ACLU of New York

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September 30, 2021

By Certified Mail

The Honorable Janet DiFiore
Chief Judge of the New York Court of Appeals
The Honorable Lawrence K. Marks
Chief Administrative Judge
Office of Court Administration
4 ESP, Suite 2001
Empire State Plaza
Albany, NY 12223

Re: **Office of Court Administration's Influence on Judges' Rulings**

Dear Chief Judge DiFiore and Chief Administrative Judge Marks:

On behalf of the New York Civil Liberties Union, we write to express serious concern that the Office of Court Administration is, through communications not disclosed to the public, instructing judges on how to interpret and apply substantive law. We believe such guidance would exceed the OCA's authority as the administrator of the state court system, a problem exacerbated by the directives not being public. We would like to meet with you to discuss this issue but before doing so would like to better understand the OCA's practice and therefore include a FOIL request with this letter.

This practice recently came to light with the revelation of an OCA memorandum, conspicuously marked "*Confidential—Internal Use Only*," telling judges to adopt a restrictive reading of a June 2021 Appellate Division decision, *Crawford v. Ally* (197 AD3d 27 [1st Dept 2021]). In *Crawford*, the First Department held that due process requires New York courts to provide people charged with crimes with an evidentiary hearing before they can be subjected to a pre-trial order of protection that deprives them of significant personal or property interests. (*Id*. at 34). This ruling was a significant step in the right direction for low-income New Yorkers, particularly people of color, who were all too frequently barred from their homes and separated from their families without process based on a prosecutor's mere say-so that an order of protection was warranted.[1]

[1] *See* brief of *amici curiae* Brooklyn Defender Services et al. at 5–7, *Crawford v. Ally*, 197 AD3d 27 (1st Dept 2021) (explaining that "the automatic issuance of full orders of protection based on bare allegations and without a showing of necessity disproportionately impacts New York's Black and brown communities").

Within days of this landmark decision, however, the OCA Counsel's Office issued a memorandum directing judges to read *Crawford* very narrowly.[2] For example, the memorandum instructs judges that "courts should resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing."[3] The memorandum also states, with bolded and underlined emphasis, that "*Crawford* . . . **should not be read** as to require live witnesses and/or non-hearsay testimony."[4] Subsequently, an OCA spokesperson represented that it is "normal practice" for the OCA to issue memoranda like the one in *Crawford* regarding "cases that have potential significant operational impacts on the courts."[5]

Memoranda instructing judges on how to interpret and apply substantive law raise several concerns. First, "it is the province of the court to declare what the law is," (*People v. Knickerbocker Ice Co.*, 99 NY 181, 184 [1885]), and an administrative agency instructing judges on how to interpret caselaw is a usurpation of that role, "threat[ening] . . . the independence of the judiciary," (*Matter of Duckman*, 92 NY2d 141, 156 [1998]). Further, it is especially troubling that the OCA has chosen to interpose its views in "cases that have potential significant operational impacts on the courts" by undermining court-ordered procedural protections that benefit the most marginalized members of our community. Finally, the public and litigants have the right to know how courts reach decisions, and the OCA's practice of influencing judicial decision-making through internal memoranda not made available or even known to the public offends the "broad presumption," rooted in the First Amendment and common law, "that the public is entitled to access to judicial proceedings and court records." (*Mosallem v. Berenson*, 905 NYS2d 575, 578 [2d Dept 2010]).

To better understand the breadth of the OCA's practice, we therefore request, pursuant to New York's Freedom of Information Law, access to and copies of:[6]

(1) With respect to federal or state court decisions, all documents[7] created by the OCA (including its Counsel's Office) between January 1, 2011 and the date of your final response to this request and distributed within the OCA and/or to judges in the New York State Unified Court System in which the decisions are summarized, analyzed, interpreted, construed, explained, clarified, and/or applied;

(2) With respect to federal or state statutes, regulations, or ordinances, all documents created by the OCA (including its Counsel's Office) between January 1, 2011 and the date of your final response to this request and distributed within the OCA and/or

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[2] Memorandum from Office of Court Administration Counsel's Office (June 27, 2021) (enclosed).

[3] *Id.* at 4.

[4] *Id.* at 1.

[5] Sam Mellins, *New York Judges Lock the Accused Out of Their Homes, Skirting Review Required by Landmark Ruling, Critics Charge*, N.Y. Focus (July 23, 2021), https://www.nysfocus.com/2021/07/23/new-york-judges-crawford-hearing/.

[6] Please transmit these documents via email to tding@nyclu.org.

