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The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington

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THE LESSONS OF *PEOPLE V. MOSCAT*: CONFRONTING JUDICIAL BIAS IN DOMESTIC VIOLENCE CASES INTERPRETING *CRAWFORD V. WASHINGTON*

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I. INTRODUCTION

Crawford v. Washington was a groundbreaking decision that radically redefined the scope of the Confrontation Clause.[1] Nowhere has the impact of *Crawford* and the debate over its meaning been stronger than in the context of domestic violence prosecutions. The particular circumstances that surround domestic violence cases—911 calls that record cries for help and accusations, excited utterances made to responding police officers, and the persistent reluctance of complaining witnesses to cooperate with prosecutors—combine to make the introduction of "out-of-court statements" a critical component of many domestic violence prosecutions. Because domestic violence cases are subject to a unique set of political and institutional forces, it is necessary to appreciate those influences to fully understand trial courts' interpretation of the scope and import of the *Crawford* decision.

As a public defender in the Bronx, I witnessed, first hand, the excitement and confusion that followed the *Crawford* decision at the trial level. In the immediate aftermath of *Crawford*, e-mails flew about our office proclaiming the death knell of "evidence based prosecutions," the practice of prosecuting domestic violence cases without the cooperation of the complaining witness. In court, defense attorneys eagerly pushed broad interpretations of the new decision, arguing that the district attorney could no longer rely solely on 911 tapes and police testimony to prosecute defendants in domestic violence cases. In this context, a seemingly typical domestic assault case, *People v. Moscat,* was winding its way through the court system.[2]

Mr. Moscat was charged with hitting and threatening his girlfriend. The police had been summoned to the scene by a 911 call, but several weeks after Mr. Moscat's arrest, the complaining witness indicated she was not willing to cooper-

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1. 541 U.S. 36 (2004). *Crawford* abrogated *Ohio v. Roberts*, 448 U.S. 56 (1980) (permitting the admission of out-of-court statements that bore adequate "indicia of reliability") and held that the Confrontation Clause bars statements that are "testimonial in nature," unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. The Confrontation Clause states, "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

2. My office, The Bronx Defenders, represented Mr. Moscat from his arraignment through to the eventual dismissal of the charges. I became personally involved with the case after Judge Greenberg issued his decision interpreting *Crawford* in *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004) and co-authored the brief requesting that the court vacate the decision.

ate with his prosecution. The case seemed to provide an ideal opportunity for the trial judge, The Honorable Ethan Greenberg, to write the first decision in New York State interpreting the scope of *Crawford* and its impact on prosecutors' practice of relying on out-of-court statements to prosecute domestic violence cases.[3] In an environment that has become uniquely sensitized to the needs of the prosecution and the complaining witness, Judge Greenberg wrote a decision interpreting *Crawford* in the narrowest possible terms. The *Moscat* decision has been one of the most frequently cited cases in the country interpreting *Crawford.*[4] Yet, unbeknownst to the numerous courts citing the decision, when *Moscat* was written neither side nor the judge had heard the 911 tape; the issues were not briefed by either side; and the reasoning of the decision was based upon facts which turned out to be entirely false.[5] No case better illustrates the peculiar circumstances that shape interpretations of the *Crawford* decision in the domestic violence context.

Through the lens of *Moscat*, this Essay seeks to identify how trial courts' narrow readings of *Crawford* have been influenced by the forces that shape the way domestic violence cases are prosecuted. By recognizing how the dynamics of domestic-violence prosecutions mold judicial reasoning, one can better understand and evaluate trial courts' post-*Crawford* Sixth Amendment decisions. In turn, post-*Crawford* jurisprudence reveals a great deal about the environment in which domestic violence cases are tried, the presumptions that shape judicial opinions in the domestic violence context, and the obstacles many defendants face when they are accused of committing such crimes.

II. *ROBERT*'S RULES: THE CONFRONTATION CLAUSE PRIOR TO *CRAWFORD*

The plain language of the Sixth Amendment appears to guarantee defendants an absolute right to confront their accusers in court.[6] But as Justice Scalia noted in *Crawford*, the Sixth Amendment's text alone does not resolve the issue.[7] One could plausibly interpret the Sixth Amendment as guaranteeing only the right to

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3. The actual circumstances behind the *Moscat* decision were ultimately revealed to the public months later in a New York Times article by Sabrina Tavernise. *See* Sabrina Tavernise, *Legal Precedent Doesn't Let Facts Stand in the Way*, N.Y. TIMES, Nov. 26, 2004, at A1.

