
IN THE SUPREME COURT OF OHIO

State of Ohio,)	Case No. 2023-1289
)	
Appellant.)	
)	On Appeal from the Cuyahoga
-vs-)	County Court of Appeals,
)	Eight Appellate District
Garry F. Smith,)	
)	
Appellee.)	Court of Appeals Case
)	No. 111274
)	

**BRIEF OF THE LEGAL AID SOCIETY OF CLEVELAND
AS AMICI CURIAE IN SUPPORT OF APPELLANT STATE OF OHIO**

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STATEMENTS OF INTEREST OF THE AMICI CURIAE

The Legal Aid Society of Cleveland (“Legal Aid”), founded in 1905, is one of the oldest legal aid organizations in the United States. Legal Aid’s mission is to secure justice, equity, and access to opportunity for and with people who have low incomes through legal representation and advocacy for systemic change. Legal Aid, through its family law practice, focuses on preserving stability for children and protecting victims of domestic violence in intimate partner relationships. Focusing on legal matters that protect clients and their families preserve basic needs, Legal Aid helps survivors achieve safety through litigation, appellate advocacy, trainings on best practices to protect survivors’ rights, and leading policy initiatives to strengthen domestic violence laws. Legal Aid has extensive experience filing amicus briefs in both state and federal courts and has provided a voice for victims on multiple issues related to interpersonal violence, ethical issues regarding the rights of abused survivors, and Ohio’s domestic violence statutory history and application, including *State v. Carswell*, 114 Ohio St. 3d 210 (2007)¹ (Constitutionality of the DV statute and Defense of Marriage Act); *North Olmsted v. Bullington*, 1139 Ohio App 3d. (2000-8th Dist.)² and *State v. Lucas*, 100 Ohio St.3d 1(223)³ (Whether a victim can be criminally charged with violating a protection order); *Nicholson v. Scopetta*, 820 N.E.2d 840 (2004)⁴/*Nicholson v. Williams* 203 F. Supp 2d 153 (2002)⁵ (Whether a victim of domestic violence may be charged with failing to protect their children); *Gibson v. Redman*, 2001-Ohio-3449⁶ (Whether all civil protection order violations must be reported within 60 seconds); *State ex rel. Suwalski v. Peeler*, 167 Ohio St.3d 38 (2021)⁷

¹ *State v. Carswell*, 114 Ohio St. 3d 210 (2007)

² *North Olmsted v. Bullington*, 1139 Ohio App 3d. (2000-8th Dist.)

³ *State v. Lucas*, 100 Ohio St.3d 1(223)

⁴ *Nicholson v. Scopetta*, 820 N.E.2d 840 (2004)

⁵ *Nicholson v. Williams* 203 F. Supp 2d 153 (2002)

⁶ *Gibson v. Redman*, 2001-Ohio-3449

⁷ *State ex rel. Suwalski v. Peeler*, 167 Ohio St.3d 38 (2021)

(Whether federal firearm disability can be restored for conviction for the offense of domestic violence when no state civil rights have been taken away); and, *In the Matter of Grand Jury Subpoena Duces Tecum Directed to Keeper of Records of My Sister's Place*, 2002-Ohio-5600 (2004-4th Dist.)⁸ (Whether a domestic violence shelter must comply with a subpoena).

As in the instant appeal, where the outcome may affect important rights, providing input to jurists when they are addressing decisions of great public interest that affects the safety and security of victims, Amici may provide an essential service to this Court by offering legal arguments and analysis not available from any other source.

Amici's brief presents legal arguments for the reversal of the appellate court's decision, develops the legislative history that is critical to understanding the laws at issue in this appeal, raises public policy considerations, and should assist this Court in making an informed decision in this matter.

Amici is concerned that the decision below and interpretation that the 8th District Court of Appeals prescribes for evidenced-based prosecution cases will have a lasting detrimental effect on victims of domestic violence to critical safeguards and procedures that have been put in place to protect the rights of victims of intimate partner violence. Amici therefore submits this brief in support of Appellant.

Alliance for HOPE International (Alliance) is one of the leading advocacy and social change organizations in the United States focused on helping victims of domestic and sexual violence find pathway to safety, hope, healing, and community. The Alliance was founded by former San Diego City Attorney Casey Gwinn and the first Director of the San Diego Family

⁸ *In the Matter of Grand Jury Subpoena Duces Tecum Directed to Keeper of Records of My Sister's Place*, 2002-Ohio-5600 (2004-4th Dist.)

Justice Center, Gael Strack. Casey Gwinn and Gael Strack, both former prosecutors, are widely recognized as leaders and pioneers in evidence-based prosecution of domestic violence and have authored or co-authored twelve (12) books and hundreds of journal articles on the investigation and prosecution of domestic violence cases. They train regularly for the National District Attorneys Association, the American Judges Association, the National Council of Juvenile and Family Court Judges, the American Bar Association, and other membership organizations for legal professionals on ethics and strategies for the prosecution of domestic violence cases and trauma-informed practices in working with survivors. They are widely quoted in appellate opinions for their research and writing on the handling of domestic violence strangulation assault cases in numerous states.

The Alliance has six major programs: The Family Justice Center Alliance (developing and supporting wraparound services under one roof for victims of domestic and sexual violence); DomesticShelters.org (the largest online resource for domestic violence survivors in North America); the VOICES Survivor Advocacy Network (Teams of domestic violence survivors located in Family Justice Centers across the United States); the Training Institute on Strangulation Prevention (training professionals on the handling of non-fatal and near-fatal strangulation assaults in domestic and sexual violence cases); Camp HOPE America (for children impacted by domestic violence); and the Justice Project (focusing on properly investigating suspicious death cases where there is a history of domestic violence).

