

THE PROSECUTORS' RESOURCE

Forfeiture by Wrongdoing

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Overview

Forfeiture by wrongdoing is a longstanding exception to a defendant's Sixth Amendment right to confront the witnesses against him. If a defendant causes a witness to be unavailable for trial through his wrongful acts, with the intention of preventing that witness from testifying, then the introduction of the witness's prior "testimonial" statements² is not barred by the Confrontation Clause of the Sixth Amendment of the United States Constitution. The federal courts, under Section 804(b)(6) of the Federal Rules of Evidence, and several states, by rule, statute, or application of common law principles, have established forfeiture by wrongdoing as an exception to the right of confrontation. While some states have not had occasion to formally recognize the rule, the New Jersey Supreme Court has pointed out that "[n]o court that has considered the forfeiture-by-wrongdoing doctrine has rejected it."³

Significantly, wrongful acts include not only crimes, such as murder, assault, threats, and other forms of intimidation, but also declarations of love, or promises to marry or to change, when they are intended as inducements for the victim not to testify.⁴

The prosecution must prove that (1) the defendant acted wrongfully or acquiesced in wrongful acts that resulted in the witness's unavailability at trial, and (2) that the defendant intended to prevent the witness from testifying. In the majority of states, the standard of proof is by the preponderance of the evidence; the standard is clear and convincing evidence in the remainder of the states. Hearsay (including the statements sought to be admitted) is admissible in a preliminary hearing to establish forfeiture by wrongdoing.⁵ There need not be a pending case at the time of the wrongful act for the forfeiture doctrine to apply.

While relationships involving domestic violence typically involve behavior that may result in forfeiture (such as threats, intimidation, actual violence, or "loving" contrition), the availability of forfeiture should not be overlooked in other cases. For example, in human trafficking cases, traffickers may threaten to retaliate against victims or their families if they report to police. Further, in cases where the victim is involved in an

¹ To navigate back to "Bookmarks" click on the section heading.

² Statements considered to be "testimonial" are defined in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny.

³ *State v. Byrd*, 967 A.2d 285, 295-96 (N.J. 2009). Although the New Jersey Supreme Court did not apply the rule in *Byrd*, it immediately proposed a new Evidence Rule codifying the principle, which has since been formally adopted. SEE N.J. R. EVID. 804(b)(9).

⁴ See *People v. Byrd*, 855 N.Y.S.2d 505 (N.Y. App. Div. 2008); *Commonwealth v. Szerlong*, 933 N.E.2d 633 (Mass. 2010).

⁵ See, e.g., FED. R. EVID. 104(a).

intimate relationship with her trafficker, the intimidation may involve dynamics typical to domestic violence relationships as well. Such victims may be too fearful to testify or may go into hiding to escape, not trusting in the ability of law-enforcement to protect them. The doctrine of forfeiture by wrongdoing can allow the admission of statements obtained early in the investigation even if the victims later disappear.

Detailed Outline

- *Origin and Requirements:*
 - The United States Supreme Court expressed the basis for the doctrine in an 1878 decision: “[I]f a witness is absent by [the accused’s] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. ... [I]f he voluntarily keeps the witnesses away, he cannot insist on his privilege [to confront the witnesses]. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.” **Reynolds v. United States**.⁶
 - Fed. R. Evid. 804(b)(6) – A statement is admissible against a party if the unavailability of the declarant is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying.
 - The doctrine of forfeiture by wrongdoing requires the court to find that the defendant acted, at least in part, with the intent to silence the witness, to make the declarant unavailable, or to deprive the criminal justice system of evidence.⁷ **Giles v. California** and relevant lower-court decisions suggest that it is not necessary for the prosecution to show that the defendant’s *sole* intent was to prevent the witness from testifying.⁸
 - **Crawford v. Washington** does not impact the applicability of forfeiture by wrongdoing doctrine. In **Crawford**, the Court emphasized that “[t]he **Roberts test** . . . is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (*which we accept*) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”⁹ Forfeiture by wrongdoing can thus be considered an exception to **Crawford’s** (and the Sixth Amendment’s) confrontation requirement.

⁶ Reynolds v. United States, 98 U.S. 145 (1878).

⁷ Giles v. California, 128 S. Ct. 2678, 2688 n.2 (2008). The Court noted with approval Ohio’s Rule of Evidence 804(B)(6), which explicitly incorporates this purpose requirement.