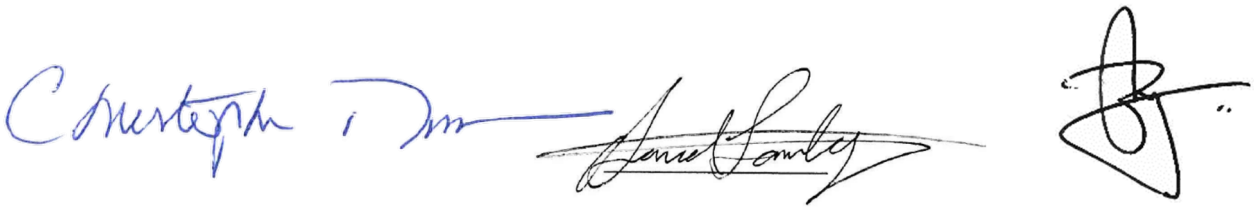
[7] As used here, "documents" includes memoranda, directives, orders, instructions, guidance, policies, procedures, rules, regulations, and/or other statements.

to judges in the New York State Unified Court System in which the statutes, regulations, and ordinances are summarized, analyzed, interpreted, construed, explained, clarified, and/or applied; and

(3) All policies, procedures, criteria, and/or guidance the OCA (including its Counsel's Office) has used since January 1, 2011 in issuing interpretations of federal and state court decisions, statutes, regulations, and/or ordinances.

Thank you for your prompt attention to this request. If you have questions about the request, we are ready to discuss it with appropriate members of your staff. Once we receive and review a complete response, we will follow up about a meeting to discuss the OCA's practices.

Sincerely,



Christopher Dunn
Legal Director

Daniel Lambright
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Enclosure: June 27, 2021 OCA Memorandum

cc: Shawn Kerby, FOIL Officer, Office of Court Administration (by email at foil@nycourts.gov)
Counsel's Office, Office of Court Administration (by mail at 25 Beaver St, 11th floor, New York, NY 10004)

MEMORANDUM

TO: Hons. Vito C. Caruso, George J. Silver, and Edwina G. Mendelson
Deputy Chief Administrative Judges

FROM: Anthony R. Perri, Deputy Counsel: Criminal Justice

SUBJECT: *Crawford v. Ally*, No. 13911, 2021 WL 2582799, at *3 (1st Dep't June 24, 2021)
Due Process Hearings and Temporary Orders of Protection

DATE: June 27, 2021

Executive Summary

On June 24, 2021, the Appellate Division, handed down *Crawford v. Ally*, No. 13911, 2021 WL 2582799, at *1 (1st Dep't June 24, 2021), a unanimous decision affecting the issuance of temporary orders of protection ("TOP(s)").

Crawford emphasizes that, before a court of criminal jurisdiction may issue a full stay-away TOP, due process requires an "evidentiary hearing" if and where such order would immediately deprive the defendant of a significant personal liberty or property interest.

Crawford does not lay out the exact contours of this "evidentiary hearing" but **should not be read** as to require live witnesses and/or non-hearsay testimony as a matter of law.

The Appellate Division only requires that the hearing be held **(i) promptly, (ii) on notice to all parties,** and **(iii) in a manner that enables the court to ascertain the facts necessary to decide whether or not the TOP should be issued.**

Procedural Posture

- *Crawford* is an appeal of a dismissed Article 78 proceeding concerning a New York City Criminal Court matter where a female defendant in a subsequently dismissed domestic violence case involving her now ex-boyfriend challenged the issuance of a full stay-away TOP.
- The Article 78 proceeding had been dismissed on mootness grounds, but the Appellate Division decided to rule on the merits because (i) there was a likelihood of repetition; (ii) the issue typically evades review; and (iii) there were substantial and novel legal issues at stake. *See Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-715 (1980).

