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Legal Jiu-Jitsu for Prosecutors in Intimate Partner Violence Cases: Forfeiture by Wrongdoing[1]

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Jiu-jitsu is a Japanese martial art that does not depend on the use of size or strength to defeat an opponent. Instead, it employs a variety of tactical moves to prevail by turning the force of an attack against the attacker. Prosecutors in domestic violence cases have a similar art at their disposal to counter confrontation challenges in the common scenario where the offender has intimidated, tricked, manipulated, paid off, killed, or otherwise arranged for the victim to be absent from the trial,[2] leaving the prosecution with only the victim's out-of-court statements to prove the case.

The doctrine of forfeiture by wrongdoing is a powerful tactic for the prosecution in these cases. Essentially, the doctrine provides that when a party (most often, the defendant in a criminal case) has engaged in some conduct to purposely prevent a witness from testifying in court, that party has forfeited the right to cross-examine that witness. Hearsay statements of a witness thus wrongfully prevented from testifying are admissible against the party responsible for that witness's unavailability, thereby effectively turning the force of the intimidation against the intimidator. In many jurisdictions the doctrine is codified—usually in the rules of evidence as a hearsay exception. In many other jurisdictions there is no formal rule or statute, but the doctrine is recognized in the common law as a matter of equity and public policy—a deterrent to acts that undermine the system of justice.

Despite the power of this doctrine to enable prosecutors to prove their cases even when victims or witnesses

have been harmed, coerced, or manipulated to prevent their appearance in court, and despite the fact that the overwhelming majority of jurisdictions have formally recognized the validity of the doctrine, there are surprisingly few court opinions on the subject, compared to other evidentiary issues. This relative paucity of caselaw suggests that prosecutors in many jurisdictions may not be taking advantage of the rule/doctrine. In a very informal poll of prosecutors subscribing to this publication, fewer than half of the 105 prosecutors responding (most of whom, presumably, prosecute crimes of violence against women—including domestic violence, sexual violence, stalking, and human trafficking—with some degree of regularity) had ever filed a motion to admit evidence under the forfeiture doctrine. Those participants were asked to explain why they had never done so. Among the most frequently selected responses were (1) unfamiliarity with the doctrine of forfeiture and its uses, (2) the belief that their judges would not grant a motion to admit such evidence, and (3) the belief that they had never handled a case where forfeiture could be proved.[3]

This article will explain the historical underpinnings of the doctrine and the public policies it promotes and will examine the current state of the law concerning forfeiture around the country. It will address some of the issues that may arise in proving the predicate facts supporting a motion to admit evidence under the forfeiture doctrine. Finally, it will suggest litigation strategies that should prove helpful in asserting and arguing the applicability of the doctrine to admit hearsay statements of intimidated witnesses who have become unavailable to testify due to wrongdoing on the part of the defendant. Although the article is focused primarily on the use of forfeiture in domestic violence cases, the same law and principles generally apply in other types of cases where defendants, or those acting on their behalf, have prevented witnesses from testifying.

Evolution of Forfeiture by Wrongdoing

Historical background

The United States Supreme Court has traced the origins of the forfeiture doctrine to 17th Century English law.[4] In Lord Morley's Case, the English court held that the prior testimony of an absent witness could be admitted where the witness had been "detained by the means or procurement of the prisoner."[5] Although the historical legal record is sparse, the doctrine was occasionally discussed or relied upon in English and early American cases.[6]

The United States Supreme Court first had occasion to consider the doctrine in *Reynolds v. United States*.[7] In *Reynolds*, which was a polygamy case involving the Free Exercise Clause of the First Amendment, the trial court admitted prior testimony by one of the defendant's wives, whose location the defendant had apparently concealed to prevent her being served with a subpoena. The Supreme Court, relying on Lord Morley's Case and other historical English and American cases, upheld the conviction, stating:

> 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. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. 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.[8]

The *Reynolds* case stood for over a century as the sole pronouncement by the nation's highest court on the doctrine of forfeiture by wrongdoing. The doctrine continued, however, to be recognized, discussed, refined, and applied in both the federal and state courts over the course of many decades. Some cases spoke in terms of "waiver" of the right of confrontation, rather than "forfeiture;"[9] however, since the 1997 codification of the doctrine in the Federal Rules of Evidence, the caselaw has largely settled on the

"forfeiture" usage.[10] As stated in Fed. R. Evid. 804(b)(6), hearsay statements of an unavailable witness are admissible when "offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result." In the wake of the federal rule, some states began to codify the rule in their own evidence rules or statutes, while others continued to recognize and apply the doctrine in their caselaw as a matter of equity and public policy.

