The Confrontation Clause After *Ohio v. Clark*

THE PATH TO REINVIGORATING EVIDENCED-BASED PROSECUTION IN INTIMATE PARTNER VIOLENCE CASES

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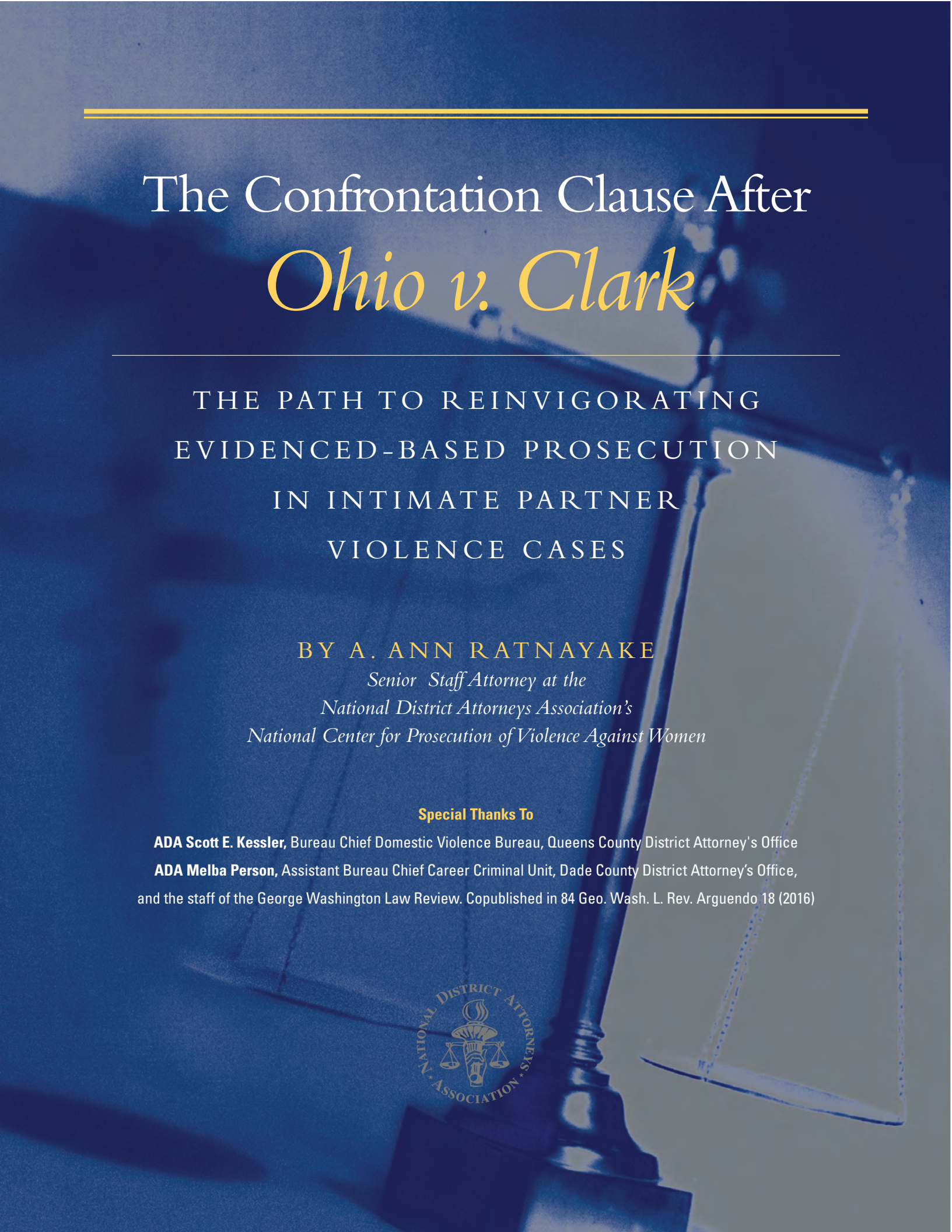

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INTRODUCTION

SOCIETY RECENTLY made strides to help victims of intimate partner violence.[1] At time of America's founding, a husband, as master of his household, had a privilege recognized by law to subject his wife to corporal punishment or beating so long as he did not inflict permanent injury upon her.[2] Since the law at the time viewed wives as belonging to their husbands, what happened between them was regarded as a private matter and was not a concern to the criminal justice system.[3]

In the 20th Century, battery against a wife was no longer viewed a privilege.[4] However, the family court system sought to marginalize marital violence.[5] Rather than punish men who assaulted wives, judges and social workers urged couples to reconcile.[6] Family courts "discouraged [battered wives] from filing criminal charges against their husbands, urged [wives] to accept responsibility for their role in provoking the violence, and encouraged [wives] to remain in the relationship."[7]

Even into the 1970s, police training manuals stated, [T]he police role in a [domestic] dispute situation is more often that of a mediator and peacemaker than enforcer of the law . . . [When] one of the parties demands arrest, you should attempt to explain the ramifications of such action . . . and encourage the parties to reason with each other.[8] Not until 1984, when the landmark case *Thurman v. City of Torrington*[9] recognized that police had a legal responsibility to respond to and protect victims of domestic violence,[10] did practices change.

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[1] *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 959 (2004).

