or unavailability of the witness. As an alternative and more effective way of eliminating the motive to threaten or kill innocent witnesses, submitted herein is the case for providing to defendant a prompt opportunity to cross-examine a witness immediately upon arrest at a confrontation hearing conducted either at the police station or at arraignment, and providing court appointed counsel to conduct such cross-examination if defendant otherwise does not have immediate access to counsel. Further submitted is that such a procedure would both comply with the Crawford requirement of a ‘prior opportunity to cross-examine’ while also removing the incentive of a defendant to kill or threaten a witness as a means of evading justice.

I. Introduction

So important to the Founding Fathers was an accused’s right to cross-examine the witnesses against him, that it was enshrined in the Bill of Rights as an integral Sixth Amendment

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right. That right is also implicitly recognized in Rule 602 of the Federal Rules of Evidence, and also in the hearsay rules set forth in Article 8.

It has been argued, however, that the cause of justice pays a high price for insuring this right because it provides an accused an incentive to intimidate, coerce, or even eliminate potential witnesses, secure in the knowledge that without a witness a case against him must be

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2 U.S. CONST. amend. VI (stating in relevant part, “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.”). However, note that the “rights conferred by the Confrontation Clause are not absolute and may give way to other important interests.” See Coy v. Iowa, 487 U.S. 1012, 1015 (1988) (allowing two minors allegedly sexually assaulted by the defendant to testify by video so as not to be subject to him “face to face”); see also Lindsay Hoopes, The Right to a Fair Trial and the Confrontation Clause: Overruling Crawford to Rebalance the U.S. Criminal Justice Equilibrium, 32 HASTINGS INT’L & COMP. L. REV. 305, 306 (Winter 2009) (stating “the modern concept of the right to a fair trial, common throughout much of the international community, was adopted and modeled after the U.S. Constitution’s Sixth Amendment.”) (and citing, Frank R. Hermann and Brownlow M. Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int’l L. 481, 485-86 (1994) (noting that the Roman view that “it is better that the crime of a guilty person remain unpunished than that an innocent person be convicted” and that compatible law required “a defendant had the opportunity for a personal encounter with the accuser”). See also Jarot Hunt Scarbrough, The Swinging Pendulum of Confrontation Clause Jurisprudence: Was Michigan v. Bryant a Response to the Inequitable Outcomes in Crawford, Davis, and Giles? 36 AM. J. TRIAL ADVOC. 153, 157 (Summer 2012) (stating that confrontation dates back to Roman times and was adopted by the English, followed by the Founding Fathers and the Supreme Court in Ohio v. Roberts, (citing Crawford v. Washington, 541 U.S. 36, 43 (2004)); Coy v. Iowa, 487 U.S. 1012, 1015 (1988)); however, such attribution was counter to the domestic violence in the Founding Fathers’ own culture); see, Sarah M. Buel, Putting Forfeiture to Work, 43 U.C. DAVIS L. REV. 1295, 1316 (Apr. 2010) (citing Myrna Raeder, Remember the Ladies and the Children Too, 71 BROOK. L. REV. 311, 317 (2005)); Trammel v. United States, 445 U.S. 40, 43-44 (1980); see also, **Harv. L. Rev. Ass’n., 6. Sixth Amendment – Witness Confrontation: Forfeiture by Wrongdoing Doctrine 122 HARV. L. REV. 336, 344, 345 (Nov. 2008) (citing Richard A. Nagareda, Reconciling the Right to Present Witnesses, 97 MICH. L. REV. 1063, 1113 (1999)) (stating, at the time, interested persons, spouses, children, atheists, and convicted felons were barred from testifying against the accused; and citing Transcript of Oral Argument at 9, Giles v. California, 554 U.S. 353 (No. 07-6053), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-6053.pdf (stating that at founding, a case such as Giles could not have been heard)).

3 Fed. R. Evid. 602, **Need for Personal Knowledge (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”).

4 Fed. R. Evid. 801(c), **Definitions that Apply to This Article (“Hearsay’ means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”); see also Sarah M. Buel, Putting Forfeiture to Work, 43 U.C. DAVIS L. REV. 1295 at Note 90 (Apr. 2010) (citing, as examples of Fed. R. Evid. 804(b)(6): U.S. v. Thevis, 665 F.2d 616, 627-633 (5th Cir. 1982) (victim’s testimony was permitted pre-Crawford when one of the counts charged against defendant was murder of the victim); U.S. v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985) (pre-Crawford, defendant lost the right to cross-examine the undercover agent whom he killed during his arrest); and Carver v. U.S., 160 U.S. 553, 554 (1896) and Carver v. U.S., 164 U.S. 694, 697 (1897) (noting that not all dying declarations are necessarily reliable)).

5 Sarah M. Buel, Putting Forfeiture to Work, 43 U.C. DAVIS L. REV. 1295, 1363 (Apr. 2010), (citing Boyd v. Indiana, 866 N.E.2d 855 (Ind. App. 2007) (finding that the defendant “may not take advantage of [the victim]’s inability to testify, which was the natural consequence of his own misconduct – murdering her”).
dismissed no matter how hideous the crime of which he is charged. In addition, witness tampering appears to work in favor of perpetrators because 80-90% of victims do not cooperate with prosecutors in domestic violence cases. These cases include instances in which a witness mysteriously disappears prior to trial, or a victim declines to cooperate or testify against a defendant whom the victim had previously identified to police as the perpetrator. This has proved to be or particular concern in domestic violence cases in which a battered spouse declines to testify against the other at trial on a variety of reasons, including purported lack of memory, a fear of retribution either admitted or suspected, a plea for understanding from the prosecutor of a victim’s desire to preserve the family unit, or a claim that the victim has changed his ways and propensity for violence and is unlikely to repeat his crime.

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6 Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1304-05 (Apr. 2010) (stating that “victims are too frightened to testify about both the initial crime and subsequent witness tampering”). This argument works under the assumption that prior statements will be inadmissible if a victim is too frightened to testify about witness tampering, which would allow admission of the prior statements under the forfeiture doctrine. Buel further relies upon *People v. Santiago* to argue that victims understand the seriousness of threats due to prior harm. *People v. Santiago*, No. 2725-02 2003 N.Y. Misc. LEXIS 829, at *31-32 (N.Y. Sup. Ct. Apr. 7, 2003).


8 People v. Henderson, 705 N.Y. S.2d 589, 590 (N.Y. App. Div. 1999) (finding that the defendant’s attempt to cause the victim to fear him was sufficient evidence of victim tampering, intimidation, and criminal solicitation); see State v. Charger, 611 N.W.2d at 228 (attempt to convince a witness to withhold information is sufficient to qualify as tampering); see also Navarro v. State, 810 S.W.2d 432, 437 (Tex. App. 1991) (tampering occurred by attempted bribery in exchange for altering testimony).

9 Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367 (1996) (citing Telephone Interview with Candace Heisler, Supervising Assistant District Attorney of the San Francisco District Attorney’s Office (Sept. 29, 1995)). Victims may start out an investigation as uncooperative with prosecutors, or may later recant or prove reluctant to fully cooperate. See also *California v. Green*, 399 U.S. 149, 167-68 (1970) (stating that witness “claimed a loss of memory”). Although this case does not involve a situation of domestic violence, it sets a standard that statements from a preliminary hearing may be used in place of forgotten information or an uncooperative witness.