4. *See, e.g.*, People v. West, 823 N.E.2d 82, 90 (Ill. App. Ct., 2005); State v. Wright, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004); People v. Isaac, No. 23398/02, 2004 WL 1389219, at *3 (N.Y. Dist. Ct. June 16, 2004); State v. Williams, No. 20368, 2005 WL 120054, at *4 (Ohio Ct. App. Jan. 21, 2005); State v. Powers, 99 P.3d 1262, 1264 (Wash. Ct. App. 2004); Andrew King-Ries, Crawford v. Washington*: The End of Victimless Prosecution*, 28 SEATTLE. U. L. REV. 301, 322 nn. 143, 148 (2005); Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 562 n.269 (2005). At the time this essay was written, approximately eleven months after the *Moscat* decision was issued, Westlaw listed forty separate cases and scholarly articles on the subject of *Crawford* that cited *Moscat.*

5. *See* Tavernise, *supra* note 3 at A1.

6. "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

7. *See* Crawford v. Washington, 541 U.S. 36, 42 (2004).

confront those individuals who actually testify at trial.[8] Prior to the *Crawford* decision, courts had largely conflated Confrontation Clause analysis with the rules governing the admission of hearsay. This was the result of the Supreme Court's determination that the Sixth Amendment did not bar the admission of *all* out-of-court statements, but rather excluded only statements of questionable reliability. In *Ohio v. Roberts*, the Court explained that the Sixth Amendment did not proscribe the admission of hearsay if the declarant was shown to be unavailable for trial and the statement bore adequate "indicia of reliability."[9] Moreover, the Court held that hearsay falling within a "firmly rooted hearsay exception" was presumptively reliable and that its admission posed no Sixth Amendment difficulty.[10] Statements that failed to qualify for admission under these exceptions could still be found admissible if there were a separate showing that the statement had "particularized guarantees of trustworthiness."[11]

While the Court professed in later decisions that it had been careful not to equate the Confrontation Clause's prohibitions with the general rules governing the admission of hearsay statements,[12] in practice Confrontation Clause analysis was rapidly subsumed by the hearsay rules. Even the requirement that the prosecution demonstrate that the witness was unavailable to testify at trial, which arguably bestowed some additional Sixth Amendment limitations on the admission of out-of-court statements, was substantially eroded in subsequent cases. Six years after the decision in *Roberts*, in a case examining the admission of the out-of-court statement of a non-testifying co-conspirator, the Supreme Court held that *Roberts* merely established an unavailability requirement for prior testimony, not for all out-of-court statements.[13] Finally, in *White v. Illinois*, the unavailability requirement was largely eliminated when the Court refused to impose such a requirement on the introduction of statements that fit within the hearsay exceptions for excited utterances and statements made for purposes of medical diagnosis or treatment.[14] By 1992, an out-of-court statement which was deemed to satisfy a hearsay exception was thus generally admissible under the Sixth Amendment as well.

The merger of Confrontation Clause analysis and the hearsay rules was vulnerable to a variety of criticisms. First, by focusing solely on the reliability of the statement, the *Roberts* framework ignored the "strong symbolic purpose"

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8. *See id.*

9. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

10. *Id.*

11. *Id.*

12. *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 814 (1990) ("Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements.").

13. *See* United States v. Inadi, 475 U.S. 387, 394 (1986) ("*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.").

14. *See* White v. Illinois, 502 U.S. 346, 356-57 (1992).

served by a face-to-face confrontation between the accused and his accuser. As the Court had explained in *Coy v. Iowa*, "[t]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution."[15] Second, the exceptions to the general prohibition against hearsay were themselves criticized as commentators questioned the psychological presumptions used to justify them. For example, the excited utterance rule is based upon the questionable presumption that a person under the sway of excitement caused by a startling event will lack the reflective capacity essential for fabrication and, consequently, that the person's statements should be considered spontaneous and reliable.[16] This presumption has been attacked by a host of critics who have asserted not only that empirical evidence suggests that it takes little time for people to craft a lie, but that regardless of whether a person deliberately lies, an excited state does nothing to ensure that a statement is free of honest mistake due to erroneous perception or memory.[17] Finally, as Justice Scalia detailed in the *Crawford* decision, the subjective nature of the *Roberts* framework, which allowed for the admission of hearsay testimony if a statement was shown to have "particularized guarantees of trustworthiness," resulted in contradictory holdings in which various courts found different statements to be reliable based on contradictory factors.[18]

In 1992, Justice Thomas expressed his concern that Confrontation Clause jurisprudence had "evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself."[19] In a concurrence which would largely presage the majority opinion in *Crawford*, Thomas described the historical basis for the right to confront witnesses and challenged the entire *Roberts* framework.[20] It would be twelve more years before the Court finally consigned *Ohio v. Roberts* to the dust bin of history. When *Crawford* was decided, however, it challenged longstanding prosecutorial practices and threaten to upset an entire methodology for the treatment of domestic violence cases.