The continuing vitality of the doctrine of forfeiture was recognized by the United States Supreme Court in the landmark decision of *Crawford v. Washington*, which interpreted the Sixth Amendment's Confrontation Clause as requiring all testimonial hearsay statements admitted at a criminal trial to be tested by cross-examination—either at trial or, if the witness is unavailable to testify at trial, at a prior proceeding with adequate opportunity for cross-examination. Rejecting judicial determinations of reliability as a substitute for cross-examination, the Court nevertheless observed that there are "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."[11]

In *Davis v. Washington*,[12] the Court noted the potential value of the forfeiture doctrine in the context of domestic violence prosecutions. *Davis*, and *Hammon v. Indiana*, the case with which it was consolidated for disposition, were both domestic violence cases in which the Court was called upon to determine the admissibility of hearsay statements made by the victims, who did not testify at trial. The Court held that the Davis victim's call to 911 was a nontestimonial call for help and, thus, admissible as an excited utterance, but that the Hammon victim's on-the-scene statements to a police officer after the emergency situation had abated were testimonial and therefore inadmissible at trial. The Court noted, however, that many times victims of domestic violence are not available to testify due to the offender's wrongful actions to dissuade them from testifying. While the doctrine of forfeiture had not been argued below, the Court observed that, on remand, the prosecution in the *Hammon* case might argue forfeiture as a basis to admit the statements, if there were grounds to do so.[13]

The Giles era

In 2008, the United States Supreme Court was presented with the opportunity to squarely address the forfeiture doctrine in the context of a domestic violence homicide. In *Giles v. California*,[14] the defendant had admittedly shot and killed his ex-girlfriend. The defendant claimed self-defense—he asserted that the victim had been aggressive toward him and had threatened his current girlfriend. He testified that during an argument with the victim, he picked up a gun and tried to leave. When the victim charged toward him with something in her hands, he held up the gun, closed his eyes, and fired several times, not intending to kill her. At trial, the prosecution presented evidence that a couple of weeks before the homicide, the police had responded to the victim's home in response to a 911 call. The victim had tearfully told police that the defendant had assaulted and strangled her and had threatened her with a knife. Those statements were admitted at trial under the pre-*Crawford* California hearsay exception admitting the trustworthy statement of an unavailable witness that described an infliction or threat of injury.[15] The California Supreme Court, noting that the *Crawford* decision precluded admission of the statement as testimonial hearsay, nevertheless affirmed the conviction based upon the doctrine of forfeiture by wrongdoing. The Court concluded that nothing in California's common-law forfeiture rule required the prosecution to prove that the defendant acted with the purpose to prevent the witness from testifying; the defendant's undisputed act of killing her was a sufficient basis to admit the victim's out-of-court statements at trial.[16] The United States Supreme Court granted defendant's petition for certiorari.

Writing for the majority, Justice Scalia concluded that, based upon the historical antecedents, the forfeiture doctrine required proof that the party against whom

the testimonial hearsay is offered had acted with the purpose of preventing the witness from testifying. Without such evidence, which the Court concluded was lacking in the *Giles* case, there was no exception to the defendant's Sixth Amendment right, as expounded in *Crawford* and *Davis*, to confront the witness by cross-examination.[17] Although the Court rejected the notion that the forfeiture standard should be more liberal in cases involving domestic violence, the majority opinion did suggest that the dynamics of domestic violence could be taken into consideration in ascertaining the defendant's intent to make a witness unavailable:

> Acts 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.[18]

In a concurring opinion, Justice Souter elaborated further on this theme:

> [T]he element of intention 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. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger.[19]

Although *Giles* mandates evidence that the wrongful conduct be aimed at making the witness unavailable for trial, nowhere does it suggest that this must be the sole motive. Several state and federal court cases have held that while proof of intent to cause unavailability must be shown, the forfeiture doctrine allows prior statements to be admitted even if there are additional motives;[20] no case has held that preventing testimony must be the sole motive for the wrongdoer's actions.