⁸ Several courts have held that the State need not establish that the defendant’s *sole* motivation was to eliminate the declarant as a potential witness; it need only demonstrate that the defendant “was motivated *in part* by a desire to silence the witness.” State v. Hand, 840 N.E.2d 151, 172 (Ohio 2006) (emphasis in original); *see also, e.g.*, United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996); United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001). Acts intended to dissuade the victim from cooperating with law enforcement, as well as those intended to dissuade her from testifying in court, may result in finding of forfeiture. People v. Banos, 100 Cal.Rptr.3d 476, 492-93 (Cal. Ct. App. 2009). The existence of other possible motives did not preclude application of the doctrine of forfeiture. *Id.*

⁹ Crawford, 541 U.S. at 62 (2004) (emphasis added). The “**Roberts test**” refers to the holding in Ohio v. Roberts, 448 U.S. 56 (1980), which allowed the admission of an unavailable witness’s statement against a criminal defendant if the statement had “adequate indicia of reliability.” According to the **Roberts** Court, the Confrontation Clause would be satisfied when the evidence fell within a

- In *Davis v. Washington*¹⁰, the Supreme Court reinforced its acceptance of forfeiture by wrongdoing, stating, “We reiterate what we said in *Crawford*: that ‘the rule of forfeiture by wrongdoing. . . extinguishes confrontation claims on essentially equitable grounds.’ . . . That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”¹¹
- The Federal Rules of Evidence Section 804(b)(6) codifies forfeiture by wrongdoing as an exception to the rule against hearsay. Several states have adopted some version of Rule 804(b)(6), while many other states have adopted the doctrine on the basis of equitable forfeiture principles.¹² In Rule 804(b)(6) jurisdictions, once forfeiture has been established, the declarant’s statements are admissible. In equitable jurisdictions, even if forfeiture is established, the declarant’s statements may still have to satisfy an exception to the rule against hearsay.
- *Forfeiture by Wrongdoing in Domestic Violence Cases:*
 - According to *Giles*, in domestic violence cases the intent to silence the witness can be inferred from an ongoing pattern of abuse.¹³ The Court observed that “[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. 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. 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.”¹⁴
 - Justice Souter’s partially concurring opinion in *Giles* added that “the element of intention [to prevent the witness from testifying] would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.”¹⁵
- *Burden of Proof:*
 - Preponderance of the evidence is the standard in the majority of states. While the United States Supreme Court has not explicitly ruled on the standard of proof for forfeiture, in the context of determining the admissibility of co-conspirator statements at a pretrial hearing pursuant to FED. R. EVID. 104, the Court held that the standard for making preliminary determinations on the

“firmly rooted hearsay exception” or had “particularized guarantees of trustworthiness.” *Crawford* overruled *Roberts* and struck down the test announced in that case.

¹⁰ *Davis v. Washington*, 547 U.S. 813 (2006).

¹¹ *Davis*, 547 U.S. at 833.

¹² In “equitable jurisdictions,” there is no codified statute or rule implementing forfeiture by wrongdoing. Rather, the courts have, as a matter of common law, applied the principle to arrive at the equitable result of precluding a defendant from asserting his right of confrontation where he has intentionally caused the absence of the witness from trial. *See, e.g.*, *People v. Geraci*, 649 N.E.2d 817 (N.Y. 1995).

¹³ *Giles*, 128 S. Ct. 2678.

¹⁴ *Id.* at 2693.

¹⁵ *Id.* at 2695 (2008)(Souter, J., concurring in part).

admissibility of evidence is preponderance of the evidence.¹⁶ In *Davis*, the Court noted that the majority of federal and state courts had applied the preponderance standard in determining whether forfeiture had occurred.¹⁷ Moreover, in its decision in *Giles*,¹⁸ despite its disapproval of California's failure to consider the defendant's intent to silence the witness, the Court did not criticize the California Supreme Court's application of the preponderance standard. As the Court of Appeals for the District of Columbia observed, imposing a higher "burden of proof on the government might encourage behavior which strikes at the heart of the justice system itself." *Devonshire v. United States*.¹⁹

- Clear and convincing evidence is the standard in Maryland, New York, Washington, and perhaps California.²⁰ The applicable standard in California is not entirely clear, as the "clear and convincing evidence" standard expressed in the evidence rule is contradicted by the holdings of the California Supreme Court.²¹
- Check your state statutes and case law to be certain which standard applies in your jurisdiction.
- *Evidentiary Hearings:*
 - An evidentiary hearing may be held, outside of the presence of the jury, where the prosecution is given the opportunity to prove by the applicable standard of proof that the defendant intentionally procured the unavailability of a witness or a victim.²²
 - This hearing is generally governed by Fed. R. Evid. 104 or its equivalent,²³ which is the rule that controls determinations of "preliminary questions," such as admissibility of evidence. Under that rule, such hearings must be conducted out of the hearing of the jury. Pursuant to Fed. R. Evid. 104(a), the evidence rules (except for claims of privilege) do not apply. Thus, hearsay (including the statements sought to be admitted) is admissible in such a preliminary hearing.²⁴
 - Advance notice requirement – When the prosecution seeks to admit hearsay evidence under the forfeiture by wrongdoing doctrine, the rules generally require advance written notice.²⁵ Even if not explicitly required by the provisions of the applicable rule, the prosecutor should provide to each

¹⁶ *Bourjaily v. United States*, 483 U.S. 171 (1987).

