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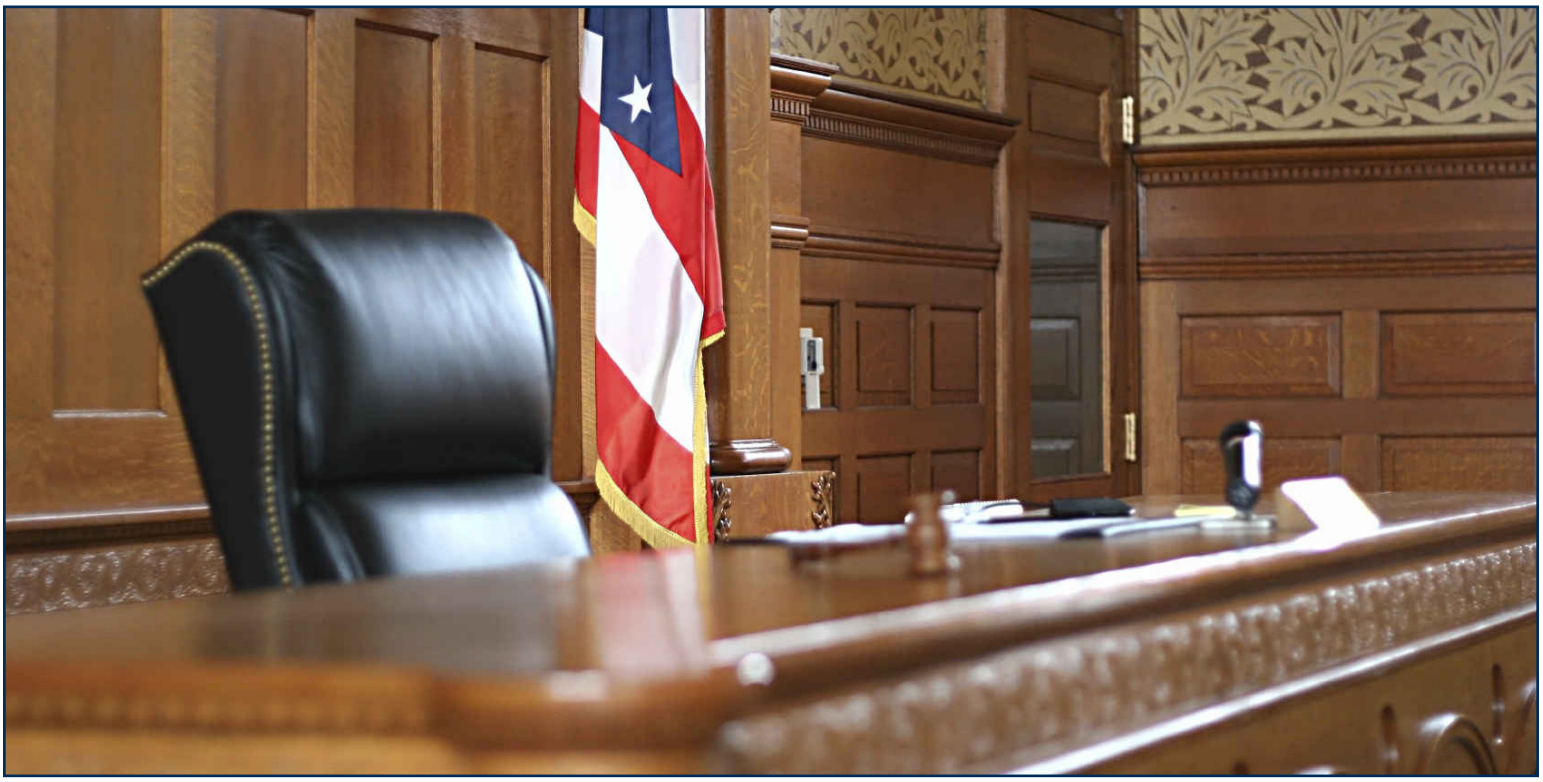