The Alliance serves as a training and technical assistance provider for the U.S. Department of Justice on support for domestic violence victims and accountability for offenders. They train agents of the Federal Bureau of Investigation as well as state and local law enforcement officers,

federal, state, and local prosecutors, doctors and nurses, judges, therapists, civil attorneys, and system and community-based advocates.

The Alliance has aggressively opposed the language of “victimless prosecution” in the handling of domestic violence cases. It is not legally or factually accurate. There are victims in domestic violence cases – adults and children. The most dangerous domestic violence offenders, men who strangle women, also are the primary killers of women, children, and police officers.⁹ And men who strangle women are not always trying to kill them. They want their victims to know that they can kill them any time they choose to ensure they will not testify in court against them for their violence.¹⁰; Rage-filled, misogynistic domestic violence offenders also make up most mass shooters in the United States. The victims of the most violent assaults are often seriously injured (with visible external injuries and serious internal injuries) and are commonly terrified of their abusers and reluctant to testify in court. The U.S. Supreme Court has acknowledged the profound intimidation victims experience and the need for evidence-based prosecution of offenders even if the victim is not willing to participate in the court process.¹¹ As Casey Gwinn and Gael Strack have articulated in two books on the prosecution of high-risk domestic violence offenders, evidence-based prosecution is the practice of prosecuting cases based on the available evidence whether the victim is able or willing to participate in the criminal justice system process or not.¹²

The Alliance is deeply invested in public safety strategies in the State of Ohio, helping to plan Family Justice Centers in Defiance and Cleveland. The Alliance has also trained on the

⁹ Gwinn & Hellman, *Hope Rising How the Science of HOPE Can Change Your Life* (2019)

¹⁰ *U.S. v. Lamott*, 831 F.3rd 1153 (citing Gwinn/Strack) (2016)

¹¹ *Davis v. Washington* 547 U.S. 813 (2006)

¹² Gwinn, et al., *The Investigation and Prosecution of Strangulation Cases* (2013; 2020 Second Edition)

handling of domestic violence strangulation assaults in cities across Ohio – emphasizing the importance of early intervention prosecution in domestic violence cases even if the victim does not participate in the prosecution of their offenders. The court’s decision in this case will impact the Alliance’s work in Ohio and across the country and profoundly impact efforts to improve victim safety and offender accountability in domestic violence cases.

Amicus Ohio Domestic Violence Network (“ODVN”) is Ohio’s federally designated domestic violence coalition, representing 76 member programs that serve survivors across Ohio. ODVN carries out its mission to support and strengthen Ohio’s response to domestic violence through the provision of training and technical assistance, raising public awareness, and promoting social change through the implementation of public policy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *Amici* fully adopt and incorporate the statistics and arguments advanced by both the merit brief of the prosecutor and other *Amicus* briefs submitted. We will direct this Court’s attention to the historical perspective in Ohio and around the country regarding prosecutorial policies as well as focus on “ongoing emergency” and victim recantation.

What we know about domestic violence in the home is that it affects those abused, family and friends, co-workers, and the community at large. Children who witness domestic violence are predisposed to a multitude of social and physical problems. Constant exposure to violence and abusive role models teaches children that violence is a normal way of life and places them at risk of becoming society’s next generation of victims and abusers.

Tragically, domestic violence can end in death for the victim, perpetrator, and the children. It also compromises public safety by involving bystanders, witnesses, and law enforcement in our communities.

Domestic violence is not about conflict between two people; rather, it is about one person exercising power and control over the other to establish superiority and to both demean and subjugate the victim. Common manifestations of that behavior include imposing economic or financial restrictions, enforcing physical and emotional isolation, emotional/psychological abuse, repeatedly invading the victim's privacy, supervising the victim's behavior, terminating support from family or friends, threatening violence toward the victim, threatening suicide, getting the victim addicted to drugs or alcohol and physically or sexually assaulting the victim. And in most cases, the offender was someone they once, and possibly still, loved.¹³

Almost paradoxical in nature, prosecuting crimes of domestic violence raises some evidentiary concerns that present unique issues for victims, prosecutors, offenders, and the Confrontation Clause. The dynamics and realities of domestic violence illustrate the practical problems prosecutors have and will continue to encounter. It is important to note that victims of domestic violence are conflicted in their approach to prosecution as their goals differ. Victims seek to escape their abuser's violence and control while still wanting contact and involvement to preserve their families, even when it is seemingly detrimental to their physical safety and emotional wellbeing. In fact, some victims keep their abusers close in order to gauge the abuser's mood and keep themselves and their children safe. Although it might appear detrimental to us, for victims it is often part of their safety plan. They often blame themselves for the abuse inflicted upon them. At the same time, victims are manipulated by their abusers who play on their sympathy to drop charges, or they are blamed by their abusers for involving the justice system in their private matters.

¹³ Vozakis, *Constitutional Law-The Confrontation Clause and the New Primary Purpose Test in Domestic Violence Cases; Davis v. Washington*, 126 S.Ct. 2266 (2006), 7 Wyo. L. Rev. 605 (2007).

Rather than acknowledge the continuing danger faced by victims of domestic violence, the appellate court adopted a narrow definition of “ongoing emergency” for purposes of a Confrontation Clause analysis. Without evaluating an ongoing emergency in the context of domestic violence, fewer cases will be prosecuted, and offenders will not be held accountable. Additionally, this evaluation can only be understood if a court understands the realities of the domestic violence relationship and the reasons why victims recant or refuse to participate with the prosecution.