¹⁷ *Davis*, 547 U.S. at 833.

¹⁸ *Giles*, 128 S. Ct. 2678.

¹⁹ *Devonshire v. United States*, 691 A.2d 165 (D.C. 1997) (quoting *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982)).

²⁰ MD. CODE ANN., CTS. & JUD. PROC. §10-901 (West 2011); *People v. Geraci*, 85 N.Y.2d 359, 649 (1995); *State v. Mason*, 160 Wash. 2d 910 (2007).

²¹ Section 1350 of the California Evidence Code, which codifies forfeiture by wrongdoing for certain serious felony cases where the witness's unavailability is the result of homicide, or kidnapping, explicitly requires a clear and convincing standard of proof. Nevertheless, the California Supreme Court has, without resolving the apparent conflict, repeatedly stated that the standard of proof for forfeiture by wrongdoing is a preponderance of the evidence. See *People v. Giles*, 152 P.3d 433, 436 n.8 (Cal. 2007), *vacated*, 128 S. Ct. 2678 (2008); *People v. Zambrano*, 163 P.3d 4, 50 n.21 (Cal. 2007); *People v. Banos*, 178 Cal.App.4th 483, 492 n.12 (2009) (declining to resolve apparent conflict, but observing that preponderance of the evidence appears to be the standard under California law), *cert. denied* 130 S. Ct. 3289 (2010).

²² *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001).

²³ Some states, such as New Jersey, may have additional requirements for the conduct of the preliminary hearing on forfeiture. In *State v. Byrd*, 967 A.2d 285 (N.J. 2009), the New Jersey Supreme Court set out specific requirements for the preliminary hearing on forfeiture by wrongdoing in addition to what is explicitly required under N.J. R. Evid. 104. *Byrd*, 967 A.2d at 303-04.

²⁴ *Davis*, 547 U.S. at 833.

²⁵ *E.g.*, OHIO. R. EVID. 804(b)(6).

adverse party notice of an intention to introduce such statement(s), in a manner sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

- Mid-trial forfeiture – In at least one case, the forfeiture doctrine was applied to permit the witness's testimony on direct examination to stand without cross-examination, where the defendant was responsible for sending individuals to the courtroom to intimidate the witness, who broke down on the stand and was unable to continue his testimony. Rather than declare a mistrial, the court held a forfeiture hearing and determined that the defendant was responsible for the witness's inability to continue, and that he had forfeited his right to cross-examine the witness.²⁶

Trial Strategies

When preparing a case, the prosecutor should:

- Work collaboratively with police and community advocates to provide support services to victims so they will be more likely to stay involved in the prosecution of the case and be available to testify against their abuser. Remember that if the victim testifies and is subject to cross-examination, or even if the victim testifies on behalf of the defense, there is no confrontation/*Crawford* issue; the admissibility of the victim's prior statements will be controlled by the hearsay rules, including any residual exceptions.
- Consult with victims and work to protect them from intimidation with appropriate bail/bond conditions, moving to revoke bond when appropriate.
- Educate victims about intimidation and manipulation by their abusers so they will preserve evidence of intimidation and manipulation and promptly report any such incidents to law enforcement.
- Where the inducement for the victim not to testify is in the form of seemingly loving or apparently innocuous acts, consider presenting expert testimony to explain how these acts are intended to, and do, influence victims not to cooperate in the prosecution of their abusers. Such testimony need not (and probably should not) focus on common domestic violence victim behaviors or "battered woman's syndrome," but rather should explain how batterers seeking to control or manipulate their victims use such tactics to dissuade victims from cooperating with law enforcement. Such testimony may be helpful in assisting the court to understand how a tearful apology or promise to change can be considered "wrongdoing."
- Interview the victim and all witnesses (including family and friends of the victim) about any intimidation or manipulation by the defendant or by someone acting on his behalf (such as the defendant's family members or friends).
- Prosecute defendants for forfeiture crimes such as witness tampering/intimidation/retaliation, obstruction of justice, and suborning perjury.
- Train police officers to thoroughly investigate and document all the circumstances surrounding a domestic violence incident, including the history of the relationship between the victim and defendant,

²⁶ State v. Weathers, 724 S.E.2d 114 (Ct. App. N.C. 2012).

which may demonstrate a pattern of abuse designed to prevent the victim from reaching out for help or from cooperating with law enforcement.