12 Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1324 (Apr. 2010) (citing 42 U.S.C. § 10606(b)(2) (2006) (arguing that “but for” a defendant’s tampering, the case would not be procedurally blocked and noting that the federal crime victims’ bill of rights affords victims “the right to be reasonably protected from the
Although the danger the Confrontation Clause poses to domestic violence victims has been the subject of most scholarly inquiry, the danger is of equal concern to all victims and witnesses of violence.\textsuperscript{13} For example, on June 23, 1985, Air India flight 182 carrying 329 people to London blew up in flight, tossing screaming passengers, including many women and children, into the air at 30,000 feet where they endured a horrifying death either during the fall or when hitting the ocean below.\textsuperscript{14} The man accused of planting the bomb was duly charged with murder in a Canadian Court.\textsuperscript{15} Unfortunately, the prosecution’s star witness, Tara Singh Hayer, who had made prior statements implicating the defendant and was prepared to testify at the trial, was assassinated by gunshot wound before the trial.\textsuperscript{16} As a result, Tara’s prior statement was held inadmissible and the defendant charged with the murder of 329 men, women, and children escaped with only minor charges.\textsuperscript{17}

In light of such practical concerns for both witnesses and victims, prosecutors have pressed for ways in which the actual “physical” component of the confrontation clause might be dispensed with.\textsuperscript{18} Accordingly, as the notion of physical confrontation gradually became equated
\textsuperscript{14} Report of the Court Investigating Accident to Air India Boeing 747 Aircraft VT-EFO, “Kanishka” on 23 June 1985, Hon’ble Mr. Justice B.N. Kirpal Judge, High Court of Delhi, 26 February 1986.
\textsuperscript{15} “Malik, Bagri not guilty in Air India bombings”, CTV News. 16 March 2005.
\textsuperscript{16} Bolan, Kim (18 November 2009). “Tara Singh Hayer murder probe still active, 11 years later”, Vancouver Sun (Canada).
\textsuperscript{17} “Supreme Court of British Columbia: Her Majesty the Queen Against Ripudaman Singh Malik and Ajaib Singh Bagri” Courts.gov.bc.ca.
with the right to cross-examine—\textsuperscript{19}—a witness who was physically in the courtroom during a trial was obviously available for cross-examination—a legal evolution occurred in which cross-examination rather than physical presence became the keystone of compliance with the confrontation clause.\textsuperscript{20} However, further evolution resulted in the substitution of the “inherent reliability” to the right of cross-examination itself—presumably on the theory that cross-examination was only required for less than reliable testimony, but not for out of court statements that were “inherently reliable”. This process culminated in the case of Ohio v. Robert in which the Supreme Court set forth two basic requirements for admitting uncross-examined prior statements into evidence against an accused: 1) unavailability of the testifying witness at trial\textsuperscript{21} and 2) and a finding of reliability of the out of court statement, which in turn could be

\textsuperscript{19} Roberts, 448 U.S. at 63-64 (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895), “[t]he Clause envisions ‘a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.’”).

\textsuperscript{20} The Court in California v. Green stated that face-to-face confrontation “forms the core of the values furthered by the Confrontation Clause.” 399 U.S. 149, 157 (1970). Cross-examination, however, is “a primary interest secured by [the Confrontation Clause].” Roberts, 448 U.S. at 63 (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

\textsuperscript{21} Roberts, 448 U.S. at 65 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968); and Motes v. United States, 178 U.S. 719 (1900)).
satisfied by it meeting the requirements of a “firmly rooted “hearsay exception, or other indicia of reliability.”

In 2004, the Supreme Court abruptly put a stop to the evolution of the law of confrontation along the lines of *Ohio v. Roberts.* Rejecting the entire notion that any mere “indicia of reliability” could ever serve as a constitutional substitute for the basic right of cross-examination itself, the Court stated clearly that “[t]he framers would never have allowed admission of testimonial statements of a witness who did not appear at trial unless...the defendant had had a prior opportunity for cross examination.” Significant in this quote is the word “prior”, suggesting that the cross-examination necessary to comply with confrontation need not be at the trial itself, but could be performed by the defendant on a prior occasion. Indeed, as early as the case of *California v. Green* in 1970, the High Court rejected the notion that the availability of cross-examination of a witness prior to trial would not satisfy the confrontation clause. Rather, what is important in terms of the confrontation clause is not the timing of the cross examination, but rather whether the cross-examination, whenever conducted, challenges “whether the declarant was sincerely telling what he believed to be the truth, whether the

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22 *Roberts*, 448 U.S. at 66 (quoting *Mattox*, 156 U.S. at 244). “Hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’”

23 *Mancusi*, 408 U.S. at 213. “The focus of the Court’s concern has been to insure that there are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant, and to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these indicia of reliability.” (internal citations omitted)


25 Id. at 60.

26 Id.

27 Id. at 54.

28 *California v. Green*, 399 U.S. 149, 165 (1970). “Porter’s statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel – the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.”
declarant accurately perceived and remembered the matter he related, and whether the declarant’s intended message is adequately conveyed by the language he employed.”

Indeed, there is evidence that the most effective cross-examination is that which is conducted very soon after the events to which the witness testifies. A cross examination conducted at the trial itself, which may take place many months, or even years after the event to which the witness testifies, is less likely to be effective given that the witness may have honest lapses of memory, or in the case of a witness inclined to prevaricate or lie, have considerable time to get his story straight or make it more bullet-proof.

In this regard, it may be useful to note that in criminal cases, there is generally no proceeding similar to the taking of depositions in civil cases in which a witness’ statement may proceed.

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29 Roberts, 448 U.S. at 71 (citing Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378 (1972)). The Roberts court looked to the principal purpose of cross-examination being satisfied in order to comport with the Confrontation Clause.


31 Domestic violence victims may refresh their memory by their prior written statements though their memory need not be perfect so as to result in conviction. See Ohio v. Widder, 2003 WL 21697868 at *3 (Ohio App. 2003). See also Smith v. Georgia, 300 Ga.App. 220 (Ga. App. 2009) (victims of aggravated assault were treated as hostile witnesses by prosecutor due to their lack of memory). In one case of incest, a thirteen year old did not testify about molestation that occurred when she was nine years old and had trouble remembering upon multiple depositions what had in fact occurred. The state supreme court found that the state’s discovery deposition evidentiary rule was insufficient to meet the Crawford confrontation standard because the defendant was not present and could not cross-examine her. Florida v. Contreras, 979 So.2d 896 (Fla. 2008). Otherwise, according to one expert, a domestic violence "victim might come to court and either minimize what occurred or deny that any physical contact took place. The vast majority of victims are reluctant to testify against their abusers. The victim might also have selective memory when testifying or lie under oath to help the abuser.” California v. Moore, 2006 WL 990374 at *7 (Cal. App. Apr. 17, 2006).
be preserved long before the trial,\textsuperscript{32} and discovery is strictly limited.\textsuperscript{33} Indeed, a defense counsel in a criminal case generally has not right to even interview prosecution witnesses before trial,\textsuperscript{34} and savvy prosecutors are often quite adept at insuring that their witnesses’ statements remain oral and thus are not available in written form to defense counsel under even a typical prosecutor’s generous “open file” policy.\textsuperscript{35} It is true that preliminary hearings in felony cases may give a defense counsel an opportunity to cross-examine a prosecution witness, but given the low burden of proof in such hearings, and the opportunity to win the case at that stage most unlikely, the defense often uses this “opportunity for cross-examination” less for purposes of actually impeaching or discrediting a witness (and thus alerting both the witness and prosecutor to counsel’s cross-examination techniques apt to be used at trial), but rather as a substitute for a deposition in which the primary motive for cross-examination is not to discredit or impeach the witness, but rather to garner information and pin down the witness’ testimony.\textsuperscript{36} Even where a defense counsel is prepared to pull out all the stops in discrediting a witness in hopes of gaining dismissal, the lapse of as much as 30 days since the event to which the witness if testifying

\textsuperscript{32} Affidavits are functional witnesses, thus absent a showing that the affiant is unavailable to testify at trial or there was a prior opportunity to cross-examine them, the Confrontation Clause would be violated by an affidavit’s admission not accompanied by the affiant. Melendez-Diaz v. Mass., 557 U.S. 305, 325 (stating, “the sky will not fall” under this holding as the states had served as laboratories). See also Bullcoming v. N.M., 131 S. Ct. 2705, 2717 (2011) (finding that another employee of the forensics lab may not substitute as a witness for the purposes of satisfying the Confrontation Clause when the employee did not sign certification or participate in the blood test lab report the prosecution sought to admit into evidence).

\textsuperscript{33} Discovery, while neither a constitutional right nor available except by motion, is subject to Fed. R. Crim. P. 16 (stating repeatedly, “upon Defendant’s request, the government must disclose…” relevant discovery) and the Brady rule. See Brady v. Maryland, 373 U.S. 83, 87 (1963) (stating, “suppression by the prosecution of evidence that is favorable to an accused violates due process where the evidence is material to either guilt or punishment…”).

\textsuperscript{34} Defense counsel is limited to the witness list per Fed. R. Crim. P. 16(a)(1)(G) and F.R.E. 702.

\textsuperscript{35} Discovery is not constitutionally based, though the Brady rule requires divulsion of exculpatory or mitigating evidence to comply with the defendant’s due process right to a fair trial and jurisdictional rules, including court rules and professional conduct rules adopted by states, require disclosure of certain information during discovery. See ABA Model Rules of Prof’l. Conduct R. 3.8 (2011) (stating, prosecutors are subject to discipline for abusive investigatory practices and discovery abuses).