HISTORICAL CONTEXT

Tracing the evolutionary nature of evidence-based prosecution and the importance of hearsay evidence in domestic violence cases is especially illuminating. It is important to mention the backdrop from which barriers to effective criminal prosecution have arisen when confronted with a nonparticipating victim. Context is necessary to assist our understanding of why and how advancements across the country and in Ohio came about.

In 1979, Ohio enacted its domestic violence statute. Prior to enactment of the statute, then Attorney General William Brown convened a task force to determine whether domestic violence was epidemic in Ohio. The results were staggering. Nurses, doctors, law enforcement, social workers, attorneys, other professionals, and victims all testified. Each professional testified about abuse towards themselves, patients, clients, and those they assist. Based on the knowledge gleaned from these hearings, Ohio enacted legislation to codify domestic violence cases as unique crimes which require specifically tailored interventions. However, the issue of domestic

violence continued to be treated by criminal justice professionals largely as a private family matter and not a concern for the criminal justice system or society.¹⁴

Prior to the enactment of Ohio's law, the only option open to domestic violence victims who wanted to prosecute was under the assault statutes. That proved unworkable, however, because the dynamics of domestic violence in the intimate partner relationship context were not understood by the criminal justice system. In fact, these are the same dynamics that we note exist today. Attitudes about domestic violence emerged from the mid-nineteenth century period when it was not uncommon for a husband to inflict some level of physical chastisement to punish one's wife. As one North Carolina court stated in 1868, "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."¹⁵ Further, because acts of domestic violence often occurred behind closed doors, there were often no witnesses other than the victim and the offender.¹⁶ In fact, through the 1970's and early 1980's, stranger assault was more likely to be treated seriously and deserving of prosecutorial action than violence between intimate partners.

It quickly became apparent that law enforcement, prosecutors, and the health care systems needed to recognize the importance and necessity of collecting corroborating evidence of these acts, particularly in the face of conflicted, hesitant, or reluctant complainants. As society began to understand the realities of domestic violence, institutional reforms and

¹⁴ Furman, *Addressing Evidentiary Problems in Prosecuting Domestic Violence Cases Post-Crawford*, 25 Temp. Pol. & Civ. Rts. L.Rev. (2016).

¹⁵ *State v. Rhodes*, 61 N.C. 453 N.C. (1868).

¹⁶ *Felton v. Felton*, 79 Ohio St. 3d 34, 1997-Ohio-302, 679 NE2d 672 (1997)

responses were needed across the spectrum for law enforcement, prosecutors, jurists, and health care providers.¹⁷

Today the concept of domestic violence as a public health crisis figures prominently in societal consciousness and represents a crime that prosecutors take seriously.¹⁸ Even so, prosecutorial transformation lagged behind the evolution in public awareness. The move toward evidence-based prosecution eventually caused prosecutors to review cases in a different way, but tactical and strategic changes in domestic violence prosecutions were not implemented until the late 1980s and 1990s.

Alleged victims of domestic violence who enter the justice system find that there are compelling reasons to discontinue their active participation in criminal prosecution. These compelling reasons frequently have nothing to do with whether the offense was committed. They include familial, social, financial, and fear-based considerations, not to mention an unawareness of the criminal justice process. Victims are frequently unprepared for the number of court appearances required, and the lack of input they are allowed in plea negotiations and sentencing, when considering the volume of constitutional protections that defendants receive. Many alleged victims expect the process to be predictable and straightforward. Dissatisfaction with the way that the system responds often compels many victims to request dismissal of the charges.

¹⁷ Barth, “*I’d Grab Anything. And I’d Forget: Domestic Violence Victim Testimony After Davis v. Washington*,” 41 J. Marshall L. Rev. 937, 938 (2008); *Rethinking Strategies for Prosecution of Domestic Violence in the Wake of Crawford*, 71 Brook. L.Rev. (2005).

¹⁸ CDC, The Division of Violence Prevention; Stockman et al., *Intimate Partner Violence and its Health impact on Disproportionately Affected Populations, including Minorities and Impoverished Groups*, J. Women’s Health (Larchmt) 2015 March 01; 24(3): 256; *Impact of Domestic Violence on Health*, VAWnet; Dahlberg & Mercy, *History of Violence as a Public Health Problem*, AMA Journal of Ethics, Virtual Mentor, 2009;11(2):167-172doj.; Saltzman et al., *Violence against Women as a Public Health Issue, Comments from the CDC, Future Directions: A National Perspective*, Vol. 19, Issue 4, 325-329 Nov. 2000)

Historically, this lack of victim cooperation made prosecutors reluctant to bring charges at all. Their inaction or unwillingness to prosecute was, to victims, emblematic of an unwillingness by the state to hold domestic abusers accountable and to ensure public safety in these cases.

Unfortunately, enacting laws that made domestic violence a crime was not enough. States were still ill-equipped to address the interdependent relationship of the crime between victim and abuser and state attitudes of inaction remained, especially given the state's inability to adequately support victims of domestic violence. Public outcry encouraged states to amend their domestic violence laws to address charging the offender and collecting necessary evidence should the prosecutor choose to prosecute without the victim's cooperation.