III. *CRAWFORD V. WASHINGTON*

In *Crawford*, the Supreme Court reversed decades of Confrontation Clause jurisprudence holding that, no matter how reliable, a "testimonial statement"

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15. *See* Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)).

16. *See* Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 Cal. L. Rev. 159, 173 (1997).

17. *Id.* at 178-82 (outlining various critiques of the excited utterance doctrine's presumption that statements are more accurate because they are made in response to a particularly startling event).

18. *See* Crawford v. Washington, 541 U.S. 36, 60-66 (2004) (noting, for example, that one court found a statement more reliable because the witness was in custody and charged with a crime, thereby making the statement more clearly against her penal interest, while another court found a statement more reliable because the witness was not in custody and not a suspect).

19. White v. Illinois, 502 U.S. 346, 358 (1992).

20. *Id.* at 361.

cannot be admitted against a defendant unless the accused has had an adequate opportunity to cross-examine the witness who made the statement.[21] The Court's "about-face" was predicated in large part upon historical analysis which suggested that the Framers intended the Confrontation Clause to prevent a reoccurrence of the abusive method of "trial by affidavit," once practiced by magistrates in sixteenth and seventeenth century England.[22] The most notorious of such trials was the prosecution of Sir Walter Raleigh, in which the defendant was convicted and sentenced to death largely on the basis of a deposition taken from his alleged accomplice, Lord Cobham. At his trial, Sir Walter purportedly demanded that the magistrates "Call my accuser before my face."[23] The magistrates refused, however, and elected instead to simply read Lord Cobham's written ex-parte statements to the jury.[24] The *Crawford* court reasoned that the Confrontation Clause must be understood principally as a guard against such unfairness, barring the introduction of "testimonial statements," but unconcerned with "the off-hand, overheard remark" which bore no resemblance to the historic abusive practices of the English magistrates.[25]

Unfortunately, the *Crawford* court forbore spelling out a comprehensive definition of "testimonial statements," and instead provided three possible definitions for this essential concept. One proferred definition describes such statements as "ex parte in-court testimony or its functional equivalent."[26] Alternatively, the Court suggested that testimonial statements might be defined as "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[27] Finally, the Court characterized "testimonial statements" more broadly as "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."[28] Nonetheless, beyond hinting that all three definitions bear some essential relationship to the abusive practices that gave rise to the Sixth Amendment, the Court was silent as to how *Crawford* should be applied to situations that do not precisely fit the model of a police station interrogation.[29] The dissent in *Crawford* criticized the majority's decision to leave the "thousands of federal prosecutors and the tens of thousands of state prosecutors" in the dark about what evidence is or is not constitutionally

21. *Crawford*, 541 U.S. at 67-68.
22. *Id.* at 43-44.
23. Crawford v. Washington, 541 U.S. 36, 44 (2004) (citations omitted).
24. *Id.*
25. *Id.* at 51.
26. *Id.*
27. *Id.* at 51-52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).
28. *Id.* at 52 (citation omitted).
29. Crawford v. Washington, 541 U.S. 36, 51-53 (2004). *Crawford* involved a statement made by the defendant's wife to the police in a tape-recorded interrogation at the police station.

admissible.[30] The majority, however, adhered to the Court's longstanding policy of limiting decisions to the specific facts before it.[31]

By allowing trial courts to resolve for themselves the proper definition of "testimonial," the *Crawford* decision set off a vociferous debate about the scope of the newly revitalized right of confrontation. Not surprisingly, several courts leapt at the opportunity to shape the contours of this area of law. Some of the earliest and most influential decisions exploring the contours of the newly revitalized right of confrontation were domestic violence courts. To understand the reasoning behind some of those decisions, it is important first to grasp the transformation, occurring over the last two decades, in how prosecutors and judges treat domestic violence cases.

IV. DOMESTIC VIOLENCE AND THE EMERGENCE OF "EVIDENCE BASED PROSECUTIONS"

Over the last two decades there has been a dramatic shift in the treatment of domestic violence cases as legislatures, courts, law enforcement authorities, and the public have grown increasingly aware of the scope and seriousness of domestic violence.[32] Public awareness campaigns, legislated alterations of police arrest practices, and the creation of specialized courts where judges are educated to be sensitive to various domestic violence issues, are just some of the developments that have profoundly altered the way domestic violence is viewed and treated in this country.[33]

Historically, the criminal justice system has been slow to recognize the criminal nature of domestic abuse. Until the last few decades, the legal system viewed domestic violence as largely a private family matter.[34] The English common law upon which the American legal system is based openly endorsed a husband's right to physically "chastise" his spouse.[35] While a number of states adopted laws

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30. *Id.* at 75 (Rehnquist, C.J., concurring). Oddly, the dissent failed to include the thousands of defense attorneys who also would have appreciated a clear declaration of the new rule.

31. One expression of the Court's rationale for this policy can be found in *United States v. Fruehauf*:

> Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests, we have consistently refused to give.

