

# WORKING WITH RECOUNTING VICTIMS

**John Wilkinson**  
**Attorney Advisor**

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

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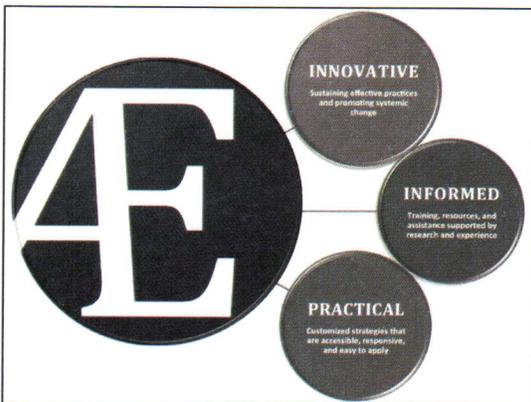
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## SUPPORT

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**What are the biggest challenges to going forward in domestic violence cases?**

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## EVIDENCE-BASED

Building and presenting a case in which prosecutors can hold offenders accountable for their behavior with or without the victim's testimony

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## OBTAINING & MAINTAINING EVIDENCE

- Physical evidence
- 911 tapes
- Crime scene photographs, videos, or diagrams
- Documentation or photos of injuries
- Medical records (both victim's and defendant's)
- Witnesses (e.g. relatives, neighbors, children)
- Written/recorded statements
- Admissions/911 calls
- Witness Statements
- Victim's Statements
- Social media
- Relationship History
- Prior relationships
- Prior convictions/suits
- Weapons/Injuries
- Firearm surrender protocol

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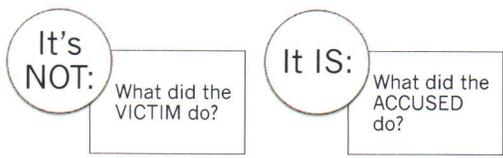
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## FOCUS ON THE OFFENDER



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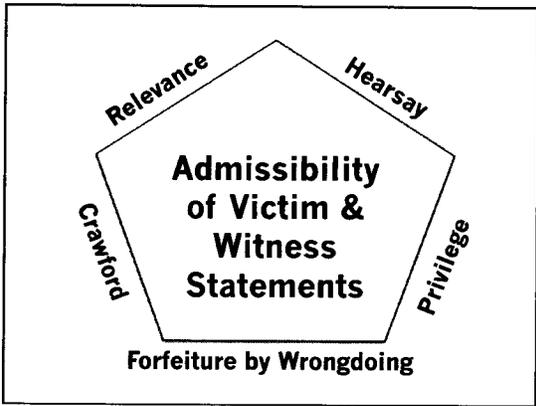
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**EVIDENCE IS RELEVANT IF**

(a) It has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) The fact is of consequence in determining the action.

UTAH RULES OF EVIDENCE, Rule 401

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**COMMON HEARSAY EXCEPTIONS**

- Excited utterances
- Then existing mental, emotional, or physical condition
- Statements for medical diagnosis or treatment
- Present sense impression

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## PRIVILEGE

- Spousal privilege
- Domestic violence advocate privilege
- Attorney/client privilege
- Physician/patient privilege

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## LIFE AFTER CRAWFORD & ITS PROGENY

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"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

U.S. CONST. amend. VI, Confrontation Clause

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**CRAWFORD V. WASHINGTON**

541 U.S. 36 (2004)

Admissibility of hearsay statements of *non-testifying witnesses* depends on whether the statement is “testimonial” or “nontestimonial”

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**“TESTIMONIAL” HEARSAY**

Admissible ONLY where:

- Declarant is available for cross-examination at trial, OR
- Prosecution shows that the declarant is unavailable AND defense had *prior opportunity* to cross-examine

*Crawford*, 541 U.S. 36 (2004)

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**“NONTTESTIMONIAL” HEARSAY**

- Not covered by the Confrontation Clause
- Left to the states to decide admissibility under their hearsay rules

*Whorton v. Bockting*, 549 U.S. 406 (2007)

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**DAVIS/HAMMON**  
DAVIS V. WASHINGTON, 547 U.S. 813 (2006)

*Davis*: 911 call seeking police assistance during DV assault was non-testimonial

Do circumstances objectively indicate *primary purpose* of questioning was to respond to emergency (non-testimonial) or to record events potentially relevant to future prosecution (testimonial)?