\textsuperscript{36} Although the Constitution guarantees that the states hold neither a grand jury indictment nor a preliminary hearing, the Fourth Amendment requires a determination of probable cause within 48 hours of a defendant’s custody. See County of Riverside v McLaughlin, 500 U.S. 44, 45 (1991).
detracts from the effectiveness of the cross-examination. Furthermore, the prosecution is not obligated to call all his witnesses at the preliminary hearing, and may not do so if he is confident that a single witness will be sufficient to show probable cause. In Grand Jury proceedings, of course, there is no opportunity for the defense to cross-examine at all, or indeed any of the future prosecution witnesses.  

Two facts thus give rise to a proposed procedure which, as submitted herein, will serve to address the concerns of witness safety, particularly in domestic violence cases: 1) That the most productive cross-examination is likely to be the one closest in time to the events to which the witness will testify; and 2) the specific recognition in *Crawford* and *Green* that the opportunity to cross-examine “prior” to trial satisfies the Confrontation Clause.

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37 Grand jury proceedings occur sans judge where the interested prosecutor and the jurors themselves play a quasi-judicial role, the proceedings are sealed, and the defendant neither has representation nor is typically permitted to be aware of the proceeding’s existence. *See U.S. Const. amend. V* (1791) (“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury...”). Grand juries follow *Fed. R. Crim. P. 6* and are purposed “to determine whether there is sufficient evidence to justify a formal accusation against a person” and to “stand between the government and the person being investigated by the government” thus ensuring innocent persons are not subject to trial specifically should not be “an instrument of private prejudice, vengeance, or malice.” *See Jud. Conference of the U.S., Model Grand Jury Charge, ¶¶ 19-20* (Mar. 2005), available at http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx (stating, “[o]rdinarily, neither the person being investigated by the government nor any witnesses on behalf of that person will testify before the Grand Jury” and “witnesses are not permitted to have a lawyer present with them in the Grand Jury room.”). *See also* *DeCamp v. Douglas Cty. Franklin Grand Jury*, 987 F.2d 1047, 1050, note 2 (8th Cir. 1991) (reiterating that grand jurors play a quasi-judicial role and also stating that grand jurors, as a discretionary instrument, possess absolute immunity as protection from reprisal or intimidation).

38 *Crawford v. Washington*, 541 U.S. 36 (2004), finding that the confrontation clause could be satisfied if the witness was “unavailable to testify and the defendant had had a prior opportunity for cross-examination;” *California v. Green*, 399 U.S. 149, 166 (citing, *Barber v. Page*, 390 U.S. 719, 725-26 (1968) (stating that, “there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable...” as support of a conclusion that “respondent had every opportunity to cross-examine [defendant] as to his statement); and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, [defendant]’s statement would, we think, have been admissible at trial even in [defendant’s] absence if [defendant] had been actually unavailable, despite good faith efforts of the state to produce him. That being the case, we do not think a different result should follow where the witness is actually produced.”). Courts have held that prior testimony from preliminary hearings or probable cause hearings were admissible in later trial under the confrontation clause. *Connecticut v. Crocker*, 83 Conn.App. 615 (2004). Such was echoed in an unpublished California case which overcame the objection that “[defendant] did not have adequate opportunity to cross-examine this witness” by stating that “[defendant] had an opportunity to cross-examine [the witness] at the preliminary hearing about the ‘facts and circumstances’ of the incident.” *California v. Sharpe*, 2004 WL 1771481, at *4 (Cal. App. Aug. 9, 2004). Even preliminary hearings where the attorney differed from that representing the defendant at trial did not disqualify cross-examination because the defendant was the common denominator,
In the aftermath of *Crawford v. Washington*[^39] and *Davis v. Washington*,[^40] prosecutors anxious to protect their witnesses from intimidation, coercion, or wrongdoing to prevent their appearance in court, have resorted to three main legal strategies: 1) Making the case to the court that the un-cross examined, out of court statement they want to introduce is not “testimonial,”[^41] citing the Crawford principle that non testimonial statements are excluded from application of the Confrontation Clause[^42]; 2) Offering evidence to the court purporting to show that the defendant “engaged in conduct designed to prevent the witness from testifying,” citing the 2008 Supreme Court case of *Giles v. California*[^43]; or 3) in the rare cases to which it applies, the Dying Declaration,[^44] citing *Crawford*’s acknowledgement that this particular hearsay exception, being “sui generis”, has a rock solid common law pedigree.[^45]

Unfortunately for the cause of intimidated witnesses and victims of domestic violence, it is submitted herein that none of these prosecutorial strategies has adequately addressed of the

[^41]: Michigan v. Bryant, 562 U.S. 344; 131 S. Ct. 1143, 1157 (2011), defining as outside the scope of the confrontation clause those responses to interrogations intended to diffuse an ongoing emergency which presumably lacks the testimonial purpose that would prescribe defendant’s subjection to “the crucible of cross-examination.”
[^42]: Id.
[^43]: Giles’ denial of forfeiture by wrongdoing is resolved by European courts as stating that, though the accused may be innocent until proven guilty, the victims may be presumed to be actual victims rather than alleged victims until proven otherwise such that alleged defendant is separated from alleged accused. *Giles v. California*, 554 U.S. 353, 358-364, 361 (2008).
problems created by Crawford. It is further submitted that empirical evidence tends to support this conclusion, though concededly much data is unavailable with regard to the exercise of prosecutorial discretion not to prosecute domestic violence cases, or whether the decision not to prosecute in an individual case can be attributed to heightened confrontation standards imposed by Crawford in the aftermath of Ohio v. Roberts.

As predicted by the concurrens in Crawford who foresaw in the new “testimonial” test a new litigation flashpoint just as problematic and arbitrary in application as the old “indicia of reliability” test of Ohio v. Roberts, the “testimonial” test remains in legal flux and its definition still largely unrefined despite many lower court attempts, giving little prospect for relief to domestic violence victims.

The standard for asserting the forfeiture by wrongdoing standard has been set so high in Giles that most prosecutors attempt to admit the evidence by arguing that the statements were non-testimonial.

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46 Crawford, 541 U.S. at 75 (Rehnquist, C.J., concurring).
47 State v. Stahl, 111 Ohio St. 3d 186, 2006-Ohio-5482, 855 N.E.2d 834, at ¶ 19. “The court in Crawford expressly declined to define testimonial, but it did give three examples of formulations for testimonial statements that historical analysis supports. The first deems testimonial all ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. The second includes all extrajudicial statements contained in formalized testimonial matters, such as affidavits, depositions, prior testimony, or confessions. And the third includes statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” (internal quotations and citations omitted)
Dying declarations, while presumably qualifying for exemption from application of confrontation, nevertheless rest primarily on dictum by the High Court,\(^{49}\) and in any case are applicable in only a very narrow set of cases.\(^{50}\)

The alternative Crawford-compliant approach submitted herein for protecting witnesses and victims consists in the following two primary elements:

1) That a small courtroom located conveniently near a police station be constructed or set aside, and that a private defense counsel or public defender be retained on 24 hour call to represent an accused who has been arrested and brought to the police station for booking. In addition, a magistrate also be on call. A system of notifying the prosecutor’s office of an impending hearing could also be implemented, though the prosecutor’s presence, though advisable, would be optional and not required.

2) Immediately upon either the termination of an interview with an arrested assault or domestic violence suspect, but before release or remand to jail pending a bond hearing, the defense counsel on call should be appointed to represent the defendant, and the victim asked to appear at the hearing, preferably within hours of the suspect’s arrest, to make her statement under oath and subject to open-ended cross-examination by the defense counsel. If the defendant wishes to call his own attorney for purposes of the confrontation hearing, this request should be granted if chosen counsel can appear within the hour. Also, if the suspect declines to participate in the hearing, he may choose to waive his right to cross-examination in writing.

The procedure outlined here is discussed in detail in the conclusion. It is submitted that the proposed procedure satisfies not only the Crawford requirement of “prior” opportunity for

\(^{49}\) Kirby v. United States, 174 U.S. 47, 61 (1899).

\(^{50}\) Flanagan, supra note 45, at 888-90. This limited exception requires that the decedent satisfy a test of knowledge and acceptance of death before the exception applies.
cross-examination, but also provides the opportunity for more effective cross-examination by a defense counsel since the witness/victim would be testifying while the events to which she is testifying are still fresh in her mind. The possible objection that the appointed counsel does not have sufficient time to prepare for cross-examination (by for example, researching the victim’s criminal record) is adequately addressed by FRE 806, which provides that any declarant’s credibility may be attacked later at trial by “any evidence that would be admissible for those purposes if the declarant had testified at trial”, and the court may admit evidence at trial “of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.” In any case, the same objection could be made to permitting the opportunity for cross-examination at a preliminary hearing to satisfy the requirement for prior opportunity to cross examine, but that argument has already been posed and rejected by the High Court in Green.\(^{51}\)

Thus if after the confrontation hearing the defense learns that the witness/victim has been convicted of a felony or made prior inconsistent statements, the defense would have ample opportunity at trial to introduce any additional impeaching evidence it has even if the declarant does not testify at trial.