365 U.S. 146, 157 (1961).

32. *See* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1182 (2002).

33. *See* Amanda Dekki, *Punishment Or Rehabilitation? The Case For State-Mandated Guidelines For Batterer Intervention Programs In Domestic Violence Cases*, 18 ST. JOHN'S J. LEGAL COMMENT. 549, 554 (2004).

34. *See* Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements On An Effective Innovation*, 68 FORDHAM L. REV. 1285, 1288-89 (2000) (providing a historical perspective on domestic violence).

35. *Id.* (citing EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 174-75 (James A. Inciardi ed., 2d ed. 1996) and Nadine Taub, *Adult Domestic Violence: The Law's Response*, 8 VICTIMOLOGY 152, 153 (1983)).

against domestic violence in the late nineteenth century, such laws typically were applied only in the most egregious circumstances involving severe injury.[36] In the 1970s and 1980s, the tide finally began to shift, as policy makers began to identify domestic violence as a criminal matter that required public action. Advocates successfully focused attention on the issue of domestic violence, and the government began supporting shelters for battered women, batterer intervention programs, specialized prosecution teams, and empirical studies on domestic violence.[37]

Despite growing political support for domestic violence victims, the criminal justice system was criticized in the 1980s and early 1990s for failing to adopt more effective strategies for combating domestic abuse.[38] Partly in response to this criticism, specialized courts were developed for handling domestic violence cases, and judges received sensitivity training in the issues surrounding domestic violence. However, as judges reinterpreted their role in the legal system "as stopping the violence, [and] not just deciding the case,"[39] their ability to act in their traditional role as impartial arbiters of the law was dangerously undermined.[40] Judges, in their new role as "those who stop the violence," became invested in the success of anti-domestic violence efforts.[41] One such effort was the use of "evidence based prosecutions," the prosecution of defendants without the cooperation of the complaining witness.[42]

The term "evidence based prosecution" or "victimless prosecution" describes a prosecution that relies on the use of out-of-court statements to establish the guilt of the defendant when the complaining witness either refuses or is otherwise unable to cooperate with the prosecution. To prosecute a defendant without the participation of the complaining witness, prosecutors seek to introduce statements the complainant may have made to a third party, such as a 911 operator or a police

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36. *See id.*; *see also* Dekki, *supra* note 33, at 553-54.

37. *Id.* at 554.

38. *See* Jennifer Thompson, *Who's Afraid of Judicial Activism? Reconceptualizing A Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs*, 56 ME. L. REV. 407, 419 (2004) (describing the judicial system's historic failure to effectively combat domestic abuse); *see also* Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1, 10-12 (1999-2000) (criticizing traditional judicial responses to domestic violence and suggesting that courts must adopt new strategies to combat spousal abuse).

39. Kaye & Knipps, *supra* note 38, at 2 (explaining that New York City was creating specialized domestic violence courts "that seek to change business as usual by casting the judicial role as stopping the violence, not just deciding the case") (internal quotations omitted).

40. Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. Rev. 33, 44 (2000) (explaining that training judges in domestic violence issues "is likely to produce in many domestic violence court judges an identification with the domestic violence victim that might adversely affect their ability to be fair and impartial adjudicators of cases in which the issue of domestic violence is contested").

41. *Id.*; *see also* Friedman & McCormick, *supra* note 32, at 1192 nn.79-80.

42. *See* Friedman & McCormick, *supra* note 32, at 1190 n.72 (noting that approximately thirty-five to forty percent of jurisdictions were prosecuting domestic violence cases without the cooperation of the complaining witness in 1995, and that some jurisdictions did so in the majority of their cases).

officer at the crime scene. These statements often are introduced as "excited utterances" under an exception to the general rule against hearsay and are offered up "for the truth," *i.e.* as a factual account of the alleged assault.[43] Prosecutors consider evidence based prosecutions to be important weapons in the fight against domestic violence because many complaining witnesses recant or refuse to cooperate with the prosecution of their partners.[44] Indeed, it has been estimated in some jurisdictions that as many as eighty to ninety percent of complaining witnesses in domestic violence cases recant their accusations or refuse to cooperate with the prosecution.[45] Evidence based prosecutions operate hand-in-hand with prosecutors' "no drop" policies, which ensure that a prosecution is pursued regardless of the expressed desire of the complaining witness.[46] A variety of reasons have been attributed to complaining witnesses' determination not to cooperate, including fear of retaliation, low self-esteem, financial dependence on the defendant and sympathy for the assailant.[47] Alternatively, complaining witnesses may absent themselves from the trial because the accusations are untrue or exaggerated or they have committed inappropriate or even criminal acts themselves. Regardless of the reason, it is clear that complaining witnesses' refusal to help the government prosecute defendants for domestic abuse poses a significant obstacle to utilizing the criminal justice system to combat domestic violence. Evidence based prosecutions largely are considered the government's most effective response to the difficulty posed by reluctant complaining witnesses.[48]

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43. *See id.* at 1222 ("The excited utterance exception . . . provides that, '[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'") (quoting FED. R. EVID. 803(2)). Rule 803 does not require that the declarant be unavailable. *See* FED. R. EVID. 803(2). More than forty states have closely followed Rule 803 in their own codification of the excited utterance rule. *See* Friedman & McCormick, *supra* note 32 at 1222.