No Victim? Don't Give Up

Creative Strategies in Prosecuting Human Trafficking Cases Using Forfeiture by Wrongdoing and Other Evidence-Based Techniques

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The challenges presented in the course of investigating and prosecuting human trafficking cases can be daunting. Among the most common and difficult of these obstacles is the inability or unwillingness of victims to participate in the process. This reluctance may be based upon a variety of factors, including the victims' fear, shame, distrust of law enforcement, and a real — or perceived — lack of alternatives to trafficking as a way of life. Sometimes the unwillingness of victims to participate arises from their relationships with their traffickers, who may exploit love and intimate relationships to recruit their victims. The undercurrents in such cases involve many of the same dynamics prevalent in dating, intimate partner, or sexual violence as well as child abuse. Also present, however, is the traffickers' significant financial interest in the victims,[2] as well as the traffickers' increased exposure to state and federal criminal charges if detected. Accordingly, trafficking victims face enormous pressure not to engage the criminal justice system and serious negative consequences if they do choose to seek help.[3] These challenges are significant but not insurmountable. Prosecutors and allied professionals can employ strategies to enhance the willingness of victims to participate in the prosecution of their traffickers and to enhance the success of the trafficking prosecution even without their participation. When victims do not participate, however, preparing and litigating forfeiture by wrongdoing motions is critical to the successful prosecution of these cases. Several key investigative and prosecution strategies are discussed below.

Collaborate with Advocates and Agencies

A coordinated, multi-disciplinary response will help to identify and appropriately respond to victims of trafficking and co-occurring crimes, and is critical to reducing the negative

consequences faced by trafficking victims. Collaboration, communication, and cross-training are essential because these crimes often involve complex legal issues and require sophisticated investigative tactics. Multi-disciplinary teams (MDTs) should include broad and diverse representation from law enforcement, prosecution, advocacy, medical, social services, and other agencies and systems with which sexually exploited women may have contact. The most effective approach to investigation and prosecution of human trafficking — both forced-labor and sex trafficking cases — will incorporate elements and philosophies of traditional domestic violence and sexual violence coordinated responses,[4] which are based on victim-centered, offender-focused principles. Prosecutors and allied professionals with expertise in child abuse, sexual violence, and intimate partner violence, those with expertise in other relevant criminal investigations (such as organized crime, narcotics, and gangs), as well as those focused on civil legal and advocacy needs, must coordinate their efforts to effectively work with trafficking victims. In addition to promoting better identification of victims and perpetrators, collaboration among these allied professionals improves the ability to prevent and detect intimidation, and to provide other services to victims, thereby making it easier for victims to cooperate throughout the investigation and prosecution. For example, victim service providers can offer victims support through psychological, sexual or other relevant trauma counseling, financial assistance, professional or vocational skill building, life skills training, housing, health care and other services which provide critical support to the victims' ability to participate in the criminal justice system. Unfortunately, support, services, and other resources such as safe housing are in short supply, a condition often attributable to the failure of communities to recognize human trafficking within their own borders or to prioritize provision of services to trafficking victims. Even communities committed to the development and delivery of necessary support services to human trafficking victims, however, confront the challenge of limited and decreasing financial resources. Collaboration allows communities to maximize their resources.

The exchange of information and intelligence among allied professionals also leads to improved collection and documentation of corroborating evidence, which will enhance victim credibility and may be particularly critical where the victim is not available to participate at trial.