It should also be recalled that “unavailability” would continue to be a requirement under the procedure proposed. But the paramount feature of the procedure proposed is that there would no longer be any incentive for a suspect to intimidate or harass a witness, or engage in conduct that would cause the witness/victim’s unavailability.\(^{52}\) The procedure would be particularly

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\(^{51}\) See Green, 399 U.S. at 165.

helpful in those “no drop”jurisdictions which require a prosecutor to proceed with prosecution of a domestic violence case even where the witness/victim declines for whatever reason to cooperate with the prosecution.

Parts II, III, and IV of this article set forth the legal history of the confrontation clause.

Part V sets forth the empirical evidence suggesting that application of the Crawford case in the absence of the procedure proposed herein has indeed inhibited the pursuit of justice, compromised the judicial process, and left witnesses and victims vulnerable to intimidation and coercion, if not creating an “open season” on victims as has been suggested.

Part VI sets forth some of the anticipated objections to this proposal.

II.

Pre-Crawford Confrontation Law

The Confrontation Clause of the Sixth Amendment states: "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Long before the current confrontation clause was written, an accused had the right to confront his witness. The confrontation clause stems from English common law, which required that “live” testimony be cross-examined. In Ohio v. Roberts, the Supreme Court of the United States incorporated the hearsay rules of evidence into the principle of confrontation, and set forth a test which upheld the admissibility of prior un-cross-examined statements if: (1) the witness was not

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53 Kalyani Robbins, supra note 49, at 217 (Nov. 1999) (citing Angela Corsilles, No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?, 63 FORDHAM L. REV. 853, 857 (1994)). Even though no-drop jurisdictions have a harder course of inaction, cases are still dropped due to lack of evidence and cooperation.


55 U.S. Const. Amend. 6.


57 Id.
available and (2) the statements met indicia of reliability by falling within a firmly rooted hearsay exception.\footnote{Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).}

In \textit{Ohio v. Roberts}, the accused was charged with forging a check and possessing stolen credit cards.\footnote{Id.} He argued that the victims’ daughter gave him the credit cards and allowed him to use the checkbook.\footnote{Id.} In a preliminary hearing, the witness stated that she did not provide Roberts with the credit cards or access to the checkbooks.\footnote{Id.} She later absconded, and despite the efforts of her parents and the prosecuting attorney, could not be presented at trial as a witness.\footnote{Id.} The issue eventually presented to the Supreme Court was whether testimony from a witness, the victims’ daughter, should be admitted as evidence.\footnote{Id. at 62.} The Constitutional question behind this issue is whether the admission of this prior testimony would violate the Confrontation Clause.\footnote{Id.} Taken literally, the Confrontation Clause would exclude every statement in which the prosecuting witness did not \textit{physically} confront the accused.\footnote{Roberts, 448 U.S. at 63-64.} The Court reasoned that the Confrontation Clause was meant to exclude some hearsay evidence, but “competing interests . . . may warrant with dispensing with confrontation at trial.”\footnote{Christine Holst, \textit{The Confrontation Clause and Pretrial Hearings: A Due Process Solution}, 2010:5 U. ILL. L. REV. 1599, 1602 (2010).} The interpretation of the Clause in this case regards the instance when witnesses are unavailable for direct confrontation at trial.

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\footnote{Id. at 63-64.} These competing interests are set forward in a non-exhaustive way by the Roberts court. The mobility of the public demands some concessions from the judiciary. Witnesses may move, become unavailable, or refuse to testify after making a preliminary statement. The Roberts court desired to include evidence deemed to be trustworthy, and broadened the idea of confrontation for policy reasons and practicality.
Relying on a compilation of prior Supreme Court holdings, the *Roberts* court reasoned that exceptions should exist to the strict reading of the Clause, and should allow trustworthy hearsay from unavailable witnesses. Although the testimony and cross-examination in these cases is obviously different, the general rule and goal of the Confrontation Clause still applies, testing and demonstrating the veracity of witness statements. The Court held that witness statements are admissible if that witness is unavailable at trial and the statement “bears adequate ‘indicia of reliability.’” Furthermore, the Court directly connected the Confrontation Clause to hearsay exceptions by stating that reliability is established if the statement fits within a hearsay exception. Even in instances outside of hearsay exceptions, evidence can be admitted if it is clearly trustworthy as a matter of law. The *Roberts* court decided to leave the question of the opportunity for or actual cross-examination for a later date.

The Court, however, does make some interesting statements regarding testimony and confrontation at preliminary hearings. Prior rulings hinted that the opportunity for cross-examination at a preliminary hearing would satisfy the Confrontation Clause, which is notably less of a vetting process than even the defendant in *Roberts* was afforded. In contrast, the *Crawford* court examines *Green*, in which evidence was permitted in trial after the defendant had the

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69 *Roberts*, 448 U.S. at 65.
71 See *Mancusi v. Stubbs*, 408 U.S. 204 (1972). “The prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.”
72 *Roberts*, 448 U.S. at 65.
73 *Roberts*, 448 U.S. at 65.
74 *Mancusi*, 408 U.S. at 213.
75 *Roberts*, 448 U.S. at 70.
opportunity to cross-examine the witness during a preliminary hearing, but chose otherwise.\textsuperscript{77}

Under this scheme, reliability and an opportunity for cross-examination satisfied the Confrontation Clause.\textsuperscript{78}

Although the rule of law set forward in \textit{Roberts} did limit some testimony and evidence as a result of a Confrontation Clause analysis, the Supreme Court of the United States created a new standard in \textit{Crawford v. Washington}. Before \textit{Crawford}, the courts allowed evidence that passed a reliability test, created in \textit{Roberts}. This test was satisfied if the witness was unavailable to testify for any reason, and his or her statements were reliable as a matter of law. A reasonable litmus test for the success of a test like the \textit{Roberts} test is whether the test is reliable and predictable. \textit{Crawford} appeared before the Supreme Court solely due to the unpredictability of the \textit{Roberts} test.

\textbf{III.}

\textit{Crawford v. Washington}

In \textit{Crawford}, the prosecution tried to admit evidence, in the form of statements to the police, from the defendant’s wife. The Supreme Court of the United States reasoned that the procedural history of \textit{Crawford} perfectly demonstrated the problems with the \textit{Roberts} test.\textsuperscript{79} This evidence consisted of statements made to the police after an altercation between her husband and another man.\textsuperscript{80} Applying the \textit{Roberts} test, the Washington State Superior Court allowed the evidence, and Crawford was convicted of first-degree assault.\textsuperscript{81} In the court’s view, the statements had “‘particularized guarantees of trustworthiness,’” and thus had the required “‘indicia of reliability’” of the \textit{Roberts} test.\textsuperscript{82} Crawford appealed the allowance of his wife’s statements to the

\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} See \textit{Crawford}, 541 U.S. at 36.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
police, and the Washington Court of Appeals reversed. The court applied a nine-factor test to examine the trustworthiness of the statements, and reasoned that the statement contradicted one made previously and the witness admitted having her eyes closed. The Washington Court of Appeals held that the statement did not have “particularized guarantees of trustworthiness.” On review, the Washington Supreme Court reversed and reinstated the trial court verdict. The Washington Supreme Court held that the statements did not fall within hearsay exceptions, but did have guarantees of trustworthiness. Furthermore, this court reasoned that the statements were trustworthy for a reason similar to the reason for reversal in the appellate court. The witness’ statements were similar to those made by the defendant, thus they were deemed reliable. This reliability exists even though the statements contradicted regarding the most important facts of the event in question. All three lower courts applied the facts of the case to the test, and ended with conflicting results. Additionally, each result could be acceptable under the Roberts test. The Supreme Court felt this case allowed for the creation of a new approach to the Confrontation Clause that was both reliable and predictable.

Coincidentally, the Supreme Court took a textual approach to their reinvigoration of the Confrontation Clause. The first question presented by Justice Scalia in the Supreme Court’s opinion “is whether this [case] complied with the Sixth Amendment’s guarantee that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
90 Id.
91 See Id.
92 Id.
against him.” This historical approach to the Confrontation Clause relies on confrontation itself as the guarantor of trustworthiness, with confrontation coming in the vein of cross-examination. The historical motivations for the Sixth Amendment include in large part this reimagining of the Confrontation Clause. This application of the Confrontation Clause allows for some flexibility as to statements and witness appearance in court, but not as broad as the Roberts test. Witnesses that are unavailable to appear in court may have their statements admitted, but only if they were previously subjected to cross-examination or non-testimonial.