44. *See* Andrew King-Ries, *supra* note 4 (describing the importance of evidence based prosecutions in the fight against domestic violence when complaining witnesses do not cooperate with the prosecution); *see also* Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to* Crawford *in Domestic Violence Cases,* 38 PROSECUTOR 14 (2004) (emphasizing the value of evidence based prosecutions in light of many complaining witnesses' determination not to participate in the prosecution of their partner).

45. Fowler v. Indiana, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004) (citing Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n.76 (2003)).

46. *See* Renee Esfandiary & Krista Newkirk, *Interview with the Honorable John E. Klock of the Alexandria Circuit Court Defending Mandatory Arrest*, 3 WM. & MARY J. WOMEN & L. 241, 241 (1997); *see also* Friedman & McCormick *supra* note 32, at 1188.

47. Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n.76 (2003) (citing Thomas I. Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 392-99 (2001)).

These reasons tend to presume the guilt of the defendant, a proposition that can rankle defense attorneys, particularly when such reasoning is relied upon by judges as well as prosecutors and advocates. Indeed, there is a legitimate concern that a complaining witness' absence from a defendant's trial will actually be held against the defendant because the trier of fact presumes that the absence is a symptom of domestic abuse and therefore an indication that such abuse actually has occurred.

48. *See Fowler*, 809 N.E.2d at 965 (suggesting that the appropriate response for the government when the complaining witness is uncooperative is to rely upon the introduction of out-of-court statements via the hearsay exceptions); Andrew King-Ries, *supra* note 4.

The *Crawford* decision, however, poses a direct threat to the use of evidence based prosecutions as a tool for fighting domestic violence. If statements to 911 operators and police officers are considered "testimonial," then their admission would be barred under *Crawford*'s Sixth Amendment analysis. Proponents of domestic violence reforms and prosecutors regard evidence based prosecutions as a critical part of the fight against domestic violence and have urged courts to refuse to apply the protections outlined in *Crawford* to domestic abusers.[49] When specialized domestic violence trial courts interpret the meaning of *Crawford* and the scope of the Sixth Amendment, they are implicitly ruling on the viability of a prosecutorial practice that many believe is an important tool in the fight against domestic violence. Given the determination of judges in domestic violence courts to recast their role "as stopping the violence," decisions interpreting *Crawford* in the domestic violence context must be viewed with a particularly critical eye and an understanding of the particular interests at stake.

V. *PEOPLE V. MOSCAT*

It is, of course, difficult to demonstrate conclusively that judges' concerns about prosecutors' ability to bring evidence based prosecutions are dominating courts' interpretations of *Crawford*. There is, however, ample evidence that judges have come to regard themselves as active participants in the fight against domestic violence.[50] Moreover, there is little question that a broad reading of *Crawford* threatens to eliminate a valued prosecutorial tool in that fight. Judges are unlikely, however, to undermine their traditional image as neutral arbiters of the law by explicitly linking their decisions interpreting *Crawford* to their interest in supporting the fight against domestic violence. Instead, courts ruling that *Crawford* does not bar the introduction of out-of-court statements by domestic assault victims tend to assert that the statements were not made in contemplation of trial and do not discuss the larger impact a broad interpretation of *Crawford* might have had upon evidence based prosecutions.[51] Thus, while the forces that might influence judges in the domestic violence context can be readily identified, textual references to such forces in published decisions are rare. A few cases, however, have offered veiled hints that courts are concerned with the impact that *Crawford* could have upon evidence based prosecutions. In *Fowler v. Indiana*, the Indiana Court of Appeals acknowledged "the frustration experienced by the State when a victim refuses to testify," and suggested that the best way to resolve the dilemma posed by uncooperative complaining witnesses was to introduce out-of-court statements.[52] The case which best exposes the influence that domestic violence concerns has had

49. *See e.g.*, Adam M. Krischer, *supra* note 44.
50. Kaye & Knipps, *supra* note 38, at 2.
51. *See e.g.*, People v. Mackey, 785 N.Y.S.2d 870, 872-74 (N.Y. Crim. Ct. 2004).
52. Fowler v. Indiana, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004).

upon courts' interpretations of *Crawford* is a much cited Bronx Criminal Court decision, *People v. Moscat*.[53]