- Exercise due diligence in procuring witnesses for trial. Failure to do so may result in failure to establish “unavailability” and preclusion of statements even where forfeiture conduct has occurred.
- In your trial notebook, maintain a section for evidence of forfeiture by wrongdoing for each witness potentially vulnerable to intimidation or manipulation so you will be prepared to proceed with a forfeiture hearing if the witness fails to appear due to the defendant’s actions. You may wish to consider requiring their appearance in court the first day of trial, regardless of when you intend to call them to testify. If your victim or witness fails to appear, make a motion for a hearing immediately prior to trial so you will know the status of your evidence before the jury is sworn or the first witness is sworn in a bench trial.
- If you become aware of the witness’s unavailability after the trial begins, request a hearing outside the presence of the jury to establish forfeiture by wrongdoing.
- Be prepared to argue an ad hoc forfeiture motion in cases where witnesses appear but improperly refuse to testify on the stand (including any improper assertions of privilege) due to the defendant’s intimidation or inducement. Remember that “unavailability” refers to the witness’s potential testimony and not just the physical absence of the witness.

Forfeiture Hearing Checklist²⁷

- **Proffer to court that witness is unavailable** (not present, refuses to testify, claiming a privilege, etc.). May need to call witnesses to establish declarant’s unavailability. Keep in mind that you may prove unavailability, a preliminary fact, through hearsay affidavits under Fed. R. Evid. 104(a) or its equivalent.
- If witness not present, **proffer due diligence** in trying to obtain the witness’s presence in court. May need to call witnesses to establish due diligence. Explain all efforts made to locate the witness and to secure his or her presence in court, including an explanation of why certain efforts may not have been pursued.
- Remind court that the **standard of proof** is preponderance (or clear and convincing where applicable).
- Remind court that **hearsay is admissible**, including the statements you are seeking to have admitted.
- **Call witnesses.** These might include investigators, patrol officers, 911 dispatcher, family members, friends, co-workers, advocates (where the victim has waived confidentiality/privilege if applicable, or has otherwise given the advocate permission to testify).
- **Question witnesses as to:**

²⁷ Be certain you satisfy any unique requirements for forfeiture hearings that may be applicable in your jurisdiction (e.g., New Jersey requirements set forth in *Byrd*, 967 A.2d at 303-04).

1. First hand knowledge—what they have personally observed (instances of abuse, intimidation, or control)
 2. Statements by victim
 3. Statements by defendant
 4. Statements by others
 5. Any other sources of information (pictures, letters, journal entries, emails, voicemail messages, postings on social networking websites, etc.)
- **Question witnesses, where appropriate, about:**
 1. History of relationship (abuse/control/isolation/manipulation/intimidation)
 2. Current incident of abuse (injuries/property damage/cause of fight)
 3. Defendant's behavior since arrest (contact with victim via phone, in person, through third parties, other electronic means, threats by defendant, promises to change by defendant, professions of love by defendant)
 4. Protective Orders/No-Contact Orders (violations, even where victim acquiesces)
 5. Defendant's criminal history of abuse/intimidation (arrests, convictions, dropped charges).
 6. Where charges were dropped previously, any actions by defendant that caused the victim to drop the charges on those occasions.

RESOURCES

1. Isley Markman, *The Admission of Hearsay Testimony under the Doctrine of Forfeiture-by-Wrongdoing in Domestic Violence Cases: Advice for Prosecutors and Courts*, 6 CRIM. L. BRIEF 9 (2011), available at, <http://www.wcl.american.edu/journal/clb/Vol.VIIIssueIIPDF.pdf>.
2. Michael H. Graham, *Rule 804(b)(6): Forfeiture By Wrongdoing*, 30B FED. PRAC. & PROC. EVID. § 7078 (1st ed.) (2010).
3. Deborah Tuerkheimer, *Forfeiture after Giles: The Relevance of 'Domestic Violence Context,'* 13 LEWIS & CLARK L. REV. 711 (2009), available at, <http://www.lclark.edu/live/files/2202>.
4. Rebecca McKinstry, "An Exercise In Fiction": *The Sixth Amendment Confrontation Clause, Forfeiture By Wrongdoing, And Domestic Violence in Davis v. Washington*, 30 HARV. J.L. & GENDER 532 (2007), available at, http://www.law.harvard.edu/students/orgs/jlg/vol302/531-542_McKinstry.pdf.
5. Aiysha Hussain, *Reviving Hope For Domestic Violence Prosecutions: Giles v California*, 6 AM. CRIM. L. REV. 1301 (2009).

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