In the late 1980's, San Diego based prosecutors designed a philosophy for pursuing those who perpetuated domestic violence that was dependent upon the totality of evidence developed in each case, as opposed to being solely reliant on the availability and willingness of the injured party to participate in the state's case. The primary underlying premise of the new philosophy was that domestic violence prosecutions should be pursued and treated like other crimes—that, is, if the elements of the crime could be proven with or without the victim's participation, then prosecutors should seek accountability from such offenders and justice for the victims and society injured by their acts. This new approach was a major factor in the 70% to 90% reduction in domestic violence homicides seen in San Diego between 1985 and 2006. According to then San Diego City Attorney Casey Gwinn, “requiring victim engagement simply puts victims in harm's way by drawing a target on their chest – telling the abuser that the victim is responsible

for their prosecution – and inviting even greater intimidation and manipulation by the abuser to avoid accountability”.¹⁹

The San Diego City Attorney’s evidence-based prosecution approach was evaluated by the American Bar Association in 2001, in a grant study funded by the National Institute of Justice, with important findings. Evidence-based or “no drop” prosecution was successful and endorsed by survivors two years after their partner was prosecuted. Though more than 70% of victims did not want to participate in prosecution at the time charges were pursued, the ABA study documented a 96% conviction rate on filed cases. But more importantly the research team contacted victims two years after their partners were prosecuted and asked them a series of questions about their view two years after prosecution. 90% of victims said they were glad their partner was prosecuted. 96% said they did not want the court to just let their abuser go even though they did not want to participate. 94% said they wanted the court to order restitution. And 91% said their abuser had not been violent with them since being prosecuted.²⁰

Various “failure to protect” lawsuits such as *Thurman v. Torrington*²¹, also played a role in changing public policy and attitudes within the justice system. However, it was after the Nicole Simpson-Ronald Goldman murders and the enactment of the Violence Against Women Act in 1994 that most states began to institute no-drop prosecution policies and turned their focus

¹⁹ Gwinn & O’Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. St. U. L.Rev. 1501 (1993); Willis, *Domestic Violence: The Case for Aggressive Prosecution*, UCLA Women’s L.J. (1997); Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L.Rev. 853 (1994); Bigornia, *Alternatives to Traditional Criminal Prosecution of Spousal Abuse*, 11 J. Contempt. Legal Issues 57, 58 (2001).

²⁰ Smith, et al, *Evaluation of Efforts to Implement No-Drop Policies: Two Central Values in Conflict, Final Report* (2001).

²¹ *Thurman v. Torrington*, 595 F. Supp. 1521 (D. Conn. 1984)

toward evidence-based prosecutions.²² Replacing a system dependent on victim cooperation with one based on the evidence reduced incentives for batterers to try to influence victim cooperation and testimony. It also helped shift an offender's focus from victim blaming. Increasing the number of offenders held accountable was widely viewed as important in removing dangerous people from society, promoting deterrence, and showing victims that the system could help protect them.²³

A "no-drop" prosecution policy can be defined both as a statement declaring that the state will not drop a domestic violence case due to victim nonparticipation and as a policy and practice for enforcing that statement. As a statement of intent to continue prosecution despite the wishes of the victim, a no-drop policy clarifies the nature of the relationship between the prosecutor and the victim. On one level this policy underscores that once charges are filed, the state, and not the victim becomes the party, and the prosecutor controls the direction of the prosecution. On another level, such a policy represents official acknowledgement of the fear victims often feel when asked to testify against their partners. Lastly, a no-drop policy conveys an institutional commitment on the part of the criminal justice system to treat domestic violence as a serious crime. In practice, a no-drop policy regulates the use of prosecutorial discretion in instances where the victim declines to participate. Often the policy comes into play after formal charges have been filed and the victim has indicated that they will not participate in the ongoing

²² Barth, *"I'd Grab Anything. And I'd Forget: Domestic Violence Victim Testimony After Davis v. Washington"*, 41 J. Marshall L. Rev. 937, 938 (2008); Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 Hous. L.Rev. 237 (238-43 (2005)); Cahn, *Innovative Approaches to the Prosecution of Domestic Violence Crimes*, in *Domestic Violence: The Changing Criminal Justice Response* 161, 162-75 (E.S. Buzawa & C.G. Buzawa, eds. 1992).

²³ Busching, *Rethinking Strategies for Prosecution of Domestic Violence in the Wake of Crawford*, 71 Brook. L. Rev. 391, 395-396 (2005).

prosecution.”²⁴. Most importantly, no-drop policies and evidence-based prosecutions close the gap between the statutory promise of protection for victims of domestic violence and the justice they receive.²⁵ It now seems clear that these changes created a tangible shift in the criminal justice system’s response to domestic violence. Specifically, the criminal justice system now treats domestic violence as a public issue, not a private one.

Ohio enacted a no-drop policy in 1997 as the response to the Supreme Court of Ohio’s decision of 1996 in *State v. Busch*²⁶ which provides that “[i]f a person is arrested or charged with committing an offense of domestic violence or of violating a protection order and if the victim of the offense does not cooperate with the involved law enforcement or prosecuting authorities in the prosecution of the offense or, subsequent to the arrest or filing of the charges, informs the involved law enforcement or prosecuting authorities that the victim does not wish the prosecution of the offense to continue or wishes to drop charges against the alleged offender relative to the offense, that involved prosecuting authorities, in determining whether to continue with the prosecution of the offense or whether to dismiss charges against the alleged offender relative to the offense, and notwithstanding the victim’s failure to cooperate or the victim’s wishes, shall consider all facts and circumstances that are relevant to the offense, including, but not limited to, the statements and observations of the peace officers who responded to the incident that resulted in the arrest or filing of the charges and of all witnesses to that incident.”²⁷

This statutory provision is still good law in Ohio.