The strange events that surround the *People v. Moscat* decision make sense only when one recognizes that the decision was fashioned by a judge in a specialized domestic violence court with the fate of evidence based prosecutions arguably hanging in the balance. *Moscat* appeared on its face to be a fairly typical misdemeanor domestic assault case. On August 11, 2003, a 911 phone call brought police to a Bronx housing complex, where they arrested Mr. Moscat and charged him with striking his girlfriend and threatening her. At arraignment, Mr. Moscat was released on his own recognizance (no bail was set), and the case was sent to the misdemeanor specialized domestic violence courtroom. After a few court dates, during which discovery was provided and motions were filed, the assistant district attorney conceded that the prosecution did not have the cooperation of the complaining witness, but stated that the government intended to proceed despite her absence. Not long thereafter, the Supreme Court handed down the *Crawford* decision and set the courthouse ablaze with speculation about the future of evidence based prosecutions.

On March 25, 2004, only 17 days after the *Crawford* decision was issued, the *Moscat* case was called in the Bronx Criminal Court Specialized Domestic Violence Part before Judge Ethan Greenberg. Defense counsel (an attorney from the Bronx Defenders[54]) explained on the record that the complaining witness had contacted the Bronx Defenders and expressed her intent not to cooperate with the prosecution of Mr. Moscat. The court asked if the defense had heard the 911 tape, and defense counsel responded that the prosecution had not yet turned it over. In fact, the tape was still in the process of being ordered, so neither the defense, the judge, nor the assigned assistant district attorney had heard the recording of the 911 call. Nonetheless, after a brief conference at the bench, Judge Greenberg solicited an application from defense counsel to bar the admission of the 911 recording. The assistant district attorney opposed the motion and the case was adjourned for decision. Despite the fact that this issue would potentially determine the fate of evidence based prosecutions in the Bronx, no briefs or legal argument were solicited or submitted. On the very same day the oral motion was made, the court issued a ten-page written decision finding that 911 calls categorically do not qualify as testimonial evidence under *Crawford*.[55] The court's decision was based primarily on the blanket assumption that a 911 call reporting domestic violence is

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53. 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

54. The Bronx Defenders is a public defender organization in the Bronx serving indigent clients that have been charged with crimes. The author is currently a staff attorney.

55. The date of the decision certainly suggested that the Judge had, in fact, written much of the decision before the issue was even raised. Judge Greenberg later asserted that the decision was erroneously dated March 25th, and that it had, in fact, been issued a day later, on the 26th. *See* People v. Moscat, No. 2003BX044511 (N.Y. Crim. Ct. Feb. 10, 2005).

"a call for help," made by a desperate victim, without contemplation of future legal proceedings.[56]

Approximately three weeks after Judge Greenberg issued his decision, defense counsel was provided with a copy of the 911 tape at issue. The tape revealed that the facts described in Judge Greenberg's decision were shockingly distinct from the actual circumstances of the call. In contrast to the call described in the *Moscat* ruling, the actual caller on the 911 recording was not the complaining witness, but rather a neighbor who spoke in a calm voice, may or may not have had first-hand knowledge of the alleged assault, and made the call approximately eight hours after the assault was alleged to have occurred.[57]

The *Moscat* decision is particularly revealing. First, the court's opinion is based entirely on factual assumptions which turned out to be false *even in the specific case before it*. In his decision Judge Greenberg stated:

> Typically, in such a call a woman tells the 911 operator (in New York City, a civilian police employee) that her boyfriend has just shot, stabbed or beaten her (and may be about to do so again); usually, the woman hurriedly answers a few questions from the operator and then asks the operator to send police officers and an ambulance to her aid. *The present case fits that description.*[58]

In fact, the present case did not fit that description at all. The complaining witness did not make the phone call; it was made by a neighbor. Moreover, the call was not made contemporaneously with the alleged assault, but approximately nine hours later.

Judge Greenberg's presumptions regarding the circumstances in which 911 calls are made illustrate an extremely biased and anti-defendant perspective. Further, they demonstrate an urgency, on the court's part, to establish that *Crawford* does not impose an obstacle to evidence based prosecutions. Despite the fact that the judge never heard the 911 tape or any testimony regarding the allegations in the complaint, his decision conjured an image of a desperate plea for help in the midst of a violent assault. There is no question that domestic assault occurs at an appalling rate in society. It is enormously troubling, however, that the supposed neutral arbiter of the law was comfortable assuming that these facts were always true and was willing to base his legal reasoning on those faulty assumptions.