Although the Supreme Court clarified the Confrontation Clause in Crawford by eradicating the Roberts indicia of reliability test, it admittedly created a new ambiguity for cases that would involve the Confrontation Clause. The Crawford rule does not allow testimonial statements to be used as evidence without the opportunity for cross-examination. The Supreme Court noted that they would not state the test for a testimonial statement, but reasoned that the facts of the case before them certainly satisfy any future test that the nature of the statements were

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93 Id. at 38.
94 Maryland v. Craig, 497 U.S. 836, 845–46 (1990). Although the Craig court appealed to history with the statement of confrontation being the guarantor of trustworthiness, the court found an exception for alleged child abuse victims. Like the Roberts court that dispensed with face-to-face confrontation for practical and policy reasons, the Craig court allowed closed-circuit televisions to serve as the vehicle for testimony during trial. This approach, unlike the absent witness in Roberts, affords the jury the opportunity to see and examine the witness, albeit from a closed-circuit feed. The Craig court believed that the use of a closed-circuit feed satisfied the goals of both the contact portion of the Confrontation Clause and the policy goals of protecting vulnerable witnesses.
95 See also California v. Green, 399 U.S. 149, 165 (1970). The defendant in this case was under oath, represented by counsel, and was available for cross-examination. The court reasoned that his statements met the criteria for suitable confrontation if he was unavailable for trial.
96 Crawford, 541 U.S. at 59.
97 See also Sheckles v. Indiana, No. 10A04-1405-CR-204, 2015 WL 127860, at *7 (Ind. Ct. App. Jan. 9, 2015). The trial court admitted video evidence regarding an alleged drug purchase. The Indiana Court of Appeals held that the admission of this video evidence was non-testimonial, but even testimonial video or photographic evidence could be admitted with the opportunity for cross-examination.
98 The Crawford court created a spectrum for the testimonial/non-testimonial scale, without creating a test to determine whether a specific statement or piece of evidence fell under either title. The Court left this ambiguity for later courts to fill in as public policy and the facts of a particular case necessitated.
99 Crawford, 541 U.S. at 68-69.
100 Id. at 68.
testimonial. The witness made statements to the police after the conclusion of the events. This witness certainly knew that her statements would be utilized in the proceedings of the predictable criminal trial. Thus, the Crawford court gives one example of a testimonial statement; one made to the police.

IV.

Post-Crawford Confrontation Law

As to Crawford’s progeny, those cases set forward the factors that make statements testimonial in nature. Statements are deemed testimonial when the person making them has reason to believe that their statements would or could appear as testimony in a courtroom. Since the tactics of using hearsay exceptions and the indicia of reliability were necessarily abandoned after the Crawford ruling, prosecutors had to find a new way to use witness testimony outside of the standard trial appearance. Many tried to expand the category of non-testimonial statements, since the only testimonial statement afforded was a statement made to the police. The Crawford holding only applied the new application of the Confrontation Clause to testimonial statements, thus non-testimonial statements were still examined under hearsay rules, with even less of a barrier than the Roberts test.

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101 See also Washington v. DeLeon, Nos. 29657-I-III, 29679-2-III, 29691-1-III, 2014 WL 7335530, at *17 (Wash. Ct. App. Dec. 23, 2014). The defendants did not have the opportunity to cross-examine the testimony regarding Gang Documentation Forms. These forms, however, were found to be non-testimonial because the individual did not act as a witness against the defendant.

102 See also Maryland v. Payne, No. 85, Sept. Term, 2013, 2014 WL 6979255, at * 16 (Md. Ct. App. Dec. 11, 2014). This case further discusses the Crawford approach to deciding an issue of whether evidence is testimonial. Testimonial evidence included police interrogations and statements made before the court. Furthermore, wiretapped conversations are non-testimonial, therefore their inclusion did not violate the defendant’s Confrontation rights.

103 See also Kirksey v. Alabama, CR-09-1091, 2014 WL 7236987, at *32 (Ala. Crim. App. Dec. 19, 2014). A business record type document can be testimonial if the author acts as a witness against the alleged perpetrator. In this case, the record was inadmissible because the document was testimonial and the defendant had no opportunity for the requisite cross-examination.

104 Crawford, 541 U.S. at 66. The Court further discusses an example of a generally non-testimonial statement, a business record.

105 Crawford, 541 U.S. at 68.
In addition to defining “testimony” for application in a Confrontation Clause analysis, one later case also shifted the ambiguity from the term “testimony” to “emergency.”\textsuperscript{106} In \textit{Davis v. Washington}, the Supreme Court created a loophole for statements that a witness could reasonably believe would end up as evidence in court. Under this new rule, statements made under emergency situations are regarded as non-testimonial.\textsuperscript{107} The \textit{Davis} court reasoned that people in those circumstances do not act as witnesses\textsuperscript{108}, since their statements allow law enforcement to meet an ongoing emergency.\textsuperscript{109} The court further reasoned that statements could become testimonial during the course of an interaction between law enforcement and potential witnesses.\textsuperscript{110} Thus, this holding refines the only example given in \textit{Crawford}, giving a non-testimonial exception to statements made to the police. Although the focus of the analysis still remains with the testimonial nature of statements, many cases after \textit{Davis} relied on statements made during the course of an

\textsuperscript{106} G. Kristian Miccio, \textit{What’s Truth Got To Do With It? A Deontological Critique and Response to Tom Lininger’s Article Reconceptualizing Confrontation After Davis}, 85 TEX. L. REV. 39, 43 (2007) (citing Tom Lininger, \textit{Reconceptualizing Confrontation After Davis}, 85 TEX. L. REV. 271, 280 (2006)). Although many court opinions treat the Confrontation Clause as a truth-seeking enterprise, the justice system is adversarial in nature, and confrontation fits within that paradigm. The Confrontation Clause guarantees an opportunity to undermine a prosecutor’s case, be it with the truth or by injection of reasonable doubt into any potential jurors.

\textsuperscript{107} \textit{Davis v. Washington}, 547 U.S. 813, 828 (2006). In Davis, a domestic violence victim called 911 during the attack. She identified her attacker to the 911 operator, and the prosecution used this information during trial. The identification was during the scope of an emergency. In this line of cases, it thus incentivized treating a period of emergency as a long length of time, because more evidence could be presented in court. In fact, evidence during a single interaction can change from testimonial to non-testimonial.

\textsuperscript{108} Id.

\textsuperscript{109} See also \textit{United States v. Liera-Morales}, 759 F.3d 1105, 1109-10 (9th Cir. 2014). This case regarding an ongoing hostage situation also falls within the emergency doctrine established by the Davis court. The primary purpose of the call was to allow agents to respond to the hostage situation, even though the provided information also included statements about past events. The court reasoned that these statements, even though not solely current, were made with the intention of resolving the hostage crisis.

\textsuperscript{110} \textit{Davis}, 547 U.S. at 828.
emergency. The emergency doctrine also applies in situations in which the witness is not the individual facing the emergency.

Furthermore, a new approach to using statements that would not normally pass under the Crawford test is the use of the doctrine of forfeiture by wrongdoing. After Crawford, testimonial statements that had not been subjected to cross-examination would be admitted under two exceptions, dying declarations and forfeiture by wrongdoing. Dying declarations have routinely been admitted under Confrontation Clause challenges. Also, testimonial statements may be admitted if the defendant, by his or her own wrongdoing, forfeited the right to confronting the witnesses against them. The forfeiture by wrongdoing doctrine may allow many statements made by domestic violence victims, due to the fact that the acts in question could be construed to entail the required specific intent to alienate witnesses. Domestic violence in itself may be

\[111\text{ See also Arizona v. Hill, 336 P.3d 1283, 1289 (Ariz. Ct. App. 2014). Although many cases rely on the declaration of evidence as non-testimonial through the emergency situation doctrine, many useful pieces of evidence can fall under the exception for medical examinations. In this case, a medical professional performed an exam after the victim was assaulted. Although the court reasoned that the situation was no longer a pressing emergency, the general justification behind the emergency situation doctrine still applied. (The medical professional desired to gain information relevant to the exam and the patient’s health.) Thus, this non-testimonial sphere of evidence includes many sources during the course of a normal investigation.}\]