[2] Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy* 105, YALE L.J. 2117, 2118 (1996) (citing William Blackstone, Commentaries *430-433; James Kent, *Commentaries On American Law* 1180 (New York, Halstead 1827) ("[A]s the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it."); Francis Wharton, *A Treatise On The Criminal Law Of The United States* 314-15 (Philadelphia, James Kay, Jr. & Brother 1846) (observing that "[b]y the ancient common law, the husband possessed the power of chastising his wife). *See Generally* Joel Prentiss Bishop, *Commentaries On The Criminal Law* 520-26 (Boston, Little, Brown & Co. 1872) (discussing chastisement prerogative in various status relations of household: parent and child, guardian and ward, teacher and pupil, master and servant, and husband and wife)).

[3] *Id.*; Edna Erez, LL.B., Ph.D., *Domestic Violence and the Criminal Justice System: An Overview*, 7 ONLINE J. OF ISSUES IN NURSING (2002) (citing Dobash, R. E., & Dobash, R., *Violence Against Wives*. (NEW YORK: FREE PRESS 1979).

[4] Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy* 105, YALE L.J. 2117, 2170 (1996).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id* at 2117 (citing 1975 Oakland Ca Police Training Bulletin).

[9] *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

[10] *Id.* at 1528.

In the 1980s and 1990s prosecutors began using evidenced-based prosecution when victims recanted.[11] Studies suggests that 80–85% of battered women will recant truthful statements against her abuser.[12] Evidence-based prosecution used 911 tapes, statements made to police officers, grand juries, neighbors, photos of injuries, jail house calls, and other corroborative evidence to prove a case of battery even when the victim refused to testify against her abuser. The 1980 *Ohio v. Roberts* "indicia of reliability" test for out-of-court statements allowed the prosecutor to introduce statements that fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness" even if the declarant did not testify.[14] But this technique became difficult when the Supreme Court expanded its Confrontation Clause jurisprudence.

In 2004, *Crawford v. Washington* redefined the Confrontation Clause analysis under the Sixth Amendment.[15] The U.S. Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[16] Justice Scalia, writing for the majority, rejected the *Ohio v. Roberts* indicia of reliability test.[17] Instead, Justice Scalia reached back to the "time of [America's] founding" and fashioned a distinction between testimonial and nontestimonial out-of-court statements.[18] *Crawford* defined a testimonial statement as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[19] Further stating, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[20] Testimonial statements are only admitted against a criminal defendant when the declarant is unavailable and the defendant had a previous opportunity to cross-examine.[21]

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[11] Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1859–60 (1996).

[12] Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 768 (2005).

[13] *Ohio v. Roberts*, 448 U.S. 56 (1980).

[14] *Id*. at 66.

[15] *See Crawford v. Washington*, 541 U.S. 36 (2004).

[16] U.S. Const. amend. VI.

[17] *Crawford*, 541 U.S. at 60.

[18] *Id*. at 51.

[19] *Id*. at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)); *See also Ohio v. Clark*, 135 S. Ct. 2180 (2015) (quoting *Michigan v. Bryant*, 562 U. S. 344, 358 (2011)) (stating the primary purpose test analyzes whether "in light of all the circumstances, viewed objectively the 'primary purpose' of the conversation [is] 'to creat[e] an out-of-court substitute for trial testimony'").

[20] *Id*. at 68.

[21] *Id*. at 68; *Id*. at 59 n.9 (Similar to hearsay, "[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Statements offered for reasons other than the truth of the matter asserted are not excluded for Confrontation Clause purposes).

The *Crawford* decision initially led to wholesale dismissal of charges in domestic violence cases where victims had refused to testify.[22] A victim who telephones the police in immediate fear for her life will likely later recant due to control tactics used by the abuser.[23] Prosecutors responded to this phenomenon and attempted to protect victims by using corroborating evidence to prosecute abusers without the victim's live testimony. However, immediately after *Crawford*, courts were forced to exclude statements made to police, grand jury testimony, 911 phone calls, prior testimony at depositions, and affidavits that under *Ohio v. Roberts* would have been admitted into evidence.[24] The *Crawford* Case curtailed evidence based prosecution.[25]

This monograph a presents case language and cites caselaw and studies which have come after the *Crawford v. Washington* decision that can be helpful to prosecutors looking to assist victims in intimate partner violence cases. Within two years of *Crawford*, *Davis v. Washington*, recognized an emergency exception for police interrogations within the *Crawford* analysis.[26] In 2011, the case of *Michigan v. Bryant*[27] effectively rewrote the strict testimonial standard enunciated in the *Crawford decision*.[28] And in 2015, *Ohio v. Clark* confirmed this change of direction for Sixth Amendment Confrontation Clause analysis.[29] Under the *Bryant-Clark* framework, the question to ask when determining the testimonial nature of a statement "is whether in light of all of the circumstances, viewed objectively, 'the primary purpose' of the conversation was to 'create an out-of-court substitute for trial testimony.'"[30] Lastly, *Giles v. California* expounded upon forfeiture by wrongdoing exception to testimonial statements making them admissible in certain cases where the defendant's wrongdoing caused the witness's unavailability.[31] Prosecutors can use these new developments to pursue intimate partner violence cases with vigor once again.

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[22] *E.g.*, Robert Tharp, *Domestic Violence Cases Face New Test Ruling That Suspects Can Confront Accusers Scares Some Victims From Court*, Dallas Morning News, July 6, 2004, at 1A (In Dallas County, Texas, judges are dismissing up to a dozen domestic violence cases per day because of evidentiary problems related to *Crawford* evidentiary issues.).

[23] *Id*.

[24] *See Crawford*, 541 U.S. at 68.

[25] Deborah Tuerkheimer, *Confrontation And The Re-Privatization Of Domestic Violence*, 113 Michigan Law Review First Impressions 32, 41 (2014).