Current state of the law

Today, the vast majority of United States jurisdictions explicitly recognize the doctrine of forfeiture by wrongdoing, either as codified in some fashion or as a matter of caselaw based upon principles of equity and public policy—the principle that a person should not benefit from his or her own wrongdoing—and as a deterrent to the corruption of the criminal justice system. While there are variations among jurisdictions in the quantum of proof necessary to establish forfeiture and in the procedural requirements to introduce statements under the doctrine, no jurisdiction that has considered the doctrine has ever rejected it.[21] Thus, the current absence of law on forfeiture in a jurisdiction does not preclude its adoption by judicial decision in appropriate circumstances.[22] The most significant areas of potential difference in operation of the forfeiture doctrine from one jurisdiction to another are briefly summarized below:

- **Burden of proof.** In nearly all jurisdictions that formally recognize forfeiture, the proponent of the statement (typically, the prosecution) must establish the grounds for forfeiture by a preponderance of the evidence. Only three states require a higher burden—in Washington, Maryland, and New York the grounds for forfeiture must be established by clear and convincing evidence.[23]

- **Reliability.** Colorado and New Jersey, as well as a few other jurisdictions, require a showing that statements admitted under the forfeiture doctrine are reliable, at least to some degree (which may be less than the reliability required for statements admitted under other hearsay exceptions).[24] The United

States Supreme Court has never suggested reliability is a requirement under the federal constitution for statements admitted under the forfeiture doctrine. In fact, the Court has explicitly observed in *Crawford* that forfeiture does not correlate with reliability, but rather allows statements to be admitted as a matter of equity.[25] New Jersey law, however, requires that a statement admitted under the doctrine of forfeiture generally must be in a sound recording or signed statement, or given under oath; if none of those circumstances apply, the proponent of the statement must show compelling indicia of reliability.[26]

- **Forfeiture of hearsay objection.** In jurisdictions where forfeiture is codified as a hearsay exception, no other hearsay exception is required. So long as the requirements of the rule are met, the prior statement is admissible. However, in jurisdictions where the doctrine is a creature of caselaw, it is sometimes argued that forfeiture applies only to the right of confrontation, not to the hearsay objection. The Colorado Supreme Court has held that forfeiture of confrontation does not result in forfeiture of the hearsay objection; the statement still must come within a recognized hearsay exception.[27] The weight of authority in other jurisdictions suggests that forfeiture of confrontation, a more important right than a hearsay objection, *a fortiori* demands forfeiture of any hearsay objection.[28]

  In fact, the *Giles* court observed that "[n]o case or treatise that we have found ... suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights. And the distinction would have been a surprising one, because courts prior to the founding excluded hearsay evidence in large part because it was unconfronted."[29]

Proving Forfeiture

To present evidence under the doctrine of forfeiture by wrongdoing requires that the prosecution prove, by the applicable standard of proof, (1) that the witness is unavailable, (2) that the cause of the unavailability is some wrongdoing on the part of the defendant, and (3) that the defendant engaged in (or acquiesced in) the wrongdoing with the intent of making the witness unavailable. In cases where the State can show overt witness tampering (*e.g.*, jail phone calls in which a defendant instructs the victim not to go to court), these elements are not difficult to prove. In others, particularly where the intimidation or manipulation is subtle or where third parties are involved, proof of forfeiture may present more of a challenge.

Unavailability of the witness

The forfeiture doctrine requires that the witness be unavailable to testify in court.[30] Unavailability includes not only inability or failure to appear in court, but also refusal to testify[31] or assertion of a privilege to avoid testifying,[32] as well as other circumstances that may be set forth in the evidence rule.[33] Generally speaking, the unavailability requirement means that the prosecution must make a showing of reasonable efforts to produce the witness in court.[34] This means that the prosecutor cannot simply opt not to call an available witness because the testimony might be unhelpful to the case and use hearsay statements as a substitute, even if the defendant has engaged in wrongful conduct to prevent the witness's testimony.[35] There is no caselaw that has explicitly required the State to seek a bench warrant or a material witness complaint to prove it has made a reasonable effort to produce the witness. Arresting victims for the purpose of ensuring their appearance in court has multiple negative consequences for victim safety and for the community. These victims are re-traumatized when they are arrested; they are discouraged from reaching out for help from law enforcement in the future; arrest may erode already-fragile trust in law enforcement; and victims may face collateral consequences such as loss of employment, housing, or public benefits as a result of arrest.[36] In addition, routine arrest of victims of domestic violence can jeopardize the jurisdiction's federal funding.[37] Finally, every state has victims' rights codified in the state constitution and/or in statutes. Prosecutors can credibly argue that, under the circumstances, arrest of victim-witnesses to produce their testimony in court is unreasonable and therefore not required as a condition of admitting testimony under the forfeiture doctrine.[38]