\[112\text{ Louisiana v. Falkins, 146 So. 3d 838, 848 (La. App. 4 Cir. 2014). In this case, three separate callers made 911 calls during the course of an attempted break-in. The first call came from an individual inside the apartment, who happened to be the defendant’s girlfriend. The second call came from the apartment security worker, who saw the defendant trying to kick open the door to an apartment. The third call came from the victim’s sister, who also happened to be inside the apartment. The court held that all three calls fell under the emergency doctrine, because the information given to the 911 operator was intended to aid in the resolution of an ongoing emergency. The court reasoned that the information was presented as an account of current events, not as a statement of the past that would qualify the statements as testimonial. Although the first and third callers were indisputably facing an ongoing emergency, the apartment security guard was not in immediate danger or an integral figure in the emergency in question. Nonetheless, her statements were allowed into evidence as non-testimonial statements outside the Crawford requirements for further confrontation.}\]


\[114\text{ Id.}\]

\[115\text{ Brittain v. Georgia, 766 S.E.2d 106, 112 (Ga. Ct. App. 2014). An abduction victim, and also a witness to the murder of her husband, went missing during the scope of the investigation into the named defendant. Her calls to friends immediately after she escaped her abductor, as well as her 911 call upon arriving safely at the nearest payphone, were allowed as evidence without the question of whether those calls were testimonial or non-testimonial evidence. The court followed the precedent of the forfeiture doctrine and reasoned that the conduct of the defendant eliminated his Confrontation rights.}\]

\[116\text{ Vargas, supra note 57, at 175.}\]
enough to qualify for forfeiture by wrongdoing, because those types of relationships are isolating to victims.\textsuperscript{117} There are many challenges to this approach to prosecuting domestic violence cases. In effect, the defendant would be held guilty of the acts for which he or she is on trial to admit evidence.\textsuperscript{118}

Recently, the Supreme Court further discussed \textit{Crawford} and the Confrontation Clause in light of testimonial and non-testimonial statements.\textsuperscript{119} The question in \textit{Ohio v. Clark} was whether statements made by a three-year-old child were testimonial in nature, therefore implicating the Confrontation Clause under \textit{Crawford}.\textsuperscript{120} The lower courts disagreed on whether the statements made to a teacher regarding abuse at home were testimonial.\textsuperscript{121} In holding that the statements did not implicate the Confrontation Clause, the Supreme Court noted the relevant factors for consideration. Statements made by children, especially children as young as the abused in this case, “rarely, if ever, implicate the Confrontation Clause.”\textsuperscript{122} Children, and the witness in this case, cannot have the purpose of making statements for future use in a criminal proceeding.\textsuperscript{123} In addition, the teacher who received and acted upon the statements was not a law enforcement officer, and had the primary goal of responding to the current situation for the safety of the child.\textsuperscript{124}

\begin{footnotesize}
\begin{enumerate}
  \item Vargas, \textit{supra} note 57, at 180.
  \item \textit{Id.} at 2177.
  \item \textit{Id.} at 2178. “Clark moved to exclude testimony about L.P.’s out-of-court statements under the Confrontation Clause. The trial court denied the motion, ruling that L.P.’s responses were not testimonial statements covered by the Sixth Amendment.” “Clark appealed his conviction, and a state appellate court reversed on the ground that the introduction of L.P.’s out-of-court statements violated the Confrontation Clause.” “In a 4–to–3 decision, the Supreme Court of Ohio affirmed. It held that, under this Court's Confrontation Clause decisions, L.P.’s statements qualified as testimonial because the primary purpose of the teachers' questioning ‘was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution.’”
  \item \textit{Id.} at 2182.
  \item \textit{Id.} at 2181.
  \item \textit{Id.} at 2182. “It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality.”
\end{enumerate}
\end{footnotesize}
Crawford provided a new template for the Confrontation Clause, with the Supreme Court and lower courts defining the necessary terms for its current application.

V.

Crawford's Consequences for Domestic Violence Victims: Empirical Data

Domestic violence (which encompasses both battering and intimate partner violence125) continues to be an epidemic facing our nation today.126 Over 20% of all the violent victimizations between 2003 and 2012 were attributable to domestic violence, with the greatest percentage being intimate partner violence.127 In addition, nearly one in three women and one in four men experience physical violence by an intimate partner at some point in their life.128 Though recent evidence has

125 WORLD HEALTH ORGANIZATION, Understanding and Addressing Violence Against Women: Intimate Partner Violence, (2012), http://apps.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf. Intimate partner violence is physical, sexual, and emotional abuse and controlling behaviors inflicted by an intimate partner. Battering is a severe form of intimate partner violence, where the controlling and abusive behaviors are increasing and escalating.

126 See Nancee Alexa Barth, “I’d Grab at Anything. And I’d Forget.” Domestic Violence Victim Testimony after Davis v. Washington, 41 J. MARSHALL L. REV. 937, 939-40 (2008) (quoting Planned Parenthood of S. Pa. v. Casey, 505 U.S. 833, 888 (1992)) “Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because battering is not usually reported until it reaches life-threatening proportions) the actual number of families affected . . . . In fact, researchers estimate that one of every two women will be battered at some time in their life . . . ”).


128 Matthew J. Breiding, et al., Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011, CENTERS FOR DISEASE CONTROL AND PREVENTION (2014), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1_e. An estimated 31.5% of women and 27.5% of males experience physical violence by an intimate partner.
shown a drop in the occurrence of domestic violence, the numbers are still alarming, and are likely much higher because some claim that as much as half of the occurrences go unreported.

According to the Centers for Disease Control and Prevention, there are four main types of intimate partner violence: physical, sexual, stalking, and psychological, which includes both verbal and non-verbal mental or emotional abuse. Due to the nature of domestic violence, the harm is often not readily apparent, often consisting of unseen emotional and psychological symptoms, including depression, panic attacks, and flashbacks.

A. States' Interest in Domestic Violence Prosecution

Although the majority of victims are young, multi-racial, non-Hispanic women, domestic violence is boundless and is a growing public health concern with enormous economic costs.

In 1995, it was estimated that intimate partner violence cost the nation over 5.8 billion dollars each year.

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130 See Buel, supra note 3, at 1329 citing James Allan Fox & Marianne W. Zawitz, *U.S. Dep't of Justice, Homicide Trends in the United States*, U.S. DEPARTMENT OF JUSTICE (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf. Recent data shows that the number of women murdered by an intimate partner has stayed the same for the last two decades.


133 Id.

134 Jennifer E. Truman and Rachel E. Morgan, *Domestic Violence Accounted for about a Fifth of all Violent Victimizations between 2003 and 2012*, U.S. DEPARTMENT OF JUSTICE (2014), http://www.bjs.gov/content/pub/press/ndv0312pr.cfm. Overall, 76% of domestic violence was against females and 24% against males. In addition, domestic violence is highest in the 18 to 24 age range. Finally, for victims age 12 and over, multiracial, non-Hispanics had the highest rate of domestic violence (16.5 victimizations/1000 persons). The following is a breakdown of rates of domestic violence for other ethnicities: blacks had 4.7 victimizations/1000 persons; whites had 3.9 victimizations/1000 persons, Hispanics had 2.8 victimizations/1000 persons; and other non-Hispanics had 2.3 victimizations/1000 persons.

135 National Center for Injury Prevention and Control, supra note 123
year with the majority being attributable to medical and mental health costs and the remaining in lost productivity.\textsuperscript{136} Updating these figures to only 2003, the number jumps to a staggering 8.3 billion.\textsuperscript{137}

Due to its significant societal impact, the government has a substantial interest in addressing the domestic violence epidemic\textsuperscript{138}, which includes successfully prosecuting domestic violence cases.\textsuperscript{139} The societal benefits of domestic violence prosecution are two-fold: prosecution is an outward manifestation of the states' seriousness to address the domestic violence epidemic and successful prosecution decreases the chances of victim re-abuse.\textsuperscript{140}

Recognizing the state's substantial interest in curtailing domestic violence, the justice system has undergone a major reform in the past 40 years\textsuperscript{141}. The most recent wave of reform focuses on implementing mandatory intervention procedures for domestic violence cases, including mandatory arrest and "no-drop" policies.\textsuperscript{142} While it is evident that these mandatory