[26] *See Davis v. Washington*, 547 U.S. 813, 822 (2006).

[27] *Michigan v. Bryant*, 562 U. S. 344 (2011).

[28] *See Id*.

[29] *See Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015); *see also* Shari H. Silver, Michigan v. Bryant: *Returning to an Open-Ended Confrontation Clause Analysis*, 71 Md. L. Rev. 545 (2012).

[30] *Ohio v. Clark,* 135 S. Ct. 2180 (2015) (quoting *Michigan v. Bryant,* 562 U. S. 344, 358 (2011)).

[31] *Giles v. California*, 554 U.S. 353 (2008).

I. The Evolution of the Testimonial Standard

A. *Davis v. Washington:* The Primary Purpose Test

In *Davis v. Washington*, the Court recognized an emergency exception for police interrogations.[32] Some statements made during police interrogations are nontestimonial when the "circumstances objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[33] "They are testimonial when . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[34]

The Supreme Court consolidated two lower court cases: *Davis v. State*[35] and *Hammon v. State*.[36] In *Davis*, the lower court admitted statements made to a 911 operator.[37] In *Hammon*, the lower court admitted statements and an affidavit made to the police who responded to a domestic disturbance complaint.[38] Amy Hammon told the police when they arrived that "nothing was the matter."[39] Police entered the home to investigate and found evidence that an argument had occurred between Hershel and Amy Hammon.[40] Later, Ms. Hammon memorialized in affidavit form that the defendant "[b]roke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter."[41] The Court distinguishes between this fact scenario and the *Davis* case, where the victim tells the 911 operator that the defendant was "usin' his fists," and then slightly later in the conversation, was "r[unning] out the door."[42]

Justice Scalia, writing for the majority, found the statements to the 911 operator made in *Davis* objectively indicated an ongoing emergency and thus were nontestimonial, while the

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[32] *See Davis v. Washington*, 547 U.S. 813, 822 (2006).
[33] *Id.*
[34] *Id.*
[35] *State v. Davis*, 111 P.3d 844 (Wash. 2005).
[36] *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005).
[37] *Davis*, 547 U.S. at 817.
[38] *Id.* at 820.
[39] *Id.* at 819.
[40] *Id.*
[41] *Id.* at 820.
[42] *Id.* at 817.

statements made in *Hammon* to the police did not occur during an ongoing emergency and thus, were testimonial.[43] The Court cited the following factors to distinguish between the two cases: (1) whether the victim "was speaking about events as they were actually happening rather than describing past events,"[44] (2) whether a "reasonable listener would recognize that [the caller] was facing an ongoing emergency," as opposed to providing a narrative of a past crime,[45] (3) whether the "statements were necessary to be able to resolve the present emergency rather than to simply learn . . . what happened in the past,"[46] and (4) "the level of formality" of the interviews.[47] The Court stated that in *Davis*, the victim faced an ongoing emergency, needed help to resolve an ongoing emergency and was communicating in a frantic rather than tranquil or formal manner to do so.[48] Whereas in *Hammon*, the victim was separated from her husband, protected by police and spoke about events that happened in the past after the abuse had happened, and thus, was not experiencing an ongoing emergency.[49]

B. *Michigan v. Bryant:* Rewriting the Testimonial Standard

In 2011, the Court addressed the primary purpose test again in *Michigan v. Bryant*.[50] In *Bryant*, Detroit police responded to a dispatch that a man had been shot.[51] At the scene, a man was lying on the ground next to his car at a gas station, and bleeding with a gunshot wound to the abdomen.[52] The police asked him, "what happened, who shot him, and where the shooting occurred."[53] The victim said that Bryant (the defendant) shot him through the backdoor of Bryant's house.[54] After he was shot, the victim fled to the gas station where police found him.[55] The victim subsequently died and was unable to testify at trial.[56]

The Michigan Supreme Court decided the facts were similar to *Hammon* in that "the

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[43] *Davis*, 547 U.S. at 828–829.
[44] *Id*. at 827.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*. at 829–831.
[50] *Michigan v. Bryant*, 562 U.S. 344 (2011).
[51] *Id*. at 349.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 375.
[55] *Id*.
[56] *Michigan v. Bryant*, Oyez, https://www.oyez.org/cases/2010/09-150 (last visited Jan. 8, 2016).
[57] *Bryant*, 562 U.S. at 363 (citing *People v. Bryant*, 768 N.W.2d 65, 75 n.15 (2009)).

statements were made after the defendant stopped assaulting the victim and left the premises."[57] The Michigan Supreme Court held the statements made to the police did not occur during an "ongoing emergency," and thus they were testimonial and inadmissible at trial.[58]

The U.S. Supreme Court reversed.[59] Justice Sotomayor, writing for the majority stated, "[t]he Michigan Supreme Court erroneously read *Davis* as deciding that statements made after the defendant stopped assualting the victim and left the premises did not occur during an ongoing emergency," and the lower court "failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry."[60]

The Court listed new factors such as whether "the threat to the first responders and public may continue" even after the threat to the first victim is neutralized, the "type of weapon employed," and the "medical condition of the declarant" as valid inquiries to take into account when determining whether an ongoing emergency exists.[61] "In addition to the circumstances under which the encounter occurs, the statements and actions of *both* the declarant and interrogators provide objective evidence of the primary purpose of the interrogation."[62] The Court further stated whether an ongoing emergency exists is only "one factor—albeit an important factor—that informs the ultimate inquiry regarding the primary purpose of an interrogation."[63] Later in *Clark*, the Court out right states, the ultimate question is whether "in light of all of the circumstances, viewed objectively, 'the primary purpose of the conversation' was to 'creat[e] an out-of-court substitute for trial testimony.'"[64]