Recognize, Document and Respond to Intimidation and Witness Tampering

Opportunities for victim/witness intimidation and other forms of witness tampering exist in almost every criminal case. This behavior is pervasive and difficult to detect in human trafficking cases, particularly those in which the perpetrator and victim are intimate partners.[5] A defendant's motive to dissuade the victim from cooperating is heightened by his financial interest in the victim as a commodity. The increasing involvement of gangs in human trafficking[6] adds another dimension to the intimidation. Traditional methods of combatting intimidation include vigorous prosecution, courtroom security enhancements, increased monitoring of offenders, and witness relocation. In human trafficking cases, additional strategies can effectively reduce opportunities for intimidation and improve detection of, and response to, intimidation, thereby making victims safer and more likely to participate. The first step is to educate victims and witnesses, as well as allied criminal justice professionals, about common intimidation tactics. At the outset of an investigation, law enforcement and advocates should have separate, detailed conversations with victims about safety and intimidation. Victims must know how to recognize various methods of intimidation and be encouraged to report any suspected behavior immediately to authorities. In addition, victims, witnesses, and law enforcement should be taught to thoroughly document any intimidation. Additional surveillance or law-enforcement monitoring of traffickers' communications can also yield otherwise-undiscovered evidence and witnesses.[7] AEquitas's special initiative, "Improving the Justice System Response to Witness Intimidation," has identified additional strategies to improve the ability of the community and the justice system to keep victims safe while holding offenders accountable.[8]

Conduct Thorough and Thoughtful Investigations

As in most cases involving intimate partner violence, sexual violence, stalking, or child abuse, the victim in a human trafficking case plays a critical role in providing evidence of the crime. As in those crimes, too, the dynamics of the relationship between the victim and the perpetrator often create significant barriers to the victim's participation in the criminal justice process. Even in cases where victims participate,

corroboration — although not a legal requirement — is often a practical necessity in view of the prevalent myths concerning these crimes, the victims, and the perpetrators, as well as the need to convince fact finders of the defendant's guilt beyond a reasonable doubt.

Investigations must be meticulous, conducted by well-trained officers who recognize common indicators of human trafficking, are thoroughly familiar with the applicable law, and are able to properly document and preserve important — yet commonly overlooked — evidence supporting the essential elements of the relevant statutes. Typical tactics include identifying, carefully documenting, and photographing physical evidence of human trafficking; interviewing witnesses who saw or heard something; conducting surveillance; discovering and tracing relevant financial evidence; conducting pretext phone calls (where appropriate); monitoring the defendant's phone calls from jail; reading any written communications to the victim; and working with medical and other experts to interpret and explain injury, lack of injury, common dynamics, and other important evidence. Investigators should also explore perpetrators' use of victims' Social Security numbers to fraudulently obtain credit and welfare services like food stamps or Social Security disability benefits. Quick credit histories can uncover this exploitation and prevent damage to victims' credit histories. Investigators should always attempt to interview the defendant; even if no admissions are elicited, such statements may corroborate portions of the victim's statement or other evidence, or may lead to additional evidence.

These thorough investigations often reveal additional witnesses and other evidence that corroborate details of the crime. This additional evidence may be necessary to prove that the defendant utilized the required elements — force, fraud, or coercion — to traffic the victim(s).[9] Fortunately, the strategies outlined above do not require excessive law enforcement resources, sophisticated technology, or significant overtime. By training officers and prosecutors to work together, to share information, to recognize common indicators, and to understand common dynamics, they can fearlessly pursue human traffickers and other perpetrators within the bounds of ethics but without fear of losing the case for lack of a testifying victim.

Corroboration can greatly strengthen the prosecution of any case, but is particularly crucial when the victim is unwilling or unable to participate in the prosecution. Evidence-based prosecution strategies, designed to enable prosecution to proceed without a victim's participation, prioritize the documentation of information critical to overcoming hearsay or confrontation objections to the absent victim's out-of-court statements.[10] By employing the principles of evidence-based prosecution, prosecutors will be able to counter the challenges posed by gaps in the evidence, as well as legal challenges arising from the victim's lack of participation. Much of this corroborating evidence will also be relevant to admission of a victim's out-of-court statements by establishing that the defendant forfeited his right to confrontation. Documentation, therefore, is critical so prosecutors can anticipate — and prepare for — motions to admit evidence under forfeiture by wrongdoing, discussed below.