\textsuperscript{136} Id.
\textsuperscript{138} See Andrew Kin-Ries, \textit{Crawford v. Washington: The End of Victimless Prosecution?} 28 SEATTLE U. L. REV. 301, 307 (2005) (citing Heather Fleniken Cochran, \textit{Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence}, 7 TEX. J. WOMEN & L. 89, 95 n.38 (1997)) (arguing that the harm flowing from an incident of domestic violence extends beyond the victim to the children of the household (who may also be victims and is more likely to continue the cycle of abuse later in life) and also the community at large).
\textsuperscript{139} See Thekla Hansen-Young, \textit{Considering the Constitutionality of a Confrontation Clause Exception for Domestic Violence Victims}, 14 BUFF. WOMEN'S L.J. 81, 89 (2006) (arguing the state has an interest in protecting the well being of women, the most likely domestic violence victims).
\textsuperscript{140} Id. at 90.
\textsuperscript{141} Laurie S. Kohn, \textit{The Justice System and Domestic Violence: Engaging the Case But Divorcing the Victim}, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 196-98 (2008) (citing State v. Pettie, 80 N.C. 367, 368 (1879) "It is settled law of this state that the courts will not invade the domestic form or interfere with the right of a husband to control or govern his family . . . "), State v. Oliver 70 N.C. 60, 61-62 (1874) "it is better to draw the curtains, shut out the public gaze, and leave the parties to forget and forgive.")., Deborah Epstein, \textit{Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System}, 11 YALE J.L. & FEMINISM 3, 9-13 (1999)). Historically, there was minimal intervention for domestic violence because it was considered a private matter within the family. Starting in the 1970's and into the 1980's, spurred by the Women's Rights Movement, many states started to adopt criminal and civil remedies for domestic violence. Although the majority of states codified the criminality of domestic violence, these reforms did not mandate that the justice system take any action.\textsuperscript{142} Id. at 199. Jurisdictions adopting a mandatory arrest policy statutorily command their police officers to make arrests when probable cause is found in a domestic violence cases. Similarly, in "no-drop" jurisdictions, the discretion of the prosecutor is eliminated because policy mandates that all charged domestic violence cases be pursued.
intervention policies have increased the number of domestic violence cases that enter the justice system, the ultimate success of the policies is debatable because if the arrested offender is not prosecuted and convicted, the victim will likely not be in a safer position.

B. Prosecutorial Challenges in Domestic Violence Cases

Domestic violence prosecutions have inherent challenges, most notably, the high prevalence of the victim's recantation or sheer refusal to testify. There are often very few witnesses to domestic violence incidents and the defendant, who is often shielded by the Fifth Amendment privilege, is the only witness, other than the victim, to hear the victim's statements. As such, the victim's participation in the prosecution against the abuser is paramount and can prevent a case from being dismissed.

The controlling and violent nature of domestic violence leads many victims to recant. Victims are often threatened with further violence from their abusers during prosecution, or alternatively, met with extreme flattery to encourage recantation. In addition to the threat of

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143 Id. at 199 (citing Renee Romkens, Law as a Trojan Horse: Unintended Consequences of Rights-based Interventions to Support Battered Women, 13 YALE J. L. & FEMINISM 265, 265 (2001)).
144 See id. at 237 (arguing that for a mandatory arrest policy to be beneficial to the victim, a jurisdiction needs to have the resources to handle the likely increase in caseload).
146 See Beloof & Shapiro, supra note 50, at 7 (citing Donna M. Mathews, Making the Crucial Connection: A Proposed Threat Hearsay Exception, 27 GOLDEN GATE U. L. REV. 117, 138 (1997)).
147 See Percival, supra note 135, at 236 (citing Neal A. Hudders, The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer? 49 DUKE L.J. 1041, 1047 (2000)).
148 Brown, 94 P.3d at 577-78. The intimate and strong emotional relationship between the abuser and victim creates a sense of loyalty that the victim affords their abuser. This loyalty causes the victim to protect their abuser by recanting the statement or refusing to testify.
149 See Tom Lininger, Prosecuting Batters After Crawford, 91 VA. L. REV. 747, 769 (2005) (citing Randall Fritzler & Lenore Simon, Creating a Domestic Violence Court: Combat in the Trenches, 37 CT. REV. 28, 33 (2000)) (reporting that one study found that over half of the victims of domestic abuse are threatened with retaliatory abuse).
150 Id. at 751-52.
violence and intimidation, there are other reasons for victim recantation: financial dependence on the defendant, pressure from friends and/or family, love for the defendant and a hope that he/she will improve, and having children with the defendant.  

Due to the high likelihood that the victim witness will be "unavailable" due to recantation or refusal to testify, it is not uncommon for domestic violence prosecutions to be carried out without the victim. Pre-Crawford, these so-called “victimless prosecutions” relied heavily on many forms of hearsay, including victim statements made to 911 operators and police. However, with current uncertainty surrounding the admissibility of the non-testifying victim's statements, Crawford may have the unfortunate impact of reversing the Nation's long and hard fought battle of domestic violence reform.

C. Prosecutorial Challenges Compounded: Post-Crawford

The Supreme Court's decision in Crawford further magnified the inherent challenges domestic violence prosecution and threatened the ability of the government to successfully pursue "victimless" prosecutions. First, victims are less likely to report the abuse because of the legal obstacles that await them, including threats of and actual imprisonment for refusal to cooperate with the prosecution. Prosecutors recognize the importance of the victim participation and may take extreme measures to ensure it. In addition, some abusers use their

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151 Id.
152 Kin-Ries, supra note 128, at 301. "Victimless" prosecution is also known as evidence-based prosecution.
153 Id.; See also Lininger, supra note 139, at 820 (reporting that before Crawford, a majority of district attorney offices in California, Oregon, and Washington reported that their offices relied on hearsay in over 50% of domestic violence cases).
154 See Percival, supra note 135, at 217 (citing Nathan Max, Domestic Violence on Decline, PRESS-ENTERPRISE (Riverside, Cal.), Dec. 21, 2004 at A1).
155 See id. at 216-17 (citing Wendy N. Davis, Hearsay, Gone Tomorrow? A.B.A. J., Sept. 2004, at 22, 24) (observing that since Crawford, there has been much confusion in the lower courts on how to successfully prosecute domestic violence cases, resulting in many dropped cases.
156 Id. at 241. Victims with knowledge of the criminal justice system will be less trustful of prosecutors and fear of their own prosecution for refusal to testify could prevent domestic violence victims from coming forward because of adverse implications on later child custody or family court proceedings.
157 Id.
awareness of the increased likelihood of a case being dismissed when victims fail to testify to dissuade their victims from contacting the police in the first place.\footnote{See Buel, supra note 3, at 1331 (reporting that some abusers actually explain to their victims that the case is likely to be dropped if they do not appear in court).}

Second, because abusers recognize the importance of the victim testimony at trial, they are incentivized to taunt, scare, and otherwise intimate their victims to ensure recantation or their "unavailability" for trial.\footnote{Lininger, supra note 102, at 300 (citing Andrew King-Ries, Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions, 39 CREIGHTON L. REV. 441, 459 (2006)).} Witness tampering, such as this, is prolific and extremely damaging in domestic violence cases, both to the success of the prosecution and the harm to the victim.\footnote{Buel, supra note 3, at 1323-33 (citing Andrew King-Ries, An Argument for Original Intent: Restoring Rule 801(D)(1)(A) to Protect Domestic Violence Victims in a Post-Crawford World, 27 PACE L. REV. 199, 217 (2007)).} Witness tampering is the "most common crime committed by batters;" however, it is rarely prosecuted.\footnote{Id. (citing Lininger, supra note 139, at 820). A study of district attorney's offices in Oregon, Washington, and California found that 59% of domestic violence defendants are less likely to plead guilty post-Crawford.}

Lastly, prosecutorial resources and overall judicial economy are threatened with the enhanced confrontation protection that \textit{Crawford} provides.\footnote{Lininger, supra note 102, at 297.} Domestic violence defendants are now more likely to go to trial versus take a plea deal, as they did much more readily pre-\textit{Crawford}.\footnote{Id. (citing Lininger, supra note 139, at 820).}

Domestic violence prosecution has shouldered the brunt of the impact felt by \textit{Crawford} and its progeny.\footnote{Percival, supra note 135, at 216} The uncertainty of the admissibility of the non-testifying victim's statement has made it essential for the prosecution to have victim participation. However, many domestic violence offenders recognize this importance and use it to their benefit. Thus, the without the victim, many more domestic violence cases are dropped.\footnote{Lininger, supra note 139, at 820. Jurisdictions in Oregon, Washington, and California dismissing around 75% of charges; Percival, supra note 136, at 217 (citing Davis, supra note 146, at 22, 24). In addition, as a result of the Crawford decision, one jurisdiction has dismissed up to a dozen domestic violence cases a day because of the victim's refusal to participate in the prosecution.}

\section*{VI.