Justice Scalia in his sharp dissent accused the Bryant majority of destroying the testimonial/nontestimonial Confrontation Clause jurisprudence he announced in *Crawford*, and attempting to resurrect the old reliability test.[65] He may be correct. In *Bryant*, the Court not only added additional factors to deciphering when the primary purpose of a conversation is testimonial, but also announced: "[T]here may be other circumstances, aside from ongoing emergencies, when a statement is not procured with the primary purpose of creating an out-of-court

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[58] *Id*.
[59] *Id*. at 349.
[60] *Id*. at 363 (internal quotations omitted).
[61] *Id*. at 363–364.
[62] *Id*. at 367 (emphasis added).
[63] *Id*. at 366.
[64] *Clark*, 135 S. Ct. at 2180.
[65] *Id*. at 391–92.
[66] *Id*. at 358–59.

substitute for trial testimony."[66] And the Court further states, "[i]n making the primary purpose determination [for the *Crawford* testimonial/nontestimonial analysis] standard rules of hearsay . . . will be relevant."[67]

The Court explained, "[i]mplicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross examination. This logic is not unlike that justifying the excited utterance exception in hearsay law."[68]

While the Court stopped short of deeming all excited utterances as nontestimonial for Confrontation Clause purposes, it holds open the door for that argument, and plausibly swings the pendulum of Confrontation Clause jurisprudence toward the *Ohio v. Roberts* standard.[69]

In applying the new factors, the Court examined the circumstances in which the conversation occurred.[70] In *Bryant*, an armed shooter, whose motives for and location after the shooting were unknown, had mortally wounded the victim.[71] The Court distinguished the case from *Hammon* where the assailant was known, and used only fists rather than a gun.[72] The Court further stated, "the physical separation that was sufficient to end the emergency in Hammon was not necessarily sufficient to end the threat in this case," where the police did not know the location of the shooter.[73] An emergency existed.

The Court then analyzed the victim-declarant's statements and actions to determine whether the primary purpose was to create an out-of-court substitute for trial testimony. The victim, bleeding from a gunshot wound to his abdomen, was lying down on the ground next to his car at a gas station. He was in great pain and spoke with difficulty. The police asked, "what happened, who had shot him, and where the shooting had occurred."[74] The victim-declarant said that Bryant shot him through the backdoor of Bryant's house.[75] After he was shot, the victim fled to the gas station where police found him.[76] The victim's answers to police questions were pep-

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[67] *Id.*

[68] *Id.* at 361.

[69] *Id.* at 358–59 ("In making the primary purpose determination, rules of hearsay will be relevant."); *id.* at 361–62 (analogizing the logic in admitting statements made during on-going emergencies to those made under the excited utterance hearsay exception).

[70] *Bryant*, 562 U.S. at 370.

[71] *Id.* at 374.

[72] *Id.* at 373.

[73] *Id.* at 373–74.

[74] *Id.* at 349.

[75] *Id.* at 375.

[76] *Id.*

pered with questions as to when medical services would arrive.[77] The Court determined that from the description of the victim-declarant's condition, "we cannot say that [the victim's] would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.'"[78]

Next the Court analyzed the interrogator's statements and actions to determine whether the primary purpose was to create an out-of-court substitute for trial testimony.[79] The Court agreed with the Michigan Solicitor General, "[w]hen an officer arrives on the scene and does not know where the perpetrator is, whether he is armed, whether he might have other targets, and whether the violence might continue . . . the primary purpose [of interrogation] . . . is designed to meet the ongoing emergency."[80] The Court noted nothing the victim said indicated that the cause of the shooting was purely personal or the threat was limited to him.[81] Furthermore, the weapon used was a gun, and the assailant, who was at large still, possibly posed a threat to the victim, public, and law enforcement.[82]

Lastly, the Court considered the formality of the circumstances, when determining whether the primary purpose was to create out-of-court substitute for trial testimony. The Court articulated that questioning at the parking lot in a situation that was fluid and confused, officers arriving at different times and each asking the victim what happened, was not a structured interview.[83] Justice Sotomayor concluded, "the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the victim] to or focused him on the possible future prosecutorial use of his statements."[84] The Court concluded the statements were not testimonial.[85]

C. *Ohio v. Clark:* Reaffirming the *Michigan v. Bryant* Testimonial Standard

In the 2015 case of *Ohio v. Clark*, the Court addressed the issue of whether a conversation between teachers and a three-year-old child regarding possible abuse was testimonial

[77] *Id.*
[78] *Id.*
[79] *See id.* at 371–72, 376–77.
[80] *Id.* at 371–72
[81] *Id.* at 372–73, 376–77.
[82] *Id.* at 376.
[83] *Id.* at 377.
[84] *Id.*
[85] *Id.* at 378.

under the primary purpose test.[86] Because Ohio law mandates teachers report child abuse to law enforcement, the defendant argued that the statements were testimonial.[87] While the Court declined to adopt a categorical rule denoting that only law enforcement officers are subject to testimonial analysis, it did announce, "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."[88]

Justice Alito reiterated that courts must consider "all of the relevant circumstances "under the primary purpose analysis.[89] The ultimate question is whether "in light of all of the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony."[90] "[W]hen the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial," and thus is not testimonial.[91] "The existence *vel non* of an ongoing emergency is not the touchstone of testimonial inquiry," but rather "simply one factor . . . that informs the ultimate inquiry of primary purpose of an interrogation."[92]