²⁴ Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L.Rev. 853, 858-859 (1994)

²⁵ Corsilles, at 881.

²⁶ *State v. Busch*, 76 Ohio St.3d 913, 1996-Ohio-82, 669 NE2d 1125 (1996)

²⁷ RC 2935.03(B)(e)(ii).

Following the enactment of Ohio’s evidence-based prosecution and “no drop” laws and policies, prosecutors have been more open to pursuing criminal charges even when an alleged victim has been reluctant to participate in the prosecution. It is noteworthy that evidence-based prosecution is heavily reliant on no-drop policies.

As this practice evolved, it became evident that the crime scene yielded the bulk of probative, relevant evidence. For example, statements made at the scene of the incident to police officers by alleged victims and offenders are among the most important tools of an evidence-based prosecution. These cases are then developed as if there is no victim available to testify in court. Crafting prosecution policies using law enforcement observations, body worn cameras, 911 call tapes, photographic evidence of the scene at the time of the event; documenting injuries suffered, other physical evidence, medical records and witness statements and observations, and statement made by the offender against their interests, such as jail calls to victims can, in many domestic violence cases, be a more effective model in proving the elements of the offense.²⁸ As a permissible paradigm, evidence-based prosecution reflects the direction in which Ohio and the rest of the nation has been moving.

For more than thirty years, prosecutors, using the full panoply of evidentiary tools, have successfully brought domestic violence cases to trial across the country, filling in the evidentiary gaps created by nonparticipating alleged victims. The position taken by the Court of Appeals in this case stands in direct contravention to the direction taken by the Ohio General Assembly and the courts of this state.

²⁸ Leventhal & Aldrich, *The Admission of Evidence in Domestic Violence Cases Without a Victim: A National Survey*, 11 Berkeley J. Crim. L. 77, 80-81 (2006); Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim*, 39 Prosecutor 18 (2005)(describing evidence -based prosecutions).

It is important to note that neither the U.S. Constitution, the Constitution of the State of Ohio nor the rules of evidence have ever dictated to prosecutors that the appearance of alleged victims in domestic violence cases is a mandatory requirement.

ARGUMENT

I. PUBLIC POLICY DICTATES THAT STATES HAVE A COMPELLING INTEREST TO PROTECT VICTIMS OF DOMESTIC VIOLENCE.

The history and development of domestic violence prosecutions make the *Crawford/Davis* line of confrontation cases especially difficult for prosecutors to navigate. While the United States Supreme Court's ruling in *Crawford v. Washington*²⁹ in 2004 requires prosecutors to determine when evidence-based prosecutions are appropriate, such prosecutions have continued to be a mainstay for seeking just results in domestic violence cases.

It goes without saying that Ohio has a compelling interest in protecting its citizens from harm. Although domestic violence occurs within a personal relationship, the harm extends beyond the victim and dramatically affects communities. "Each year, domestic violence is responsible for billions of dollars in property damage and loss, medical costs, mental healthcare costs, police and fire protection services and victims' services."³⁰

The most effective way to prosecute domestic violence, in cases where the alleged victim may be cajoled or coerced into not participating in the prosecution, or into recanting earlier inculpatory statements, or refusing to testify at trial, is to use the various hearsay exceptions which allow others to testify as to the victim's prior statements and to gather and utilize other documentary evidence. In determining which statements are testimonial, excited utterances and

²⁹ *Crawford v. Washington* 541 U.S. 36, 124 S. Ct. 1354 (2004)

³⁰ King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, Faculty Law Review Articles 301, 307 (2005)

present sense impression exceptions as well as statements made for medical diagnoses are in the forefront.

The removal of these tools would have the practical effect of shifting power to the abuser, who then only needs to convince the complainant not to participate in the prosecution to escape accountability.

II. THE PATTERN OF BEHAVIORS PRESENTED IN DOMESTIC VIOLENCE CASES UNDERLIES THE REASONS THAT VICTIMS RECANT OR REFUSE TO COOPERATE IN THE PROSECUTION OF THEIR CASES.

Domestic violence is fundamentally different from violence between non-intimates or strangers because it is an ongoing pattern of conduct defined by both physical and nonphysical manifestations of power.³¹ It is often long-term and continuous. The prosecution of these cases is unique in that the defendant and the complaining witness are often connected by a history of intimacy, children, economic necessity, and other personal and social reasons.

Beyond immediate physical injury or death, domestic violence victims are more likely to report negative mental and physical health outcomes-both acute and chronic or substance abuse.³²

Recognizing the dynamics of domestic violence is instructive for the justice system because not all victims act in the same manner to an abusive event. Some respond aggressively, some are silent, some demonstrate fear, some are ambivalent, and some simply have no affect.

³¹ Tuerkheimer, *A Relational Approach to the Right of Confrontation and its Loss*, 15 J.L. & Pol. 725 (2007).

³² Dutton, et al, *Court-involved Battered Women's Responses to Violence: The Role of Psychological, Physical, and Sexual Abuse*, *Violence and Victims*, 14(1), 89-104 (1999); Bonomi, et al, *Medical and Psychosocial Diagnoses in Women with a History of Intimate Partner Violence*, *Archives of Internal Medicine*, 169(18), 1692-1697 (2009); Epstein, et al, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 *Am. J. Gender, Soc. Polc'y & Law* 465-498 (2008); Koepsell, et al, *Factors that Influence Battered Women to Leave Their Abusive Relationships*, *Violence and Victims*, 21(2), 131-147 (2006).