Litigate Forfeiture by Wrongdoing Motions

The Sixth Amendment provides defendants with the right to confront witnesses against them; however, the right is not absolute. In cases where the defendant intimidates a victim or witness or otherwise prevents his/her participation in a trial, the defendant may be found to have forfeited his right to confront that witness at trial. In these instances, prosecutors may introduce the absent witness's prior out-of-court statements under the doctrine of forfeiture by wrongdoing. These statements, coupled with the corroborating evidence described above, can provide prosecutors with evidence sufficient to prosecute human trafficking cases even when the victim is unable or unwilling to participate.

The doctrine of forfeiture by wrongdoing can allow the admission of a victim's statements obtained early in the investigation if she is later unavailable to testify at trial, provided that the defendant wrongfully procured her unavailability. The wrongdoing may consist of direct or explicit forms of intimidation, such as murder, assault, threats, and other aggressive behavior. Sometimes, however, the wrongdoing is indirect or subtle. Authorities should not overlook declarations of love, or promises to marry or to change, as possible wrongdoing when such behavior is intended as an inducement for the victim not to testify. It is crucial that law enforcement and prosecutors not only ask victims about these

acts — which do not at first blush appear to be overt misconduct — but also explain their significance at the earliest opportunity so victims will recognize these subtle attempts at manipulation and report them immediately. Prompt reporting of an immediate threat or inducement can increase victim safety and allow authorities to document evidence of intimidation or manipulation that will be crucial to present at trial.

In the majority of states, the standard of proof for the establishment of forfeiture by wrongdoing is a preponderance of the evidence; the standard is clear and convincing evidence in only three states.[11] In addition, at preliminary forfeiture hearings, hearsay (including the statement(s) sought to be admitted) is admissible. Moreover, at the time that the wrongful act is committed, there need not be a pending case for the forfeiture doctrine to apply. Where there is evidence that a victim or witness is not participating in the prosecution of a trafficker because of the defendant's conduct to prevent the witness from testifying, a forfeiture motion can permit the introduction of a wealth of hearsay evidence that would otherwise be barred. Such evidence may permit successful prosecution in spite of the unavailability of the witness for trial.

Preponderance of the evidence, requiring a showing that it is more likely than not that the evidence presented is true, is significantly lower than the standard required for proof of a defendant's guilt at trial. Nevertheless, prosecutors should not treat the burden lightly and should, to the extent possible, support the reliability of the evidence they introduce to establish the defendant's wrongdoing. They should err on the side of introducing as much corroborating and supporting evidence as possible; this will strengthen not only the forfeiture by wrongdoing motion, but also the subsequent record, in the event of an appeal.

Just as in a trial, the introduction of corroborating evidence at a forfeiture hearing will enhance the reliability and credibility of each separate piece of evidence. This practice will not only protect the record of the hearing on appeal but will also help tilt the balance in favor of introducing the witness's hearsay statements if the defense objects that the evidence is too prejudicial, under the Fed. R. Evid. 403 balancing test, to be introduced at trial.[12]

Rule 804(b)(6) of the Federal Rules of Evidence codifies forfeiture by wrongdoing as an exception to the rule against hearsay. Several states have adopted some version of Fed. R. Evid. 804(b)(6), while many other states have adopted the doctrine on the basis of equitable forfeiture principles.[13] In Fed. R. Evid. 804(b)(6) jurisdictions, once forfeiture has been established, the declarant's statements are admissible, subject to Rule 403 constraints. In equitable jurisdictions, however, even if forfeiture is established, the declarant's statements may still have to satisfy a codified exception to the rule against hearsay.

Introduce Circumstantial Evidence of Defendant's Wrongdoing in your Case-in-Chief

After overcoming the hurdle of a missing victim or witness through the successful litigation of a forfeiture by wrongdoing motion, the prosecution may still face challenges created by the absence of the victim or witness at trial. For example, fact finders may decide that the statements of victims or witnesses who do not testify at trial are not believable. They may conclude that the victim's or witness's unexplained absence from trial means that the crimes charged are not serious or never happened. They may even speculate that victims or witnesses who do not participate in the trial are themselves guilty of criminal activity. Because of these mistaken beliefs, the prosecutor may want to introduce the evidence of the defendant's wrongdoing at trial to explain the victim's or witness's absence from the trial. In these instances, prosecutors should consider preparing and litigating motions to introduce evidence of the defendant's wrongdoing. This evidence is relevant to explain why the victim/witness is not present at the trial and testifying; however, it is also highly relevant to issues such as defendant's intent, motive, consciousness of guilt.[14]