The Court further stated that formality of the interrogation is another factor for consideration in the primary purpose test where less formal questioning is more likely to be non-testimonial.[93] The Court added, "in determining whether a statement is testimonial, standard rules of hearsay designed to identify some statements as reliable, will [also] be relevant."[94] Lastly it stated, "under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial."[95] "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."[96]

In applying the test, the Court first examined the circumstances under which the interrogation occurred.[97] Similar to *Bryant*, the interrogators (the teachers) were not sure who abused the victim, how best to secure his safety, and whether other children were at risk.[98] It further

[86] *See Clark*, 135 S. Ct. at 2177.
[87] *Id.* at 2179.
[88] *Id.* at 2182.
[89] *Id.* at 2180 (internal quotation marks omitted).
[90] *Id.* (internal quotation marks omitted).
[91] *Id.* (internal quotation marks omitted).
[92] *Id.* (alteration in original) (internal quotation marks omitted).
[93] *Id.*
[94] *Id.* (internal quotation marks omitted).
[95] *Id.*
[96] *Id.* (internal quotation marks omitted).
[97] *See id.* at 2181.
[98] Id.

states, "[t]he teachers' questions were meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or some other means is irrelevant."[99] The Court asserted that an ongoing emergency existed, since from the interrogator's perspective, circumstances of the abuse were unclear, and the conversation was aimed "primarily at identifying and ending the threat."[100] The informal setting of the preschool lunchroom and classroom added to the Court's conclusion that the statements were not testimonial.[101]

Furthermore, the Court notes, "The teachers asked L. P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized station-house questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*." [102]

As for the victim-declarant, the Court stated, "young children have little understanding of prosecution . . . [and] it is extremely unlikely that a 3-year-old child . . . would intend his statements to be a substitute for trial testimony."[103] "[A] young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all."[104] In fact, "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause."[105] The Court held, "considering all the relevant circumstances here . . . the child's statements were clearly not made with the primary purpose of creating evidence for . . . prosecution."[106]

The Court, in dicta, stated, "[w]e have recognized that the Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible at the time of founding."[107] Thus, even if statements are testimonial under the primary purpose test, they may still be admitted into evidence if they would have been admissible under exceptions allowed at "time of founding."[108]

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 2182.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 2181.
[107] *Id.* at 2180.
[108] *Id.* at 2180–81 ("Thus, the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements made under the Confrontation Clause.")
[109] *See Giles*, 554 U.S. at 358 (quoting *Crawford*, 541 U.S. at 54).

II. Understanding Exceptions to the Testimonial Standard—Forfeiture by Wrongdoing

In *Giles v. California*, the Court expounded upon "those exceptions established at the time of the founding."[109] "The first of these [exceptions] were declarations made by a speaker who was both on the brink of death and aware that he was dying."[110] The second, forfeiture by wrongdoing, "permitted the introduction of statements of a witness who was detained or kept away by means or procurement of the defendant."[111]

In *Giles*, the defendant (Giles) admitted to shooting his ex-girlfriend, but stated he acted in self-defense.[112] The State sought to admit statements the murder victim made to police responding to a prior domestic violence call.[113] The crying victim had told officers that Giles "accused her of having an affair, and that after the two began to argue, Giles grabbed her by the shirt, lifted her off the floor, and began to choke her."[114]

The lower court found the statements to be testimonial, but admitted them under the equitable doctrine of forfeiture by wrongdoing.[115] As for the forfeiture by wrongdoing doctrine, the majority used historical caselaw from the "time of founding" to conclude "the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[116] "[The] unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying."[117] The Court vacated and remanded the case because "the state courts in this case did not consider the intent of the defendant . . . but the court is free to consider evidence of the defendant's intent on remand."[118]

The majority, the concurring, and the dissenting opinions all addressed the issue of domestic violence. In the majority opinion, Justice Scalia stated, "[a]cts of domestic violence often

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[110] *Id.*
[111] *Id.* at 359 (internal quotation marks omitted) (citations omitted).
[112] *Giles*, 554 U.S. at 356.
[113] *Id.*
[114] *Id.* at 356–57.
[115] *Id.* at 357.
[116] *Id.* at 359 (emphasis in original).
[117] *Id.* at 361 (emphasis in original).
[118] *Id.* at 377.
[119] *Id.* at 377.

are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions."[119] "Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be *highly relevant* to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would [be] expected to testify."[120] Justice Souter's concurrence in which Justice Ginsburg joined and Justices Breyer, Stevens, and Kennedy specifically agreed,[121] stated, "*intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship*, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."[122] Justice Breyer's dissent, which Justices Kennedy and Stevens joined, goes one step further and suggests "a simple intent requirement" should be applied "across the board" in domestic violence cases.[123]

In the wake of *Giles*, commentators have heavily criticized the decision[124] for its fractured convoluted nature, "selective originalism,"[125] and "le[aving] lower courts ill-equipped to make the careful evaluations demanded of them" by "failing to answer questions regarding the level and type of evidence required to find intent."[126] In the intervening years since the *Giles* decision, the majority of courts have held the requisite intent can be found by a preponderance of evidence.[127]

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[120] *Id*. (emphasis added).

[121] *Id*. at 379 (Souter, J., concurring in part, writing for himself and Justice Ginsberg); *id*. at 404 (Breyer, J., dissenting, writing for himself, Justice Stevens, and Justice Kennedy and specifically agreeing with Justice Souter's concurrence)

[122] *Id*. at 404 (emphasis added).