Since victims are not monolithic, they do not all respond by crying or acting fearful. One victim's calm sense of presence is another victim's hysterical cry for help.

Courts must be mindful that there is no ideal victim, and each victim brings the nuances of their own lived experiences. Thus, evidence-based prosecution provides an equitable mechanism for the presentation of those complex dynamics in these cases.

Additionally, most assaults provoke some stressful or traumatic reaction in their victims. Research has shown that victims who are subjected to long-term violence by their partners suffer significant trauma.³³ Testifying victims must often relive the trauma of domestic violence by describing it in court.

They must endure intense questioning and also confront their attackers face to face as they testify³⁴. As recognized by the U.S. Supreme Court, “[t]his particular crime is notoriously susceptible to intimidation or coercion of the victim to ensure she does not testify at trial.”³⁵

In effect, it is domestic violence itself that causes the victim's unavailability. The cyclical and patterned nature of domestic violence demonstrates that a domestic violence abuser does not necessarily stop the abuse when the criminal justice system intervenes.³⁶ Instead, many abusers become more abusive to reassert their control over their victims. Empirical studies have shown that abusers use this control to convince their victims not to cooperate or participate in the prosecution. In some cases, however, additional threats or acts of violence are unnecessary to

³³ Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 Stan. L. & Pol'y Rev. 269, 283 (2015).

³⁴ Epperson, *Restoring Balance to Domestic Violence Prosecution after Crawford*, 9 Va. J. Crim. L. 163 (2021); Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L.Rev. 747 (2005); Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Prosecutions*, 37 B.C.J. L. & Soc. Just. 1, 50 (2017).

³⁵ *Davis v. Washington*, 126 S.Ct. 2266, ***161 L.Ed.2d 224 (2006).

³⁶ Simon, *Confrontation and Domestic Violence Post-Davis: Is There and Should There Be a Doctrinal Exception*, 17 Mich. Journal of Gender & Law 2 (2011).

ensure a victim's silence. Further, threats from abusers are not limited to physical harm. In one study, 42% of victims reported economic threats and 25 % were threatened with the loss of their children, either through kidnapping or exaggerated claims of unfitness made to child protective services.³⁷

Studies have shown that approximately 80% of victims do not assist in the prosecution of their cases.³⁸

It is also apparent that many victims choose to remain with or return to the people who abuse them. Reasons for this include love or the desire to continue the relationship; promised change by the abuser, the offender's appeal of sympathy through the descriptions of their suffering from trauma, mental and physical problems, intolerable jail conditions and life without the offender; the need for economic, parenting or other support from the offender; the potential collateral consequences of a conviction or an acquittal; the fear of future violence if the victim cooperates with the prosecution, and how the abuser will behave after spending time in jail. These reasons are in line with the body of literature linking emotional needs and attachments with continued involvement with their abusers.³⁹

³⁷ Krischer, *Though Justice May be Blind, It is not Stupid*, 38-DEC Prosecutor14 (2004)

³⁸ Hardaway, *Domestic Violence and the Confrontation Clause: The Case for a Prompt Post-arrest Confrontation Hearing*, 22 *Cardozo J.L. & Gender* 1 (2015); Bonomi, et al., "Meet me at the hill where we used to park": *Interpersonal Processes Associated with Victim Recantation*, *Social Science & Medicine* 73 1054-1061 (2011) bonomi.1@osu.edu; Lininger, *Reconceptualizing Confrontation After Davis*, 85 *Tex. L.Rev.* 271, 281 (2006); Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 *Cal. L.Rev.* 213, 236 (2005); Meier, *Davis/Hammon, Domestic Violence and The Supreme Court: The Case for Cautious Optimism*, *First Impressions*, 22, 22-27 (2006); Ellison, *Prosecuting Domestic Violence Without Victim Participation*, *The Modern Law Review* 65(6), 834-858 (2002).

³⁹ Bonomi, et al, *Love as a Battlefield: Attachment and Relationship Dynamic in Couples Identified for Male Partner Violence*, *Journal of Family Issues* 29(1), 125-150 (2008).

However, none of the aforementioned factors make an offender any less blameworthy or culpable. Because the victim is intimately familiar with this pattern, they often conclude it is in their best interest not to cooperate with prosecutors.

III. THE APPELLATE COURT ERRED IN ITS DETERMINATION THAT THE STATEMENTS MADE TO LAW ENFORCEMENT BY THE ALLEGED VICTIM WERE TESTIMONIAL AND NOT IN RESPONSE TO AN ONGOING EMERGENCY.

The Cuyahoga County appellate court applied a narrow application of what constitutes an “ongoing emergency” for purposes of determining whether to allow the admission of evidence. “Judicial failure to recognize that a law enforcement officer also seeks information for the purpose of protection and this failure to expand the current stringent view on what constitutes an ongoing emergency is detrimental to the prosecution of domestic violence cases where the victim is unavailable.”⁴⁰

Considering the realities of domestic violence, it is clearly impractical to attempt to find the beginning and end of an emergency in such a context. Determining the contours of an emergency can be arbitrary even in a non-domestic violence context, but it is even more arbitrary in the context of an abusive relationship where a victim is under constant threat of assault and control. An alleged domestic violence victim’s exigency extends beyond what might appear to an outside observer or a reasonable person unfamiliar with the culture of a domestic violence relationship.⁴¹ As Deborah Tuerkheimer explains:

“A domestic violence victim’s safety may be wholly contingent on her communication with police and her “narration of events” is linked inexorably to resolving—however temporarily—the danger posed by her batterer. The “cry for help” may sound, then, much like a narration of events because it is a victim describing battering that will, in all likelihood, continue in the absence of some

⁴⁰ Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Prosecutions*, 37 B.C.J.L. & Soc. Just. 1, 29 (2017).