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*Hammon*: Statements of DV victim to police at scene after emergency ended were testimonial

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**MICHIGAN v. BRYANT**  
131 S.C.T. 1143 (2011)

Existence of ongoing emergency is only ONE factor in determining “primary purpose”

- Formality vs. informality
- Statements/actions of both questioner and declarant help to determine primary purpose

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**WHAT IS “TESTIMONIAL”?**

Generally more formal or made to law enforcement or their agents

Primary purpose is to report facts for later prosecution

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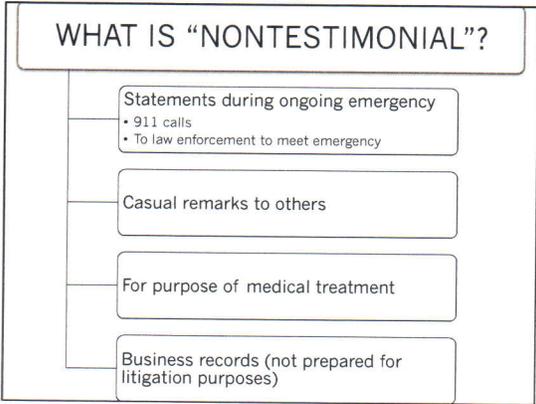
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**SALT LAKE CITY V. WILLIAMS**  
 128 P.3D 47 (UTAH CT. APP. 2005)

Statement to the 911 operator and victim's exclamation were not testimonial because statements were made for the purpose of seeking protection from immediate danger

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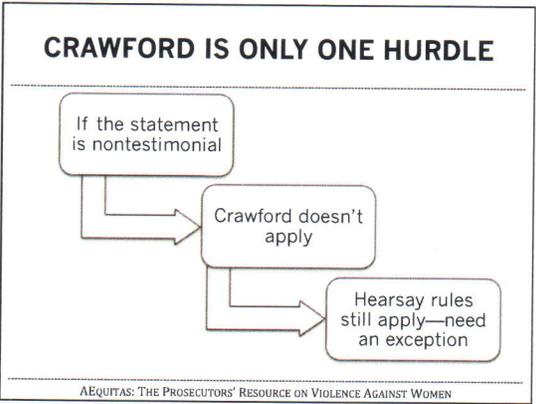
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## HEARSAY EXCEPTIONS

1. Present sense impression
2. Excited utterance
3. Then existing mental, emotional, or physical condition
4. Medical treatment

UTAH RULES OF EVIDENCE, Rule 803

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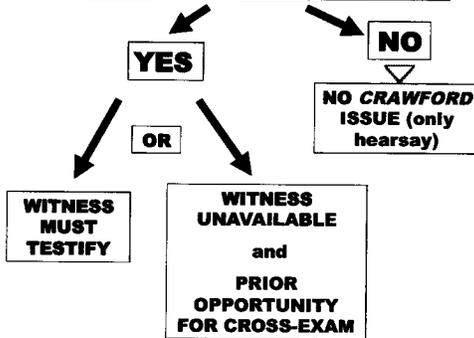
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### IS STATEMENT TESTIMONIAL?



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## SOURCES OF NONTESTIMONIAL STATEMENTS

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## 911 CALLS

May "evolve" into testimonial statements

- Redact when necessary

Uses:

- To corroborate victim's trial testimony
- To refute recantation/minimization
- As evidence of crime when victim does not testify

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## ON-SCENE STATEMENTS

- To children or others at scene
- To officers in response to ongoing emergency

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## UNAVAILABILITY OF WITNESS AND PRIOR OPPORTUNITY FOR CROSS-EXAMINATION

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**PRIOR OPPORTUNITY FOR CROSS**

Call victim at preliminary  
(probable cause) hearing

- Pass discovery
- Short adjournment if needed
- Limit objections

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**FORFEITURE BY  
WRONGDOING**

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**WHAT IS WITNESS  
INTIMIDATION?**

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Urban criminal justice system professionals said more victims were intimidated in domestic violence cases each year than in gang or drug crime.