Potential Objections and Responses to This Proposed Solution}
An anticipated objection to this proposed solution is that the motive of the cross-examiner would not be sufficiently similar to the motive that would be demonstrated at trial for the unavailable witnesses’ statements to be used as evidence.\textsuperscript{165} If the goals at a preliminary proceeding and subsequent trial are not similar, then the goals of that later examination could not be considered satisfied, and those earlier statements should not be admitted.\textsuperscript{166}

In \textit{United States v. DiNapoli}, the nature of the proceedings in which questioning occurred was different, one being a grand jury proceeding and the other being the trial.\textsuperscript{167} The precise issue was whether the prosecutors had a similar motive in examining two grand jury witnesses as it would have had the opportunity to cross-examine at trial been available.\textsuperscript{168} The witnesses testified to the non-existence of a “club” implicated in a RICO proceeding.\textsuperscript{169} The government urged that the motive could not be similar because it was the aim of the prosecutors to determine whether there should be further indictments.\textsuperscript{170} During the grand jury proceeding, the prosecutors asked whether the witnesses knew of the “club,” then pressed the veracity of the witnesses’ denials by bringing up the only piece of evidence in the public record.\textsuperscript{171} The prosecutor, however, had more evidence that it was unwilling to present before the grand jury.\textsuperscript{172}

\textsuperscript{165} \textit{See} \textit{Roberts}, 448 U.S. at 71. The \textit{Roberts} court asserted that the Confrontation Clause was satisfied by the goals and objectives of cross-examination, even if cross-examination itself did not occur at trial. Furthermore, “the principal purpose of cross-examination: to challenge “whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.” Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv.L.Rev. 1378 (1972).

\textsuperscript{166} \textit{See United States v. DiNapoli}, 8 F.3d 909, 914-15 (2d Cir. 1993).

\textsuperscript{167} \textit{Id.} at 909.

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} \textit{Id.} at 911.

\textsuperscript{170} \textit{Id.} at 915.

\textsuperscript{171} \textit{Id.} at 911.

\textsuperscript{172} \textit{Id.} “The prosecutor, obviously skeptical of the denials, pressed DeMatteis with a few questions in the nature of cross-examination. However, in order not to reveal the identity of then undisclosed cooperating witnesses or the existence of then undisclosed wiretapped conversations that refuted DeMatteis’s denials, the prosecutor refrained from confronting him with the substance of such evidence. Instead, the prosecutor called to DeMatteis’s attention the
argued that this difference included dissimilar motives in terms of approach and overall questioning.\textsuperscript{173}

The DiNapoli court began its inquiry by clarifying the approach to determine whether a party’s motives were substantially similar in the way required by rule 804(b)(1).\textsuperscript{174} Instead of relying upon whether a side takes the same position, the party must have a substantially similar interest in asserting that position or side of an issue.\textsuperscript{175} Although grand jury questioning and trial proceedings are markedly different in burdens of proof and general approach to questioning, the DiNapoli court rejected the government’s position that a prosecutor would never have the same motive in a trial as a grand jury interrogation.\textsuperscript{176} Furthermore, the determination of whether there was a substantially similar motive must be fact specific.\textsuperscript{177} Under this proposed solution, the Confrontation hearing examination would have the substantially similar motive of discrediting the witness.\textsuperscript{178} Although the DiNapoli court ultimately held that the motives were not similar enough to allow the statements to be admissible, this decision provides a framework for demonstrating the sufficiently similar motives inherent in the proposed solution.\textsuperscript{179}

Another potential objection is that the cross-examiner would not have all of the available information at the time of the examination. Although more evidence would come to light after the initial examination, this lack of a complete record does not affect the proposed use of these

\textsuperscript{173} Id. at 914.
\textsuperscript{174} Id. at 912.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 914.
\textsuperscript{177} Id.
\textsuperscript{178} See id. at 914-15. “The proper approach, therefore, in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.”
\textsuperscript{179} Id. at 915.
statements in a later proceeding.\footnote{See United States v. Koon, 34 F.3d 1416, 1427 (9th Cir. 1994) aff'd in part, rev'd in part, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996); United States v. McClellan, 868 F.2d 210, 215 (7th Cir.1989); United States v. Salim, 855 F.2d 944, 953–54 (2d Cir.1988); Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985); Thomas v. Cardwell, 626 F.2d 1375, 1386 n. 34 (9th Cir.1980), cert. denied, 449 U.S. 1089, 101 S.Ct. 881, 66 L.Ed.2d 816 (1981).} In United States v. Koon, there was video evidence that showed the infamous arrest of Rodney King, as well as a taped interview with one of the officers from a state court proceeding.\footnote{Koon, 34 F.3d at 1426-27.} At the time of the interview with Briseno at the state court proceeding, the opposing party had the opportunity to and did in fact cross-examine Briseno about his statements.\footnote{Id. at 1427.} Koon argued that the opportunity to cross-examine was hindered because the Holliday tape (recording King’s arrest) was better developed at the time of the later proceeding.\footnote{Id. at 1426. “At the state trial, Briseno was cross-examined by all three of his codefendants as well as the prosecutor, who spent part of his time trying to establish Briseno’s own culpability.” The video benefited from enhancements after the initial trial, which would have allowed for a more complete line of questioning.} It was specifically argued that the examination of Briseno could have been more complete with the enhanced video, because more information would have changed the questioning.\footnote{Id.} Thus, it was argued that the prior testimony should not be allowed as evidence because the previous cross-examination was completed without information that may have altered the course of the questioning.\footnote{Id. at 1426. “The failure of a defendant to discover potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine.” “Often information will surface after a trial which, if known to a defense attorney, would have made the cross-examination of a witness more thorough or even more advantageous to the defendant. Nevertheless, that lack of information does not make the opportunity for cross-examination ineffective even though the cross-examination itself is less than optimal for the defendant.”}

The Koon court, however, held that the later availability of important information did not constitute a lack of opportunity of cross-examination at an earlier proceeding.\footnote{Id. at 1427; see Cardwell, 626 F.2d at 1386 n. 34.} Specifically, having the opportunity to cross-examine is the necessary limit to use of earlier statements as
evidence, not taking full advantage of that opportunity. The Koon holding applies to this proposed solution because of the inherent lack of a full evidentiary record at the time of the Confrontation hearing. The proposed solution, however, provides the necessary opportunity for cross-examination along with the requisite substantial similarity of motives.

VII.

Conclusion

The Supreme Court decision in Crawford v. Washington holding that prior statements of victims and witnesses are inadmissible at a criminal trial unless the victim is unavailable to testify at trial, and the defendant has had a prior opportunity to cross-examine the witness need not put victims at risk of intimidated, threat, and death if, in accordance with Crawford, defendant is accorded an opportunity to cross-examine the victim immediately upon his arrest either at the police station, at arraignment, or immediately thereafter. Giving the defendant such a prompt opportunity to cross-examine would deprive the defendant of the time needed to arrange, plan, or conspire to intimidate, harass, threaten, bribe, or kill the chief witness against him. It would also provide the defendant with the right to the most effective kind of cross-examination—namely contemporaneous cross-examination before the witness has had a chance to be revise, reflect, or alter testimony in accordance with possible prosecutorial prepping or coaching. The argument that contemporaneous and immediate cross-examination may be less effective than cross-examination after the cross-examining attorney has had considerable time for investigation and learning additional facts that may be helpful in a later cross-examination

187 Koon, 34 F.3d at 1427. See McClellan, 868 F.2d at 215 (“the emphasis in [the Rule 804(b)(1) ] inquiry is upon the motive underlying the cross-examination rather than the actual exchange that took place”); Salim, 855 F.2d at 953–54 (under Rule 804(b)(1), defendant is entitled to ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’ ”) (quoting Fensterer, 474 U.S. at 20).
has already been rejected by the Ninth Circuit in Koon\textsuperscript{188} and the Supreme Court in Green\textsuperscript{189}, and in any case is more than adequately counter-balanced by the advantages to the defendant of the opportunity to cross-examine before the witness can be coached or prepped by the prosecution.

\textsuperscript{188} Koon, 34 F.3d at 1427; see Cardwell, 626 F.2d at 1386 n. 34. “The failure of a defendant to discover potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine.” “Often information will surface after a trial which, if known to a defense attorney, would have made the cross-examination of a witness more thorough or even more advantageous to the defendant. Nevertheless, that lack of information does not make the opportunity for cross-examination ineffective even though the cross-examination itself is less than optimal for the defendant.”

\textsuperscript{189} California v. Green, 399 U.S. 149, 165 (1970). “Porter’s statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel – the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.”