This is not, however, to suggest that merely putting a subpoena in the mail or even into the hands of the victim will necessarily be sufficient. It may be necessary to show that early, diligent efforts were made to locate a missing victim or other efforts made to enable an intimidated victim to testify.[39] Persuading a fearful or reluctant victim to come to court is a delicate task that must be undertaken only—if ever—in such a way that the victim is not further traumatized by inappropriate pressure (e.g., threats of arrest; the suggestion that child custody might be adversely impacted).[40] If the victim must travel to attend the trial, the prosecution may be obligated to offer to provide travel expenses before the victim will be deemed unavailable.[41] If the victim is outside the jurisdiction of the court, the prosecution may be required to attempt to secure the witness's presence with the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings[42] to establish unavailability.[43]

All contacts, attempted contacts, and efforts to locate a victim should be carefully documented. Even significant efforts to locate a victim may be deemed insufficient if they are not commenced until the eve of trial.[44] Communicating with victims early and often throughout the pretrial period offers the best opportunity to keep them engaged so they are better able to participate. Such communication also allows the prosecutor to learn of any witness intimidation at the earliest opportunity so it can be documented and effectively countered. Evidence of intimidation will be invaluable in the event the victim does not appear for trial and a forfeiture motion becomes necessary. Such evidence is also helpful to explain recantation or minimization if the victim does testify at trial, as well as to establish consciousness of guilt. In addition, each conversation with the victim permits contact information to be updated. Victims can be asked to provide the name and contact information of a trusted friend who could get them a message if they should need to relocate on short notice.

Due to "wrongdoing" on the part of the defendant

It is well-established that "wrongdoing" in this context does not mean that the conduct must be unlawful in and of itself. Rather, "wrongdoing" is related to the object of the conduct—wrongfully preventing the witness from testifying.[45] Some acts of intimidation, and the messages they are intended to convey, are subtle. Sometimes the wrongdoing consists of emotional manipulation designed to dissuade the victim from testifying.[46]

Proving that the defendant's actions caused the witness's unavailability is necessary, as well. Evidence to support causation, or leads to such evidence, can sometimes be obtained by carefully interviewing the victim early in the process—the time at which many victims tend to be the most forthcoming about the violence in the relationship. This is the most promising opportunity to obtain information about the history of the relationship, which might prove invaluable in establishing the "classic abusive relationship" referenced by Justice Souter in his concurring opinion in *Giles*. In addition, documenting changes in the victim's willingness to testify might permit the prosecutor to correlate those changes with post-arrest encounters between the victim and defendant. Patterns may emerge from a history of dropped protective orders or prior failures of the victim to appear for trial. In cases where the wrongdoing is less overt, or where it involves reliance on exploitation of the dynamics in the abusive relationship, expert testimony may assist the court in understanding the effect that the defendant's actions would likely have had on the victim.

Forfeiture also requires that the wrongdoing be attributable to the defendant. If a defendant enlists others (family members, friends, or other allies) to engage in wrongful conduct to prevent the witness from testifying, engages in a conspiracy whose objects include preventing witnesses from testifying, or "acquiesces" in such conduct (under Fed. R. Evid. 804(b)(6) or state rules with similar wording),[47] the defendant is subject to forfeiture. However, entirely independent acts of third parties—even if their intention is to assist the defendant—will not result in forfeiture of the defendant's right of confrontation. A defendant's complicity or acquiescence in the wrongful conduct of others can sometimes be proved circumstantially—a task made easier when the burden is less than proof beyond a reasonable doubt. For example, if a defendant urges a friend or family member to "talk

to" the victim and that person makes repeated calls to the victim's phone and the previously-engaged victim stops returning the prosecutor's calls, it can be argued that the defendant is most likely responsible for the victim's failure to testify at trial.