The faulty assumptions in Judge Greenberg's decision lend proof to what many practitioners regard as judges' predisposition to believe the prosecution's version of domestic assaults. A 911 call can be interpreted in at least two very different ways. First, a 911 call can be a desperate cry for help motivated solely by the caller's desire for safety. This is how the prosecution is likely to portray the call, and it is the image that Judge Greenberg explicitly adopted. Alternatively, a 911

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56. *See Moscat*, 777 N.Y.S.2d at 880.
57. *See* Tavernise, *supra* note 3 at A1.
58. *Moscat*, 777 N.Y.S.2d at 878.

call can be an accusation made directly to the police with the intention of getting the defendant arrested.[59] Under this view, the call is far more likely to be considered testimonial, and the substance of the call is less likely to be presumed true.

To appreciate the full implications of judicial bias in domestic violence cases, one must recognize that the majority of domestic violence cases in the Bronx are likely to be tried by judges, not juries. In New York, the prosecution is able to eliminate the defendant's right to a jury trial by reducing the misdemeanor charge from a class A misdemeanor, which carries a maximum sentence of one year in jail, to a class B misdemeanor, which has a maximum sentence of ninety days in jail.[60] Most charges can be reduced simply by charging the crime as an attempt.[61] For example, to avoid a jury trial, the assistant district attorney can reduce a charge of assault in the third degree (a class A misdemeanor) to attempted assault in the third degree (a class B misdemeanor). This means that the judge who determined the admissibility of the 911 call might be the ultimate finder of fact should the case go to trial.

Imagine if Mr. Moscat's case had gone to trial in front of Judge Greenberg. At trial, Mr. Moscat might argue that the complaining witness was lying about the alleged assault. The defendant, however, would have to convince the judge that the complaining witness was lying when the Judge had already assumed, without even hearing the content of the 911 recording, that the complaining witness made the call as a plea for help without contemplation of a future trial. A judge who assumes such facts is clearly not a judge a defendant can confidently trust to presume innocence and entertain the possibility that the complaining witness had fabricated her version of events.

Moscat illustrates far more than one domestic violence judge's predisposition to believe that allegations of domestic assault are true. Judge Greenberg's willingness to presume facts and his eagerness to issue a decision regarding the scope of *Crawford* is best explained by the court's desire to protect a practice which is

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59. *See* Friedman & McCormick, *supra* note 32.

60. *See* N.Y. CRIM. PROC. LAW. § 340.40(2) (McKinney 2004).

> In any local criminal court a defendant who has entered a plea of not guilty to an information which charges a misdemeanor must be accorded a jury trial, conducted pursuant to article three hundred sixty, except that in the New York city criminal court the trial of an information which charges a misdemeanor for which the authorized term of imprisonment is not more than six months must be a single judge trial. The defendant may at any time before trial waive a jury trial in the manner prescribed in subdivision two of section 320.10, and consent to a single judge trial.

Id.; *see also* People v. Burke, 715 N.Y.S.2d 603, 606 (N.Y. Crim. Ct. 2000) (holding that the reduction of the charges from class A misdemeanors to class B attempt misdemeanors, thereby depriving defendant of a jury trial pursuant to N.Y. CRIM PROC. LAW. § 340.40(2), does not constitute an abuse of prosecutorial privilege).

61. *See* N.Y. PENAL LAW § 110.05(8) (McKinney 2004) ("An attempt to commit a crime is a . . . Class B misdemeanor when the crime attempted is a misdemeanor.").

regarded as an important tool in "stopping the violence."[62] Judge Greenberg acknowledged that, "[t]he [*Crawford*] issue is of special importance to courts—like this one—dedicated to trying cases of alleged domestic violence."[63] In *Moscat*, the court identified the unique impact the *Crawford* issue could have upon the world of domestic violence prosecutions by potentially barring the introduction of critical evidence.[64] There is little question that the principal purpose of the *Moscat* decision was to resolve the larger question of whether *Crawford* would prohibit evidence based prosecutions.

Moscat suggests that decisions interpreting *Crawford* in the domestic violence context must be viewed with particular care. Judge Greenberg did not merely presume facts that supported his ultimate determination; his analysis also ignored alternative arguments suggesting that 911 calls should be considered testimonial. Judge Greenberg never considered the fact that New York State explicitly encourages 911 operators to gather evidence for use at trial. In 2003, the New York State Office for the Prevention of Domestic Violence issued the following statement in its bulletin entitled "Making the Case":

> From communications (911 or police dispatch) to the first responding officer, the supervisor, the investigator and administrative staff, each and every professional involved in the case has an opportunity—and responsibility—to help keep the victim safe and *hold the offender accountable*. . . . We encourage you to see the case from all perspectives and figure out *how you can do your part to help build a good case*.[65]

Similarly, Judge Greenberg made the bare assertion that 911 callers were unaware that their statements would be available for prosecutorial use simply by analyzing the factual scenario of a woman making such a call after "her boyfriend has just shot, stabbed or beaten her."[66] Notably, *Moscat* did not explore the public's understanding of how 911 calls are used. In *People v. Cortes*, a case not involving domestic violence, Bronx Supreme Court Justice Phyllis Skloot-Bamberger noted that "an objective reasonable person knows that when he or she reports a crime the statement will be used in an investigation and at proceedings relating to a prosecution."[67] Callers using 911 generally know that the information they provide will be used for further investigation, and they often refuse to give their names for

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62. Kaye & Knipps, *supra* note 38 at 2. It is notable that Judge Kaye, the co-author of the article calling for judges to reinterpret their role as stopping the violence is the Chief Judge of the State of New York. As Chief Judge, Judge Kaye's responsibilities include overseeing approximately 1,200 state judges, one of whom is Judge Greenberg.