Relevant Facts in the Underlying Criminal Court Matter

- Defendant was originally charged with third-degree assault, petit larceny, obstruction of breathing or blood circulation, and second-degree harassment based on her now ex-boyfriend's sworn allegations.
- At arraignment, the Criminal Court issued a full TOP after hearing from counsel.
    - Defense Counsel argued against its issuance noting (i) that the address on the TOP was the defendant's own apartment, (ii) that she was the lessee, and (iii) that she resided there with her young children for whom she was the primary caregiver.
    - The People responded that "there was no indication in their file that a limited TOP was 'necessary or appropriate.'"
    - The Court declined to issue a limited TOP emphasizing that they would not do so "without the People's consent."
        - The sworn allegations supporting the arrest do not seem to have been explicitly referenced as a basis for the full TOP.
    - The case was adjourned for five days for the People to "investigate" the appropriateness of the full TOP.
- The Court held a hearing on the next court date.
    - The People argued that the TOP should remain a full stay-away, "considering the nature of the charges" and the complainant's visible physical injuries. The People also asserted that both defendant and complainant resided in the apartment. This was based—at least in part—on approximately seventeen prior domestic incident reports.
        - NB: The prior Domestic Incident Reports ("DIR(s)") all were against the complainant, in favor of the defendant. There appears to have been no discussion of this fact or the details in the DIRs specifically at this proceeding.
    - Defense Counsel asserted that the lease allowed only the defendant, her brother, and her two children to live in the apartment and thus the complainant's refusal to leave the residence based upon the TOP created a significant risk that she could lose the apartment.
        - In subsequent motions, Defense Counsel produced a NYCHA lease substantiating this assertion.
    - The Court denied defendant's request for a modification of the TOP.
        - Defense Counsel then requested a due process hearing based on, what counsel referred to as, the property and family interests at stake.
        - The court stated that it was "hearing ... the issues [now]" and denied the request.
        - The case was then adjourned a month.
- A subsequent motion to amend the TOP was denied on the grounds that there had been "no change of circumstances."
- The defendant next sought "a writ of mandamus directing the Bronx Criminal Court to hold an evidentiary hearing concerning the appropriateness and scope of the [TOP]" issued in her criminal case.

- At a proceeding held soon thereafter (but three months after arraignment), a different Criminal Court judge ruled that a full TOP was not appropriate under the relevant CPL § 530.12 factors and issued a limited order after reviewing the following evidence:
    - Previous DIRs noting many prior incidents of abuse against the defendant by the complainant;
    - Photographs of the injuries where there was "nothing of any specificity indicating that [the defendant] was in fact responsible for those injuries;" and
    - That the complainant had previously threatened the defendant and had an alcohol abuse issue.
- The criminal case was later dismissed upon a motion by the prosecution.

Appellate Division Holding

- "This Court need not articulate the precise form of the evidentiary hearing required."
- At a minimum, however:
    - **when the defendant presents the court with information showing that there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of the TOP**,
    - the Criminal Court should:
        - **conduct a prompt evidentiary hearing**
        - **on notice to all parties** and
        - **in a manner that enables the judge to ascertain the facts necessary to decide whether the TOP should be issued.**

Analysis/Implications

- The Appellate Division rightly was attempting to prevent the future issuance of unwarranted TOPs by re-articulating the reality that due process requires a thoughtful and thorough analysis of all the facts before and readily available to the Court before a TOP may issue.
- The actual missteps in *Crawford* are arguably confined to the arraignment and the first full hearing on the potential modification of the TOP.
    - *Crawford* suggests that the Criminal Court at arraignments incorrectly relied predominantly on the People's "consent" rather than its own independent analysis of the facts in deciding to issue a full TOP.
    - The record at the TOP hearing (investigation appearance) is better but still deficient as the Court fails to fully evaluate the evidence that is before and readily available to it.
    - The final full hearing that modified the order arguably would satisfy the due process requirements that the First Department is attempting to impose and does not appear to have included any live testimony.
        - Therefore, what would be considered normal best practices in issuing a TOP—rather than a full-blown hearing with live testimony—could potentially address

the deprivation concerns this unique fact pattern raised for the Appellate Division.

- A "*Crawford* hearing" is only triggered when a defendant pleads that the TOP may cause an **immediate** and **significant** deprivation of a **substantial personal or property interest**.
    - Accordingly, a defendant who does not live with a partner or who is not in danger of actually losing whatever property interest may exist in a shared dwelling, may well fail to meet this threshold burden.
        - By contrast, the defendant in *Crawford* was not merely being excluded from a shared residence but also in danger of losing her actual lease and of being deprived of access to her children.
    - When adequately pled, however, the issuing court should review the sworn allegations, the current DIR, any prior DIRs, and any other evidence proffered and hear the defense and prosecution out fully on the record before exercising its independent judgement.
        - Although a more robust record is advisable where the defendant pleads a significant personal/property interest, courts should resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing due to the significant negative operational impact and real safety (physical and psychological) concerns for most domestic violence complainants.
    - The prompt hearing on notice may properly be conducted (or at least commenced) at arraignment if the People are present, and a full TOP may be reasonably issued at that time.
        - However, courts may also need to be more flexible in reopening such an evidentiary hearing as additional facts are gathered rather than merely examining later applications for a change in circumstances.
        - When the People are not represented at the arraignment and a "*Crawford* hearing" is warranted, a full TOP may nevertheless issue where appropriate under CPL § 530.12 after making as thorough a record as possible, and the matter should be adjourned to the shortest date where both sides could be present to continue the hearing.

Please let me know if you have any comments or questions regarding this memorandum.

Thank you.