Trial Strategies for Forfeiture by Wrongdoing

The benefits of using forfeiture in cases involving domestic violence, or other crimes where victims or witnesses are vulnerable to intimidation,[48] are obvious. The New Jersey Supreme Court has succinctly stated the public policy rationales underlying the doctrine: to remove any profit that a defendant might realize from his or her own wrongdoing; to deter defendants from engaging in wrongdoing to harm or intimidate a witness; and to further the truth-finding function by providing an alternate means for the jury to receive evidence they would otherwise be prevented from hearing.[49] While it is always desirable to prevent intimidation to the extent possible by proactively and collaboratively working to reduce its occurrence,[50] when intimidation does occur and prevents the witness from testifying, forfeiture directs the negative consequences of the act to the person responsible—the defendant. Combined with other strategies, such as charging intimidation-related crimes when possible or asking for jury charges on consciousness of guilt for acts of intimidation, moving for forfeiture helps to eliminate the payoff for defendants who engage in such acts, tilting the risk-benefit analysis in favor of abstaining from intimidation tactics.

Be ready

Forfeiture cannot be used effectively unless the prosecutor is prepared to use it when circumstances warrant. Any experienced domestic violence prosecutor knows that the ability of a victim to testify truthfully against an abuser tends to be fluid. Depending on what the offender might be doing to intimidate or manipulate the victim, together with other things that might be going on in the victim's life at the time and the availability of resources to support the victim, the victim's ability to testify may vary from one week to another. Typically, victims are most willing to participate in the process early in the proceedings—immediately after the defendant's arrest. But the longer a prosecution drags on, the greater the opportunity for a defendant to wear down the victim's will to go forward with the case.[51] Conversely, a victim who has been reluctant to proceed due to a defendant's promises to change (to get counseling, stop drinking/drugging, etc.) might decide to testify, after all, when those promises prove to be empty, when the defendant commits further acts of abuse, or when the victim's personal circumstances change.

The prosecutor should assess, early and often throughout the pretrial period, the ability and willingness of the victim to testify at trial. For vulnerable victims, a "forfeiture file" is a helpful addition to the prosecutor's trial file or notebook. This repository can hold evidence and leads about evidence that might support a motion for forfeiture should it become necessary, as well as case research and, perhaps, a sample brief that can be quickly adapted to accommodate the particular facts of the case. The evidence supporting a motion might include records of prior proceedings and witnesses to previous incidents. While most forfeiture motions are filed in advance of trial, maintaining the necessary information at the ready facilitates the filing of a motion on short notice or in the midst of trial, if the victim should unexpectedly fail to appear for trial or refuse to testify. The forfeiture file should also contain documentation of contacts with the victim, efforts to contact or locate, and any statements of the victim indicating willingness or intention to testify, as well as expressions of fear or concern about testifying.

File the motion

Unless the jurisdiction prescribes specific procedures for a forfeiture motion, the motion should be consistent with other motions *in limine* to admit evidence at trial. The supporting papers should include an affidavit or certification regarding the evidence that the prosecution will rely upon to support the motion, as well as a brief arguing the facts and law. In jurisdictions that lack an evidence rule on forfeiture or any caselaw on the doctrine, it may be particularly important to cite persuasive cases from other jurisdictions, as well as to

very carefully articulate and argue the strong public policy supporting the doctrine. In addition, it may be important in such jurisdictions to address any precedent on judicial "amendments" to the codified rules of evidence.[52] An office/unit "brief bank" containing sample or previously-filed briefs can be an invaluable way to save time and refine arguments in future cases. Sample briefs are available from AEquitas.[53]

The motion papers should identify the specific statements the prosecution seeks to admit at trial. In many cases, some of these statements might be admissible under an alternative theory, as well—they may be admissible as nontestimonial statements that also fall within another hearsay exception. In such cases, the prosecutor should argue both theories in the alternative, and request that the court rule on both theories in the alternative. In the event of an appeal, the appellate court will then have a good record as to both grounds for admissibility, which might obviate the need for a remand if the appellate court finds the statement(s) inadmissible under one of the alternative theories.[54]

The brief should identify or argue the applicable burden of proof: preponderance of the evidence or clear and convincing evidence. In jurisdictions without law specifying the applicable burden, the prosecution can argue that the great weight of authority in other jurisdictions calls for a preponderance standard. Sometimes the rules of evidence or caselaw provide general rules for the quantum of evidence necessary to establish the foundation for admitting other kinds of evidence, and the burden for proving forfeiture can be analogized accordingly.