63. People v. Moscat, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004).

64. *Id.* at 877-78.

65. NEW YORK STATE OFFICE OF THE PREVENTION OF DOMESTIC VIOLENCE, BEST PRACTICES IN CASE DEVELOPMENT: MAKING THE CASE (2003), *at* http://www.opdv.state.ny.us/public_awareness/bulletins/fall2003/bestpractices.html (emphasis added).

66. *Moscat*, 777 N.Y.S.2d at 878 (a factual scenario, of course, which had not actually occurred).

67. People v. Cortes, 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004)

this very reason.[68] The fact that many 911 callers have been educated to understand that their statements will be available for use by both the prosecution and the police suggests that such calls would classify as "testimonial statements."

It is important to recognize that courts interpreting *Crawford* in a domestic violence context are likely to be influenced by judges' institutional interests in preserving evidence based prosecutions. As a result, these decisions may fail to explore alternative arguments that, in fact, suggest that "[t]he 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates."[69]

Judge Greenberg was willing to assume all the facts necessary to conclude that 911 calls are not testimonial for the purposes of *Crawford* analysis. Moreover, he decided this pivotal legal issue without briefing. It is difficult to conclude that a judge who departed so egregiously from accepted norms of judicial behavior and who was operating in the context of a legal system in which judges are encouraged to consider themselves active opponents against domestic violence, was not influenced by the desire to maintain the viability of evidence based prosecutions.

The Bronx Defenders did file a motion requesting that Judge Greenberg vacate the *Moscat* decision in light of its factual errors and the judge's misapprehension, in our view, of the meaning and scope of *Crawford*.[70] Judge Greenberg denied the motion to vacate on February 10, 2005, stating that the logic of his decision, while regrettably based upon incorrect facts, stated the correct rule for applying *Crawford*. In the unpublished denial of the motion to vacate, Judge Greenberg argued that the *Moscat* decision was narrowly tailored to apply only to those 911 calls which were, in fact, calls for help.[71] This claim, however, was belied by the fact that the judge had found that the call in question was a call for help based solely on the assertion that it was a 911 call in a domestic assault case. The denial of the motion to vacate included a specific acknowledgement that the *Moscat* decision was "useful to [the court's] own institutional purposes" in light of the need to determine whether evidence based prosecutions could continue to go forward.[72]

VI. CONCLUSION

As the *Moscat* case aptly illustrates, the potential for *Crawford* to eliminate prosecutors' ability to pursue evidence based prosecutions is likely to have a profound influence upon courts' interpretations of the scope of the Sixth Amendment right to confront witnesses. In order to fully understand many *Crawford*

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68. *Id.*; *see also* FREQUENTLY ASKED QUESTIONS, NEW YORK POLICE DEPARTMENT, *at* http://www.nyc.gov/html/nypd/html/miscpdfaq2.html#3 (last visited Apr. 10, 2005) (allowing for anonymous 911 calls).

69. *See Cortes*, 781 N.Y.S.2d at 415.

70. I co-authored the motion to vacate with David Ziff, a talented Columbia Law Student who interned at the Bronx Defenders.

71. People v. Moscat, No. 2003BX044511 (N.Y. Crim. Ct. Feb. 10, 2005).

72. *Id.*

decisions, one must appreciate the unique dynamics of domestic violence prosecutions and the unusual role that many judges adopt in such cases. The *Moscat* case is more than simply an interesting case study in erroneous fact finding. Ultimately, *Moscat* should act as a warning to all those concerned with preserving a defendant's right to a fair trial. Regardless of whether one believes that a 911 phone call is admissible under *Crawford* as a call for help, or inadmissible as an accusation made with the knowledge that it would be available for use at trial, *Moscat* serves to emphasize the dangerous tension between a judge's role as the neutral arbiter of the law and her role as an advocate trying to stem domestic violence. *Moscat* raises serious concerns regarding trial courts' interpretation of the scope of the Sixth Amendment. Furthermore, the *Moscat* decision calls into question fundamental presumptions of judicial neutrality and suggests that courts should reconsider the costs associated with becoming advocates in even worthy social causes such as the fight against domestic violence.