

Supreme Irony: Elder Justices Make Unpunished Elder Abuse More Likely



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In early March, the U.S. Supreme Court ruled in the case of *Crawford v. Washington*, No. 02-9410, that the interview a wife gave to police officers investigating a possible crime done by her husband could not be used in court. In a unanimous decision, the Justices overturned a 24-year-old precedent and ruled that witness statements can only be used at trial when the witness is “unavailable to testify and the defendant had had a prior opportunity for cross-examination.”

This may not sound like an earth-shifting decision, but it is for those who prosecute crimes against older persons. “[W]e can fully expect there to be an increase in the targeting of elderly victims,” the head of Elder Abuse Prosecutions for the San Diego (CA) District Attorney’s office, Paul Greenwood, said. “Why? The answer is simple... Choose a victim that may not be around at the time you get caught. Then successfully argue that because your accuser is not in court, the prosecutor cannot use prior out of court statements made by the accuser before their death or before they suffered a mental disability.” Indeed, just three days after the Supreme Court ruling, a Colorado court delayed the trial of a man accused of stealing into a nursing home, disrobing a 90-year-old female resident, and “becoming sexually aroused.” The victim has since died, and the judge is unsure whether the statements of those who talked to the victim at the time of the crime can be admitted. Without those statements, there is little case.

What you can do: Ask your state legislators to work with elder abuse prosecutors to craft a new law that meets the Supreme Court’s requirements while simultaneously ensuring elders aren’t made even more attractive to criminals who hope to get away with their crimes.

California prosecutors lamented that the ruling overturned Evidence Code Section 1380, which had allowed prosecutors to play videotaped interviews of older victims if by the time of the trial itself the victim had died or become mentally incapacitated. In Kentucky, advocates immediately dropped their effort to win a similar evidence exception in their state.

Yet some say the development actually gives more control to some victims of domestic violence (including elder abuse), by assuring that if a victim changes his or her mind and decides *not* to prosecute the abuser, the prosecutor cannot go ahead without them. That is what happened in Oregon, where a domestic assault case heard in the morning was dismissed in the afternoon on the very day the Supreme Court decision was announced. The victim had refused to testify, and statements that she had made to others were now deemed inadmissible. Writing in the online magazine *Slate*, South Bronx public defender David Feige approvingly noted that the Supreme Court decision had “radically shifted the balance of power from prosecutors to reluctant complainants, giving alleged victims more control over the cases of their own victimization and greater freedom from the paternalistic philosophy of prosecution [regardless of the victim’s desires].” Of course, others argue that oftentimes victims of domestic violence (including elder abuse) don’t testify because their abusers threaten to hurt them more if they do, so not everyone agrees this development is a good thing for victims.

Several observers believe it is going to take “years” to sort through the implications of the ruling, and Chief Justice Rehnquist himself, while agreeing with the outcome in the *Crawford* case, warned that “[This] decision casts a mantle of uncertainty over future criminal trials in both federal and state courts.” Meanwhile, proposals are being drawn up to get around the ruling and ensure that the abusers of elders who die or become incompetent before trial don’t get a free pass. One suggests a new law allow a public defender to be appointed to represent a defendant who has not yet been caught, so that the public defender can cross-examine the victim as soon as the case is filed. It is hoped this procedure would both preserve the accused’s rights and, simultaneously, ensure that the victim’s subsequent death or incapacity doesn’t kill the case.

The Supreme Court’s decision in *Crawford v. Washington* is available on the web at <http://supct.law.cornell.edu/supct/html/02-9410.ZS.html/>.