

## **IN HOT PURSUIT OF THE “RECATING VICTIM”**

In case you didn't know, we are living in a state where uncooperative victims of domestic violence are ducking and running from prosecutors and investigators who wish to compel their testimony. At this very moment, thousands of victims are holed up in their homes or are “on the lam” in their attempts to avoid contact with law enforcement officials.

I have many concerns about the government's aggressive practice of pursuing uncooperative victims and I believe there needs to be a change in the way our criminal justice system handles first time offenses involving domestic violence.

### **The Recanting Victim**

The “recanting victim” phenomenon is nothing new. Any professional who has ever worked with domestic violence cases knows that a great number of people who report domestic violence frequently change their mind about pressing charges, once things have cooled off and reality sets in about the consequences of a criminal conviction. It is often the case that the accused and accuser make up, move back in with one another, and attempt to make things better.

Out of concern for people inflicted with the “Domestic Violence Syndrome” (i.e., people who are perpetually trapped in abusive relationships), prosecutors have adopted the philosophy that it is their job to rescue victims from making the wrong decision, and that it is their ethical duty to bring the perpetrator to justice, in spite of the consequences a conviction will have on the parties' relationship or family.

### ***The Use of Spontaneous Statements***

Using an exception to the hearsay rule, often called the “excited utterance doctrine,” prosecutors used to successfully prosecute domestic violence cases, when the victim either refused to testify or recanted his or her statement. During trial, the prosecutor would simply play the 911 tapes taken from the incident and call the responding officer to the stand who would testify as to what the victim told him about the incident during the investigation. This type of evidence was permitted under the theory that the victim's spontaneous statements were reliable since they were made when the victim was under a great deal of stress from the incident, and therefore the victim was not likely to have fabricated his or her story.

Prosecutors knew that it was much easier to secure a conviction when the victim refused to cooperate, given the impossibility for the defense to cross examine a 911 tape or a police officer who is merely regurgitating what the victim had said during the investigation. Thus, the preferred domestic violence case for most prosecutors was one in which the victim refused to cooperate and never set foot in the court room.

### ***The Crawford Decision***

In 2003, the glorious days of prosecuting domestic violence cases came to a screeching halt based on a United States Supreme Court decision entitled, "*Crawford v. Washington*." According to the *Crawford* decision, the Confrontation Clause excludes "testimonial" hearsay from trial unless the declarant testifies at trial, or the declarant is unavailable to do so *and* the accused had an opportunity to cross-examine the declarant at the time of the hearsay. The high court's decision put an end to the long standing practice of calling police officers to the stand to testify on behalf of the recanting victim. Consequently, it is now necessary in most cases that the victim testifies in order for the prosecution to obtain a conviction.

### *The New Game*

In spite of the *Crawford* decision, the District Attorney's Office's mad dog approach to these cases has not changed. Prosecutors are now going to extreme lengths to compel victim's testimony. For example, when victims refuse to appear in court, prosecutors sometimes obtain "body attachments" or warrants for their arrests, and then send their investigators after the victims to have them hauled into court. In other instances, prosecutors will go so far as to charge victims with contempt of court for failing to appear. Thus, it is not unheard of these days where both the accuser and the accused are facing criminal charges.

Furthermore, frightening cat and mouse games are being played out on the streets as a result of the District Attorney's current position of chasing after victims. Government officials are pounding on the doors of victim's homes, going to victim's work places, and conducting around the clock surveillances of the victim's known hangouts. Meanwhile, victims are taking time off of work, refusing to answer their phones, and booking trips out of the state to avoid detection.

At the risk of being labeled a proponent of domestic violence, I believe it is time for a change in the way our system handles cases involving uncooperative and recanting victims of domestic violence. My belief that we need to change the criminal justice system's method for handling these cases is based on the following four arguments:

- 1) The government's position of not listening to victim's of domestic violence when they do not wish prosecution is based on a flawed assumption that these people cannot think for themselves. Most people who call the police because of a domestic disturbance do not suffer from Domestic Violence Syndrome. After all, women are much more independent than they were in the past, and it is much easier for people to leave relationships these days with the help of emergency protective orders issued by the police and restraining orders issued by the family courts.
- 2) If a person truly wants to continue in a relationship or has hopes of keeping a family together, why is the government so quick to interfere with that decision? Isn't it a no-brainer that a criminal conviction for domestic violence

is likely to damage the relationship, especially where there has been a loss of liberty or employment opportunities?

- 3) If our main concern in these cases is to protect victims of domestic violence, why are we making it scary for people to call the police? Certainly in some cases it is appropriate for the police to simply keep the peace without making an arrest. However, with the current policy, people who are deserving of this basic police service do not call the police because of the severe consequences that usually follow.
- 4) Why is our government wasting so much money chasing after recanting victims when the likelihood of obtaining a conviction is so little? Although I do not have statistics to support this argument, I know from being in court that there is an enormous increase in the amount of these cases dismissed in spite of the government's expenditures in attempting to locate uncooperative or recanting victims.

### *A New Approach- Domestic Violence Diversion Programs*

In a state that has shown drug addicts a great deal of compassion by decriminalizing the use and possession of drugs and by creating diversion programs, I believe we should be more sympathetic to uncooperative victims and their families who wish to stay together. People who call the police regarding domestic disturbances should be listened to when they desire prosecution and also when they do not.

Admittedly, in some cases it may **not** be appropriate to follow the victim's request. Some examples are where there are repeat offenses or where there are serious injuries. In these cases the government should prosecute the offender in spite of the victim's wishes, to promote safety and to send a strong message to the public that domestic violence is wrong.

Conversely, where it is a first offense with little or no injuries, and the victim expressly states that he or she does not wish prosecution, the system should give the offender the opportunity to participate in a domestic violence diversion program. This program would require the offender to attend batterer's treatment classes, and upon successful completion of the program, the case would be dismissed. Without a doubt, this program is much more likely to achieve the desired results of teaching people how to manage their anger and resolve conflicts, while allowing people to keep their relationships intact.