⁴¹ Tuerkheimer, *A Relational Approach to the Right of Confrontation and its Loss*, 15 J.L. & Pol’y 725, 732 (2007).

action by law enforcement...The exigency the victim experiences require a narration of past events in order to resolve the immediate danger***. In short, the meaning of exigency to a victim of domestic violence is different than it is to other types of crime. This reality fatally undermines judicial reasoning predicated on the “crying for help” versus “providing information to law enforcement” rubric.”⁴²

In deciding that there was no “ongoing emergency” because the offender had left the scene before law enforcement arrived, the appellate court erred as a matter of public policy. It should be emphasized that an offender’s departure from the scene hardly means that the danger of imminent harm to the victim has dissipated.⁴³ In fact, Jacqueline Campbell’s danger assessment tool includes a question as to whether the abuser has avoided arrest. Avoiding arrest is, itself, a risk factor for lethality and contributes to the ongoing risk to the victim.⁴⁴

This focus on whether the defendant left the scene by the time the alleged victim had a first encounter with law enforcement is misplaced when considering the reasons why many victims become unavailable witnesses. The defendant’s absence from the scene in this case did not make the situation less of an emergency. In fact, the alleged offender’s temporary departure and absence from the scene extended the emergency and made it ongoing. Clearly, a lapse in time in reporting the incident or the fact that the defendant left the home is not dispositive of whether there was an “ongoing emergency.”⁴⁵

⁴² Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 B.Y.U. L.Rev. 1, 26, (2009); quoting, Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right to Confrontation*, 85 N.C. L.Rev. 1, 20-21 (2006); Raeder, *Domestic Violence Cases after Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & Pol’y 759 (2007); Tuerkheimer, *Exigency*, 49 Ariz. L.Rev. 801 (2007).

⁴³ Tuerkheimer, *A Relational Approach to the Right of Confrontation and its Loss*, 15 J.L. & Pol’y 725, 741 (2007).

⁴⁴ Campbell, *Assessing Dangerousness*, Newbury Park, Sage (1995)

⁴⁵ Yee, *Confronting the “On-Going Emergency”*: *A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 Fla. St. U. L.Rev. 729 (2008); Bloom, *Utter Excitement About Nothing: Why Domestic Evidence-Based Prosecution will Survive Crawford v. Washington*, 36 St. Mary’s L.J. 716 (2005); *Lawton v. State*, 913 S.W.2d 542, 553 (Tex. Crim. App. 1995); *Salazar v. State*, 38 S.W.3d 141, 154 (2001).

In this case, the fact that defendant left only meant the victim was lucky she wasn't killed. In fact, "in many cases, the declarant's later inability or unwillingness to testify at trial can be indirect evidence of the ongoing emergency: the declarant is trying to avoid the negative consequences of making the statement to the police. The emergency may still be ongoing at the time of trial and the declarant's unavailability is a direct result of that emergency. The risk of serious harm to welfare may be present from the time of the hearsay statement to the moment of trial. Analyzing the testimonial nature of a hearsay statement in this manner both recognizes the complex and problematic dynamics of cases involving certain relationships and respects the ultimate values of the criminal justice system."⁴⁶

From a public policy perspective, the appellate court did not consider the instant situation through the lens of the alleged victim, or the totality of the circumstances presented to the trial court for resolution. A more nuanced contextual judicial inquiry by the appellate court would have resulted in consideration of the nature and history of the abuse that the alleged victim suffered in determining, objectively, whether the emergency faced was ongoing for her and how her calculus colored her decision not to participate further in the prosecution. Of course, there is no "one moment in time" that captures the incident of intimidation as there is not one discrete moment that establishes when the ongoing emergency has passed.⁴⁷

⁴⁶ Yee, at 795.

⁴⁷ Turkheimer, *Forfeiture in the Domestic Violence Realm*, 85 Tex. L.Rev. 49 (2007); Tuerkheimer, *Forfeiture After Giles: The Relevance of "Domestic Violence Context,"* 13 Lewis & Clark L. Rev. 711 (2009); Simon, *Confrontation and Domestic Violence Post-Davis: Is there and Should There Be a Doctrinal Exception*, 17 Mich. J. Gender & L. 175 (2011); *Werley v. State*, 814 So. 2d 1159 (Fla. Dist. Ct. App. 2002 (call to 911 one hour after being beaten by husband was admissible as an excited utterance)); *Rodriguez v. State*, 274 S. W.3d 760, 765 Tex. Ct. App. (2008); *People v. Johnson*, 2006 WL 364 8929 Cal. App. Dist. (2006); *People v. Lewis*, 2007 WL 4206637, *3, Cal. Ct. App. 1 (2007).