KERRY HEALEY, NATIONAL INSTITUTE OF JUSTICE, RESEARCH IN ACTION, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES (Oct. 1995) <https://www.ncjrs.gov/pdffiles/witintim.pdf>

Domestic violence victims appear at elevated risk for retaliation, especially when living with or economically dependent on the offender, or in contact with the offender because of shared parenting.

DO ARRESTS AND RESTRAINING ORDERS WORK? (Buzawa & Buzawa eds., 1996)

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## MORE SUBTLE TACTICS

- Non-verbal cues
  - “The look”
  - Taking off jewelry, shirt
  - Making a fist
- “Code” words
  - “Now you did it!”
- Culture

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## ENLISTING THIRD PARTIES

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Most explicit acts of intimidation take place where police exert little control: at the witness's home, school or work; or while the witness is running errands or socializing.

Nicholas Fyfe & Heather McKay, *40 (4) BRITISH J. OF CRIMINOLOGY*, 675-91 (2000)

But witnesses also report being intimidated at the crime scene, while at the police station making a statement and while in the courthouse waiting to testify. Some report being intimidated while on the witness stand

KELLY DEDEL, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, WITNESS INTIMIDATION (2006) <http://www.cops.usdoj.gov/files/ric/Publications/e07063407.pdf>

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“Only unsuccessful intimidation ever came to the attention of police or prosecutors.”

KERRY HEALEY, NATIONAL INSTITUTE OF JUSTICE, RESEARCH IN ACTION, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES 2 (Oct. 1995) <https://www.ncjrs.gov/pdffiles/witintim.pdf>

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## HOW DO WE FIND OUT?

- ◉Victims are:
  - Most likely to have evidence of intimidation
  - Least informed about significance
- ◉Many discard such evidence, unaware of its importance

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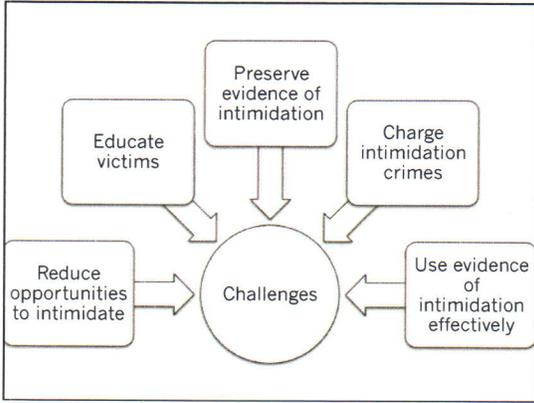
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**EDUCATE VICTIMS**

- What is considered intimidation?
- What should I do if I'm being intimidated?
- What should I save?
- How should I save it?
- Victims are not investigators—consider risk to them and to case*

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**PRESERVE EVIDENCE**

- Ask about intimidation during every witness contact
- Previous cases dropped/dismitted may show history of intimidation

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**CHARGE INTIMIDATION CRIMES**

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|  |                                      |
|--|--------------------------------------|
| Obstruction of justice   | Subornation of perjury/attempt       |
| Crimes committed for intimidation purposes (assaults, stalking, unlawful mischief) | Try with original crime, if possible |

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**EFFECTIVE USE OF EVIDENCE**

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- Forfeiture by wrongdoing
- Explain witness recantation/ minimization
- Consciousness of guilt
- Aggravating factor at sentencing

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**FORFEITURE BY WRONGDOING**

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### EXCEPTION TO CONFRONTATION

"The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.

Reynolds v. U.S., 98 U.S. 145, 158 (1878)

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### PUBLIC POLICY

"...to permit such a subversion of a criminal prosecution would be contrary to public policy, common sense, and the underlying purpose of the Confrontation Clause... and make a mockery of the system of justice that the right was designed to protect."