[123] *Id*. at 405.

[124] *See* Tom Lininger, *The Sound Of Silence: Holding Batterers Accountable For Silencing Their Victims*, 87 Tex. L. Rev. 857, 864 (2009); Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects Of Giles's Forfeiture Exemption To Confrontation Were Or Were Not Established At Time Of Founding*, 13 Lewis & Clark L. Rev. 605, 609 (2009); Ralph Ruebner & Eugene Gorynov, Giles v. California: *Forfeiture By Wrongdoing, And A Misguided Departure From Common Law And The Constitution* 40 U. Tol. L. Rev. 577, 578–79 (2009); Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. Davis L. Rev. 1295, 1326 (2010); Stephanie Bignon, *Forfeiting Justice Instead of Confrontation Rights In The Court's Most Recent Forfeiture By Wrongdoing Jurisprudence*, 69 Md. L. Rev. 390, 390 (2010).

[125] Tom Lininger, *supra* note 120 at 878; Thomas Y. Davies, *supra* note 120, at 609.

[126] Harvard L. Rev. Ass'n, Leading Cases, *Sixth Amendment—Witness Confrontation—Forfeiture by Wrongdoing Doctrine*, 122 Harv. L. Rev 336, 341 (2008); *See also Parker v. Commonwealth*, 291 S.W.3d 647 (Ky. 2009) ("Under *Giles*, we must determine not only whether there was sufficient evidence . . . but we must further determine whether there was sufficient evidence to show [the defendant's] motivation in causing [the victim's] absence was to prevent [the victim] from testifying. Unfortunately, the *Giles* opinion does not provide clear guidance in how to approach these thorny issues.").

[127] *See, e.g.*, *United States v. Johnson*, 767 F.3d 815, 823 (9th Cir. 2014); *United States v. Johnson*, 495 F.3d 951, 972 (8th Cir. 2007); *United States v. Marchesano*, 67 M.J. 535, 544 (A. Ct. Crim. App. 2008); *People v. Faz*, 2008 WL 4294946, at *6 (Cal. Ct. App. Sept. 22, 2008); *Vasquez v. People*, 173 P.3d 1099, 1101 (Colo. 2007); *State v. Thompson*, 45 A.3d 605, 616 (Conn. 2012); *Roberson v. United States*, 961 A.2d 1092, 1095–96 (D.C. 2008); *Gatlin v. United States*, 925 A.2d 594, 596 (D.C. 2007); *Brittain v. State*, 766 S.E.2d 106, 113 (Ga. Ct. App. 2014); *People v. Hampton*, 941 N.E.2d 228, 239 (Ill. App. Ct. 2010); *In re* T.T., 892 N.E.2d 1163, 1179 (Ill. App. Ct. 2008); *Parker v. Commonwealth*, 291 S.W.3d 647, 669 (Ky. 2009); *State v. Griffin*, No. 14-KA-251 (La. Ct. App. Mar. 11, 2015); *State v. Johnson*, 151 So.3d 683, 689 (La. Ct. App. 2014); *State v. Warner*, 116 So.3d 811, 818 (La. Ct. App. 2013); *State v. Her*, 781 N.W.2d 869, 877 (Minn. 2010); *State v. Poole*, 232 P.3d 519, 527 (Utah 2010); *State v. Baldwin*, 794 N.W.2d 769, 778 (Wis. Ct. App. 2010); *see also* Allie Phillips, *Cases Interpreting Crawford v. Washington*, Am. Prosecutor's Res. Inst. July 14, 2015. *But see Brown v. Smith*, 2008 WL 4922014, at *9 (S.D.N.Y. Nov. 12, 2008); *Jenkins v. United States,* 80 A.3d 978, 989–90 (D.C. 2013) ("more likely than not" standard); *People v. Smart*, 12 N.E.3d 1061, 1067 (N.Y. 2014); *People v. Ali*, 999 N.Y.S.2d 530, 530 (N.Y. App. Div. 2014); *People v McCrae*, 895 N.Y.S.2d 101 (N.Y. App. Div. 2010).

[128] *United States v. Jackson*, 706 F.3d 264 (4th Cir. 2013).

However, courts are split as to what evidence constitutes intent under *Giles* for domestic violence cases. Defendants have argued that he or she must have a single motive for murdering the victim in order for forfeiture by wrongdoing to apply. The Fourth Circuit in *United States v. Jackson*[128] addressed this issue when it stated the "forfeiture-by-wrongdoing exception to Confrontation Clause applied . . . even if [the] defendant also had other motivations for harming witness so long as defendant intended to prevent witness from testifying."[129] The Supreme Court denied certiorari in *Jackson*.[130] The majority of courts that have addressed this issue agree that the defendant may have multiple reasons for killing the victim, but if evidence suggests that one of those intents was to silence the victim, then forfeiture by wrongdoing applies.[131]

Furthermore, courts have also held that threatening or coaxing a victim in order to prevent her from testifying also constitutes forfeiture by wrongdoing.[132] In the domestic violence context, prosecutors are advised to request a forfeiture by wrongdoing hearing, and present expert evidence regarding the power, control, domination and coercion exercised in abusive relationships to prevent the victim from seeking judicial intervention.[133]

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[129] *Id*. at 264; *see also State v. Dobbs*, 320 P.3d 705, 710 (2014); *see also* Allie Phillips, Am. Prosecturo's Research Dist., *Cases interpreting Crawford v. Washington* 69–71 (2015).