In fact, psychologist Mary Ann Dutton elaborated on the dynamics of domestic violence as follows:

Abusive behavior does not occur as a series of discrete events. Although a set of abusive incidents can typically be identified within an abusive relationship, an understanding of the dynamic of power and control within an intimate relationship goes beyond these discrete incidents. To negate the impact of the time period between discrete episodes of serious violence--a time period during which the woman may never know when the next incident will occur and may continue to live on with ongoing psychological abuse—is to fail to recognize what some battered women experience as a continuing “state of siege.”⁴⁸

It should not be dispositive that the statement is in answer to a question or that it was separated by a period of time from the startling event. In fact, it is doubtful that, in the face of immediate danger, a victim is contemplating how her statements might later be used at trial. As in the case at hand, many victims contact law enforcement to help them extricate themselves from a violent situation, not to press charges. That should be the clearest indication that the statement is not testimonial. In fact, a victim’s statement to the responding officer when assistance is sought is to allow the officers to respond to the emergent situation. That a victim would wait to contact law enforcement until she felt safe is important to the analysis. The situation is often uncertain, the victim did not know where the defendant was and only responded to a police inquiry regarding the nature and cause of her injuries, not on whether the statements could be or would be used at trial or related to later criminal prosecution.

IV. MANDATING THAT ALLEGED VICTIMS BE COMPELLED TO TESTIFY AGAINST THEIR ABUSERS AT TRIAL WILL CREATE A CHILLING EFFECT SUCH THAT MANY VICTIMS WILL NOT PARTICIPATE IN THE PROSECUTION OF THEIR CASES AND WILL NO LONGER REPORT THE CRIMES SUFFERED AT THE HANDS OF THEIR ABUSERS.

⁴⁸ Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Women Syndrome*, 21 Hofstra L.Rev. 1191, 1208 (2003); Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*, 15 J.L. & Pol’y 725 (2007).

The U.S. Supreme Court’s decision in *Davis v. Washington* clearly assumes the right of a prosecutor to go forward with a domestic violence case even with a terrified and recanting victim. Justice Scalia, in his majority opinion, even noted why victims cannot be expected to testify in many domestic violence cases, writing: “This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall.”⁴⁹ Forcing alleged victims of domestic violence to testify is, on balance, counterproductive, as is punishing them when they recant their testimony. In that a victim’s reaction is often counterintuitive, such focus serves only to minimize a victim’s reality and lived experiences. Forcing victims to testify when they fear retaliation from a defendant can and will revictimize the victim.

Forced cooperation is not in the best interests of the complaining witness, the justice system, the prosecutorial system, law enforcement, or society.⁵⁰ Importantly, forcing a victim to testify does nothing to stop the violence. It may, however, result in additional harm or death for many of those coerced. Ironically, in those instances where batterers did kill their victims, cases were actually easier to prove. Such cases were no longer thought to be private matters, victim cooperation or participation was neither expected nor required and police and prosecutors aggressively sought alternative sources of evidence.

Blaming the prosecutor for utilizing so-called “victimless prosecution”⁵¹ and the victim for not “seeing the folly of her ways”⁵² presents a myopic view of the dangers and realities faced

⁴⁹ *Davis v. Washington*, 547 U.S. 813, 832-833, 126 S.Ct. 2266, 165 L.Ed.2d 22 (2006)

⁵⁰ Kirsch II, *Problems in Domestic Violence: Should Victims be Forced to Participate in the Prosecution of Their Abusers?*, 7 Wm. & Mary J. Women & L 388 (2001); Simpson, *Benefits and Drawbacks of No-Drop Policies and Evidence-Based Prosecution*, 26 Rich. Pub. Int. L. Rev. 141, 149 (2023).

⁵¹ Op. 907.

⁵² Op. 909.

by victims of domestic violence. It also ignores the reality that domestic violence is NOT a “victimless crime”. There are victims in domestic violence cases, both adults and children. And there are highly nuanced complexities in the situation most victims face. The approach of the court here also fails to recognize that it is the relationship between the victim and the offender which creates the ongoing emergency. Sadly, blaming the victim or prosecutor rather than putting the blame squarely on where it belongs...the abuser...minimizes the evidence gathered and provides the defendant with a convenient out.

The *Smith* decision undermines evidence-based prosecution. If upheld, it will cause prosecutors in Ohio to either revert to the days when domestic violence cases were not prosecuted, giving the abuser a pass, or causing them to compel alleged victims to testify by treating them as offenders and causing them more trauma. Instead of considering a victim’s nonparticipation as part of the dynamics of domestic violence or the likely consequence of the coercive control of defendant’s actions, the appellate court framed the issue as the alleged victim’s choice and the State’s strategic maneuvers. Views like these reinforce a victim’s negative perception of the process and the system itself. Equally significant is that this appellate decision casts a shadow on the importance of evidence-based prosecutions and could easily eliminate an important avenue that created a narrow window in which these cases could proceed to justice.

Dismissing the case, as suggested by the appellate court, is likely another counterproductive exercise. It will not encourage victims to help the prosecution and cooperate fully. Instead, dismissals will only reinforce the control that offenders maintain over the process. With no incentive to refile, fewer victims will seek help from the criminal justice system, and more are likely to be seriously injured or killed by their abusers.

CONCLUSION

While it is clear that court decisions since *Crawford* have varied in their approach to an ongoing emergency, recantation, and the realities of domestic violence, the appellate court should have seen Ms. Bradley as a victim whose recantation was both reasonable and foreseeable. The appellate court's decision, vacating and remanding Smith's conviction for felony domestic violence is against public policy and public safety. Under the facts of this case, Smith was neither held accountable to his victim nor to society at large.

The *Amici* request that this Court reverse the appellate decision as to these assignments of error and allow the trial court decision to stand.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction of Amici Curiae Support and Advocacy Groups for Victims of Domestic Violence on Behalf of Appellant State of Ohio was sent by email and First Class United States Mail, postage prepaid, upon the following this 5th day of April, 2024:

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