Admitting other "bad acts" under Fed. R. Evid. 404(b)

Where practical, prosecutors should take care to file a pretrial motion to introduce the defendant's other bad acts resulting in forfeiture. The motion should carefully articulate that the evidence is being introduced for a proper purpose, is relevant to that offered purpose, and is not substantially outweighed by the danger of unfair prejudice.[15] In other instances, prosecutors can orally argue admissibility in re-

sponse to a defense objection but the principles remain the same.

While evidence of a defendant's other "bad acts" or criminal activity is not admissible to show actions in conformity with that behavior, competent evidence can be admissible to show motive, identity, intent, absence of mistake or accident, planning, common plan or scheme.[16] Significantly, it is not necessary that the other acts evidence be derived from conduct for which the defendant was charged or convicted.[17]

Prosecutors must also sufficiently argue that the probative value of the other acts evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. Conventional wisdom recognizes that most evidence presented by the prosecution is inherently prejudicial and that the more relevant and probative evidence is, the more prejudicial. Fed. R. Evid. 403, however, only guards against unfairly prejudicial evidence. While admission of other acts evidence is reviewed for abuse of discretion, it is crucial for prosecutors to ensure that motions, oral arguments, and the court's reasoning for its ruling be put on on the record.[18]

Introducing other acts to show consciousness of guilt

Prosecutors who articulate a valid purpose, other than to prove a defendant's bad character, can introduce other uncharged acts to establish a defendant's consciousness of guilt. Evidence of conduct by the defendant, or by another at defendant's behest, to prevent a witness from testifying allows the jury to draw the inference that defendant knows — and implicitly admits — his guilt because an innocent person would not engage in such conduct. Acts that demonstrate consciousness of guilt may include flight, resisting arrest, threats or intimidation to a victim or witness, having a victim or witness killed, attempts to bribe or otherwise influence a witness's testimony, tampering with physical evidence, giving contradictory or demonstrably false statements about what happened, offering to pay a victim's medical bills or restitution, apologies or rationalizations to the victim or others, or suicide attempts. Many of these acts are the same acts that prevent victims and witnesses from participating in the prosecution, and may already be the basis for a forfeiture by wrongdoing motion. The standard of proof for admissibility is the same for any other kind of circumstantial evidence. Prosecutors must first establish that the evidence is relevant under Fed. R. Evid. 401[19] and that it overcomes the counterweights of Fed. R. Evid. 403, as discussed in the previous section.[20]

Prosecutors must remember not to overlook other potential challenges to their evidence. As in any criminal case, prosecutors should make sure any documents or phone conversations, emails, or other pieces of evidence are properly authenticated, and that any other out-of-court statements fall within an exception or an exclusion to the hearsay rule.
Finally, prosecutors should draft for the court appropriate cautionary or limiting instructions whenever evidence is admissible only for a limited purpose. These limiting instructions should be given at the time the evidence is admitted, and again at the time of the final jury charge. They will substantially reduce the risk of any unfair prejudice, and thereby reduce the risk of reversal on appeal based upon the possibility that the jury considered the evidence for any improper purpose. Such an instruction should be carefully crafted to avoid impinging in any way on the jury's ultimate responsibility to resolve issues of credibility.[21]

For Rule 404(b) evidence, the prosecutor should request a restrictive limiting instruction that directs the jury to consider the evidence only as proof of intent, absence of mistake, knowledge, or other permitted purpose, and not as evidence of the defendant's bad character. To the extent the evidence is admitted on the issue of consciousness of guilt, the instruction should be drafted like a standard flight instruction. Typically, such an instruction tells the jury to decide whether the conduct occurred and, if so, to decide whether the conduct indicates a consciousness of guilt or whether it has an innocent explanation.