[130] *United States v. Jackson*, 113 S. Ct. 2782 (2013) (mem.), denying cert. to 706 F.3d 264 (4th Cir. 2013).

[131] *See, e.g., People v. Banos*, 178 Cal. App. 4th 483, 504 (2009) ("Nothing in *Crawford, Davis, Giles I* or *Giles II* suggests that the defendant's sole purpose in killing the victim must be to stop the victim from cooperating with authorities or testifying against the defendant."); *Parker v. Com.*, 291 S.W.3d 647, 670 (Ky. 2009) ("The dual motive of revenge and prevention of future testimony was the central point of the Commonwealth's theory of the case.") (allowing forfeiture by wrongdoing); *State v. Hosier*, 454 S.W.3d 883, 897 (Mo. 2015), *reh'g denied* (Mar. 31, 2015); *State v. McLaughlin*, 265 S.W.3d 257, 272 (Mo. 2008) (defendant killed witness to make witness unavailable for a sexual abuse case, but the forfeiture by wrongdoing doctrine also applied to the burglary case with the same murder victim and defendant); *State v. Milan*, No. W2006-02606CCA-MR3CD, 2008 WL 4378172, at *14 (Tenn. Crim. App. Sept. 26, 2008) (the motive was at least in part, the intent to prevent her from testifying against him at the preliminary hearing and thus that the victim's statement was admissible under the forfeiture by wrongdoing exception); *Proffit v. State*, 191 P.3d 963, 967 (Wyo. 2008) ("The [forfeiture] doctrine should be applied in this murder case, even though B.C. was killed with the primary intent of preventing him from testifying in the sexual assault case, not the murder case);

[132] *State v. Dobbs*, 180 Wash. 2d 1, 12–13, 320 P.3d 705, 706, 710 (2014) ("[Defendant's] violence and intimidation aimed at C.R. was the cause of her decision against testifying against him at trial." Court applied forfeiture by wrongdoing); *State v. Baldwin*, 794 N.W.2d 769, 779–80 (Wis. Ct. App. 2010) (past behavior and successful attempts to prevent R.Z. from testifying at prior hearings is sufficient proof that Baldwin intimidated R.Z. and prevented her from testifying, and allow for the application of forfeiture by wrong doing); *People v. Santiago*, No. 2725-02, 2003 WL 21507176, *10–11 (N.Y. Sup. Ct. Apr. 7, 2003) (the defendant made the victim unavailable to testify as a result of coercion, psychological abuse, and promises of harmonious reconciliation); *People v. Turnquest*, 938 N.Y.S.2d 749, 752 (Sup. Ct. 2012) (defendant's misconduct caused the unavailability of the complainant via a false recantation); *People v. Smith*, 907 N.Y.S.2d 860, 861 (Sup. Ct. 2010);

[133] *See People v. Byrd*, 51 A.D.3d 267, 272–74 (N.Y. App. Div. 2008).

[134] *See Crawford*, 541 U.S. at 68–69.

III. Pushing the Envelope—Admitting Evidence In Intimate Partner Violence Cases

Admitting out-of-court statements after *Crawford* is more difficult, though not impossible, due to the recent Supreme Court decisions softening the initial *Crawford* approach.[134] For example, a prosecutor presented with a strangulation attempt, where a frantic victim spoke to the police and now refuses to testify, can still succeed at trial. The first question to answer is whether "the primary purpose of the conversation was to create an out-of-court substitute for trial testimony."[135] Prosecutors can argue that statements made during the conversation with police are nontestimonial because the "circumstances objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" and end a threat to the victim's life.[136] Looking at the *Bryant-Clark* framework, prosecutors may argue that the interrogator's purpose is to protect the victim from homicide, the victim-declarant's purpose is to protect herself from harm, and the informality of the interrogation establishes it as nontestimonial. Thus, the primary purpose of the interrogation is to enable police to meet an ongoing emergency.

From the interrogator's perspective, questions similar to those in *Clark*, which "were meant to identify the abuser in order to protect the victim from future attacks,"[137] are nontestimonial. Furthermore, the prosecutor may argue that an ongoing emergency existed because circumstances of the abuse were unclear, and the conversation was "primarily aimed at identifying and ending the threat."[138] If the assailant is separated from the victim, prosecutors can analogize to *Bryant* where the ongoing emergency did not end because the defendant stopped assaulting the victim. They may also use research regarding intimate partner violence to rebut *Hammon* and demonstrate that having police simply separate a victim from an abuser for a short

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[135] *Clark*, 135 S. Ct. at 2180 (2015) (quoting *Bryant*, 562 U.S. at 358).

[136] *Davis*, 547 U.S. at 822.

[137] *Clark*, 135 S. Ct. at 2181.

[138] *Id*.

[139] Christina Nicolaidis MD, MPH et al., *Could We Have Known? A Qualitative Analysis of Data from Women Who Survived an Attempted Homicide by an Intimate Partner*, 18 J. Gen. Internal Med. 788,791 (2003) (In fact, in most "classical abuse" intimate partner relationships, the victim is rarely out of danger until she extricates herself fully from the relationship—which on average takes six to seven attempts.); Katie Beth Miller et al., *Applying Operant Learning To The Stay-Leave Decision In Domestic Violence*, 21 Behav. & Soc. Issues, 135, 136 (2012) (Statistically, an intimate partner violence victim is most likely to be murdered when attempting to leave the abuser); Gail B. Strack et al., *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. Emergency Med. 303 (2001) (research shows that nonfatal strangulation is a strong precursor to homicide).