U.S. v. Thevis, 665 F.2d 616 (5th Cir. 1982)

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### INVALUABLE TOOL

Applies to any potential witness who is

- Not reluctant, or testifying for defense

Opens the door to hearsay

- Testimonial
- Nontestimonial
  - ◉ No need for standard hearsay exception

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## GILES v. CALIFORNIA

554 U.S. 383 (2008)

- ◉ DV-related homicide: defendant shot ex-girlfriend
- ◉ Claimed self-defense
  - Previous assaults, vandalism, and threats
  - Victim charged—afraid she had something in her hand
  - Closed eyes, fired several shots
  - Did not intend to kill

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## GILES IN STATE COURTS

- ◉ 3 weeks prior → Police responded to DV call
  - Victim crying
  - Said she was assaulted, strangled, threatened with knife
- ◉ Statements allowed under FBW based upon intentional act of killing
- ◉ Appellate courts affirmed

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## REMANDED IN U.S. SUPREME COURT

- ◉ Defendant had to have *specific intent to make victim unavailable* as a witness when committing the wrongdoing
- ◉ Not enough evidence that defendant killed the victim *to prevent her from testifying*

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## THE ABUSER'S INTENTION

"Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution rendering her prior statements admissible under the forfeiture doctrine."

*Giles, 554 U.S. at 377*

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## SUPPORTING EVIDENCE

"Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."

*Giles, 554 U.S. at 377*

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## STATE V POOLE

**232 P.3D 519 (Utah 2010)**

Court adopts 3 prong federal test:  
1) The witness is unavailable at trial,  
2) The witness's unavailability was caused by a wrongful act of the defendant, and  
3) The defendant's act was done with an intent to make the witness unavailable

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## PRELIMINARY QUESTION DECIDED BY JUDGE

- Court sets preponderance as standard of proof
- Rules of evidence apply in forfeiture hearing

*Poole*, 232 P.3d 519; UTAH RULES OF EVIDENCE, Rule 104

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## POSSIBLE DEFENSES

It didn't  
happen

Self  
defense

Accident

Reasonable  
doubt

Illegal  
defenses

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## TRIAL STRATEGIES

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## HAVE A THEME

- Barriers to leaving
- Power and control
- Remember the kids
- Lethality
- Impact of DV on the community
- Resources

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## REMEMBER THE BIG PICTURE

Do NOT be distracted by the holes

- Defense goal is to focus you and the jury on the holes
- Your goal is to bring the big picture back into focus
- Tell the WHOLE story

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## ESTABLISHING DEFENDANT'S GUILT

Introduce circumstantial evidence of defendant's wrongdoing in case-in-chief

- 404b
- Consciousness of guilt

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## JUROR PERCEPTION

- Why did she pick him in the first place?
- She should just leave
- She should cooperate with those who are trying to help her
- She doesn't care so no one else should
- No victim = no crime

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## EDUCATING JUDGES & JURIES

Explain victim behavior through:

- Voir dire
- Expert testimony
- The victim
- Argument

Counter defense attempts to use a victim's behavior as evidence of the victim's lack of credibility

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## CROSSING THE UNCOOPERATIVE VICTIM

- Avoid using traditionally aggressive tactics
- Demonstrate relationship between DV dynamics and recantation
- Elicit favorable testimony, develop conflicting testimony, and attack the defendant's credibility

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## CROSS, CONT'D

- You are the one with power in the courtroom
- If you are seen as taking advantage of someone with less power, it can backfire
- Avoid any appearance of re-victimizing the victim

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## GOING FORWARD

- Thoroughly investigate and document evidence in domestic violence cases
- Be proactive to encourage victim participation
- Make effective use of intimidation evidence
- Anticipate and effectively counter defenses with evidence and trial strategies

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**John Wilkinson**  
Attorney Advisor

1100 H Street NW, Suite 310  
Washington, DC 20005

P: (202) 596-4229  
F: (202) 393-1918

[jwilkinson@aequitasresource.org](mailto:jwilkinson@aequitasresource.org)  
[www.AEquitasResource.org](http://www.AEquitasResource.org)

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