Introduce Expert Testimony to Explain Victim Behavior

Human trafficking prosecutions — like prosecutions involving other forms of violence against women — often involve dynamics and victim behaviors that may seem counterintuitive to lay people or to allied professionals unfamiliar with these crimes, and may be misunderstood as reflecting negatively on the victim's credibility. Prosecutors who work with experts to prepare and prosecute their cases can better identify relevant evidence and more readily explain the

context in which the violence against the victim occurred. Expert testimony can be critical in helping prosecutors explain dynamics and victim behavior to the jury so that jurors will understand the common control tactics of pimps and traffickers, and will not misinterpret a victim's lack of participation as evidence of a victim's dishonesty or lack of credibility.[22]

Conclusion

The criminal justice system is a critical resource for victims of sexual assault, intimate partner violence, stalking, and human trafficking. Not only are "[l]ocal police and prosecutors … the gatekeepers to the criminal justice system,"[23] but they must collaborate with all criminal justice professionals to make the system work well for victims and others who seek justice in the courts. When the system is ineffective or indifferent to victims, the victims remain vulnerable, offenders are not held accountable, communities become less safe, and justice is not achieved.

Prosecutors have a duty to lead, and their important role in educating allied professionals and the public about these crimes cannot be overstated. In *Berger v. United States*, the United States Supreme Court said that a prosecutor's responsibility is to achieve justice, and that it is the prosecutor's "duty to use every legitimate means to bring about a just [conviction]."[24] When seeking justice — both in exercising their discretion in individual cases and in implementing improvements to the criminal justice system — prosecutors must remember that legislatures are mandated to enact broad criminal laws, while the enforcement of those laws by police and prosecutors define the difference between "law-on-the-books and law-in-action."[25] Ultimately, prosecutors, as the criminal justice leaders in their respective jurisdictions, are responsible for ensuring that the system operates in an informed, fair, victim-centered, and offender-focused manner. Prosecutors must work with allied professionals to enhance the ability of every victim to meaningfully participate in the prosecution of the perpetrator. The aggressive prosecution of human trafficking crimes, using appropriate strategies that weaken the incentive for traffickers to intimidate their victims and swiftly punish attempts to do so, while maximizing practical support for victims during and after their engagement with the criminal justice system, will help to maximize victim safety while minimizing the opportunities for traffickers to escape justice.

Endnotes

1 Jennifer Gentile Long is the Director and Teresa Garvey is an Attorney Advisor at AEquitas: The Prosecutors' Resource on Violence Against Women. The authors wish to acknowledge Christian Fisanick, Assistant United States Attorney and Chief of the Criminal Division, United States Attorney's Office, Middle District of Pennsylvania for his significant contributions to this article.

2 *See,* Coalition to Abolish Slavery and Trafficking, www.castla.org.

3 For a detailed discussion of the challenges to victim participation in these cases, see Colleen Owens, et al., Urban Institute, Identifying Challenges to Improve the Investigation and Prosecution of State Human Trafficking Cases (April 2012), *available at* http://www.urban.org/UploadedPDF/412593-State-and-Local-Human-Trafficking-Cases.pdf.

4 For a more detailed discussion on a coordinated response, see Christopher Mallios & Jenifer Markowitz, *Benefits of a Coordinated Community Response to Sexual Violence*, 7 Strategies in Brief (Dec. 2011), http://www.aequitasresource.org/Benefits_of_a_Coordinated_Community_Response_to_Sexual_Violence_Issue_7.pdf.

5 *See, e.g.,* Amy E. Bonami et al., "*Meet me at the hill where we used to park:" Interpersonal processes associated with victim recantation,* 73 Social Science and Medicine 1054-61 (2011).

6 *See, e.g.,* Carrie Johnson*, Gangs Enter New Territory with Sex Trafficking,* NPR (Nov. 14, 2011), http://www.npr.org/2011/11/14/142300731/gangs-enter-new-territory-with-sex-trafficking.