[140] *Crawford*, 541 U.S. at 59 n.9.

period does not neutralize the threat to the victim in an intimate partner violence case.[139]

From the victim's perspective, the prosecutor can argue the primary purpose of the conversation is to protect the victim from harm. The situation may be similar to *Davis*, where the questions are answered while the victim is still frantic and the abuser is still nearby. It can also be similar to *Bryant* where the victim is injured. Lastly, prosecutors can argue the questioning is informal and therefore similar to *Clark*, *Davis*, and *Bryant*. These arguments can clearly illustrate that the primary purpose of the conversation was not to create an out-of-court substitute for trial testimony, but to enable police to meet an ongoing emergency.

In the alternative, if statements are found to be testimonial, prosecutors may argue that the statements should be admitted for reasons other than the truth of the matter asserted because, as *Crawford* reaffirmed, "the [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[140] Similarly, prosecutors can argue that the statements are nontestimonial because under the *Bryant-Clark* language that analogizes to hearsay standards,

> "[i]mplicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross examination. The logic is not unlike that justifying excited utterance exception in hearsay law."[141]

While the Court stops short of deeming all excited utterances as nontestimonial for Confrontation Clause purposes, it holds open the door for such argument.

Lastly, even if the statements are found to be testimonial, prosecutors can request a forfeiture-by-wrongdoing hearing. The *Giles* decision requires that the declarant must show an intent to prohibit the victim from testifying. The majority of courts do not require the defendant to have a single motive in preventing the victim from testifying, as long as the evidence shows the defendant intended to "dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecu-

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[141] *Bryant*, 562 U.S. at 361; *see Clark*, 135 S. Ct. at 2180.
[142] *Giles*, 554 U.S. at 377.
[143] *Id*. (emphasis added).

tions."[142] In *Giles*, the majority states, "[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be *highly relevant* to this inquiry."[143] Justice Souter's concurrence in which Justice Ginsburg joins and Justices Breyer, Stevens, and Kennedy specifically agree,[144] goes further to note, "*intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship*, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process."[145]

Prosecutors can request that investigating officers gather evidence by asking victims questions such as: (1) "How frequently and seriously does your partner intimidate you?"; (2) "How frequently does your partner demand you do things and verify you did them?"; (3) "Describe the most frightening or worst event involving your partner?"; and (4) "Have you ever made it known to your partner that you wanted to leave? How did your partner react?"[146] Also, prosecutors can ask the officers to speak to friends and family members and obtain written materials such as copies of text messages, Facebook posts, greeting cards, voicemails, and emails that can be used to corroborate the manipulation and intent to isolate. Jailhouse phone calls can also be particularly helpful as evidence in a forfeiture-by-wrongdoing hearing to show that the defendant was attempting to manipulate the victim into not testifying.[147] By presenting expert and corroborating evidence regarding manipulation, coaxing, and control in the context of intimate partner violence, prosecutors can lay the groundwork for admitting testimonial statements via a forfeiture-by-wrongdoing hearing.

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[144] *Id*. at 379, 404.

[145] *Giles,* 554 U.S. at 404.

[146] Jon Eliason, *Putting the Forfeiture by Wrongdoing Doctrine to Work* (2011), http://www.azmag.gov/documents/dvpep_2012-11-05_putting-the-forfeiture-by-wrongdoing-doctrine-to-work.pdf.

[147] *People v. Byrd*, 51 A.D.3d 267 (N.Y. App. Div. 2008).

[148] *See* Tim Donaldson & Karen Olson, *"Classic Abusive Relationships" and the Inference of Witness Tampering in Family Violence Cases After* Giles v. California, 36

CONCLUSION

Currently codified state laws only address intimate partner violence as a transactional crime.[148] However, intimate partner violence is not limited to a single act of assault or battery, but rather is a coercive pattern of one partner's physical violence, intimidation, and control of the other partner that often leads to homicide.[149] Prosecutors must try to assist the victim with a limited arsenal of transactional charges ranging from assault, strangulation, battery to violation of restraining order, which does not fully address the intimate partner violence relationship.[150]

Building these cases is especially difficult when a victim recants or refuses to testify, but evidence-based prosecution can continue post *Crawford*, by procuring corroborating evidence and making arguments including that the statements are nontestimonial, that they are not presented for the truth of the matter asserted, or that the Confrontation right has been forfeited by wrongdoing. Ultimately, the current state of the law is fluid, making evidence-based prosecution possible. Prosecutors must challenge the status quo and protect victims from their abusers by crafting nuanced arguments combining the latest intimate partner violence caselaw and published research. This [monograph] provides an outline of arguments available to get statements into court even when *Crawford* seems to stand in the way.

Lincoln L. Rev. 45, 81 (2008).

[149] Shannan Catalano, et al., U.S. Dep't of Justice, Female Victims of Violence 2 (2009) ("In 2007 intimate partners committed 14% of all homicides in the U.S. The total estimated number of intimate partner homicide victims in 2007 was 2,340, including 1,640 females and 700 males."); Tim Donaldson & Karen Olson, *"Classic Abusive Relationships" and the Inference of Witness Tampering in Family Violence Cases After* Giles v. California, 36 Lincoln L. Rev. 45, 81 (2008) (citing Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 Fam Ct. Rev. 476, 478 (2008); see also Amy Holtzworth-Munroe & Gregory L. Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 Psychol. Bull. 476, 477–94 (1994)).

[150] See Tim Donaldson & Karen Olson, *"Classic Abusive Relationships," supra* note 145 at 81.

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