7 Prosecutors should check the laws in their jurisdiction related to surveillance.

8 AEquitas has a special initiative, "Improving the Justice System Response to Witness Intimidation" (IWI), which is designed to improve the ability of the justice system and of the community to keep victims safe and to hold offenders accountable. For more information, see *Special Initiatives: Improving the Justice System Response to Witness Intimidation",* AEquitas: The Prosecutors' Resource on Violence Against Women, http://aequitasresource.org/special-initiatives.cfm. IWI is a field-initiated project funded by the U.S. Department of Justice, Bureau of Justice Assistance (BJA) award number 2010-MU-BX-K079.

9 Prosecutors and law enforcement should familiarize themselves with the human trafficking and other related statutes in their jurisdictions to determine the required elements. For example, many statutes include the elements of force, fraud, and coercion in describing the offender's trafficking methods, but language and conduct in the statutes can and does vary.

10 *See, e.g.,* Michigan v. Bryant, 131 S.Ct. 1143 (2011) (for discussion of ongoing emergency); *see also,* Herb Tanner & John Wilkinson, *Supreme Court Clarifies the "Ongoing Emergency" in Michigan v. Bryant*, 9 Strategies in Brief (Dec. 2011), http://www.aequitasresource.org/Supreme_Court_Clarifies_Ongoing_Emergency_in_Michigan_v_Bryant_Issue_9.pdf.

11 The states that require forfeiture by wrongdoing to be proved by clear and convincing evidence are Maryland, New York, and Washington. The applicable standard in California is less certain. 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, 446 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).

12 All evidence introduced at trial, regardless of its admissibility under the hearsay rules or an exception, is subject to FED. R. EVID. 403 or its state equivalent, which excludes evidence whose probative value is outweighed by the risk of prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.

13 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).

14 *See*, *e.g.*, State v. Thompson, 45 A.3d 605, 617-620 (Conn. 2012) (discussing evidence introduced at forfeiture by wrongdoing hearing which was also introduced to establish defendant's consciousness of guilt).

15 This rule has been generally established in Huddleston v. United States, 485 U.S. 681, 691 (1988). DAVID P. LEONARD, THE NEW WIGMORE. A TREATISE ON EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS, § 4.10 (2012). Prosecutors should check their jurisdiction for specific tests or a multi-prong analysis to go through to properly admit evidence.

16 FED. R. EVID. 404(b).

17 Prosecutors should check their local evidentiary rules, which govern the admissibility of other acts evidence. Depending upon the jurisdiction, even conduct for which the defendant was charged and acquitted may be admissible under FED. R. EVID. 404(b).

18 LEONARD, SUPRA NOTE 15, § 4.5.2.

19 FED. R. EVID 401.

20 *See, e.g.*, John Wigmore, Evidence, §276 (James H. Chadbourn rev. 1979).

21 For further guidance, please see AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY (October 2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Crawford.pdf.

22 For human trafficking cases in which expert testimony has been introduced, see, *e.g.,* United States v. Anderson, 560 F.3d 275 (5th Cir. 2011) (introducing the nature of commercially sexually exploited adolescent's relationship with pimp through expert testimony to establish that defendant was a pimp); United States v. Brooks, 610 F.3d 1186 (9th Cir. 2010) (admitting detective's testimony on pimp/prostitute relationship as relevant to provide jury with means to assess witness's credibility); United States v. Shamsud-Din, No. 10 CR 927, 2012 WL 280702 (E.D. Ill. Jan. 31, 2012) (qualifying individual to testify as expert on sex trafficking); United States v. King, 703 F. Supp. 2d 1063 (D. Haw. 2010) (holding pediatrician's testimony on dynamics of pimp/prostitute relationship relevant to dynamics, norms, culture, and circumstances that make victims susceptible to commercial sexual exploitation).

23 OWENS, *supra* note 3.

24 Berger v. United States, 295 U.S. 78, 88 (1935).

25 OWENS, *supra* note 3.

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