Although the prosecution should take the position (if permitted by the rule or caselaw) that reliability of the prior statements is an issue that need not be proved as a condition of their admission, it is often possible to argue that the statements bear circumstantial indicia of reliability. Even if reliability is not a condition of admissibility, the court may be more willing to admit statements that it deems to be reliable.

Finally, the brief should address each of the requisite elements for forfeiture: (1) unavailability of the witness (2) caused by some wrongdoing on the part of the defendant (3) with the intent of causing such unavailability; it should go on to explain how the evidence supports those elements. In arguing forfeiture—particularly to courts that may be unfamiliar with the doctrine or apprehensive about going out on a legal limb without an evidence rule or reassuring precedent as a safety net—it is often helpful to emphasize that the defendant's conduct undermines the system of justice and that denial of the motion rewards such conduct. Trial judges generally do not take kindly to interference in the operation of the courts over which they preside, so this kind of argument may be especially persuasive.

Hearing on the motion

Hearings on forfeiture should be held outside the presence of the jury—preferably before jury selection, but unanticipated motions may be heard during the course of trial.[55] Many jurisdictions have an evidence rule explicitly stating that the rules of evidence, other than those relating to privilege, are inapplicable in hearings on preliminary questions to determine the admissibility of evidence.[56] Even without an explicit rule so stating, hearsay is usually admissible at hearings on a forfeiture motion, including the statements of the absent witness that are the subject of the motion.[57] It may well be necessary, however, to introduce any hearsay evidence through a witness who is familiar with the investigation that produced the evidence. This might be the detective or investigator who has been most involved in the investigation or has been in closest contact with the victim.[58] In some cases, live testimony by other witnesses (for example, a friend or family member in whom the victim confided fear) or by an expert in victim behavior and/or domestic violence dynamics might be helpful to the court in understanding the defendant's responsibility for the victim's absence.

In cases where the prosecution is able to argue, in the alternative, that the out-of-court statements are nontestimonial and admissible under another hearsay rule, the court should be reminded at the hearing of the request to make findings and rulings on both grounds of admissibility. Additionally, to ensure the

record is preserved for appeal, the court's decision should state the applicable standard of proof and the reasons for its rulings on the motion.

If the trial court denies the forfeiture motion, it may be worth considering whether to file an interlocutory appeal. In deciding whether to take an appeal of a negative decision, consider whether other evidence will be sufficient to go forward without the victim's testimony, as well as the strength of the evidence and arguments supporting forfeiture in the particular case. Particularly when there is no existing evidence rule or caselaw on forfeiture, the prosecutor would be well-advised to consult with the Attorney General's Office before proceeding with an appeal.

At trial

Whether the forfeiture motion is successful or not, the prosecution should present, in its case in chief, evidence of the defendant's wrongful conduct to prevent the witness from testifying. An adverse ruling on forfeiture merely precludes the prosecution from introducing the victim's unconfronted out-of-court statements; it does not bar the prosecution from introducing powerful evidence of intimidation for other purposes. It may be necessary, however, for the prosecutor to file a motion to admit such evidence under the evidence rule governing evidence of "other crimes and bad acts,"[59] and for the court to provide a limiting instruction explaining the purpose(s) for which the jury can consider such evidence. Assuming there is sufficient evidence to move forward at trial without the victim's in-court testimony (whether by way of forfeiture or otherwise), evidence of intimidation or manipulation serves two important purposes. First, it explains the victim's absence, countering any inferences on the part of the jury that the victim simply did not care enough (or was not seriously enough harmed) to bother appearing for trial. Testimony of an expert on victim behavior can provide further assistance in explaining the victim's absence in light of the offender's conduct.[60] Second, evidence of intimidation or manipulation is evidence of consciousness of guilt.[61] Just as innocent parties do not need to flee the scene of a crime, they do not need to harm, threaten, pressure, or manipulate others to prevent them from testifying. A jury instruction on consciousness of guilt should be requested, and the prosecutor should argue consciousness of guilt in summation, even if the court declines to provide the jury charge.

At sentencing

If the defendant is found guilty—again, regardless of whether the court granted a forfeiture motion—wrongful conduct intended to dissuade the victim from testifying should be argued as an aggravating factor weighing in favor of a lengthier sentence within the allowable range.

Conclusion

Offenders in domestic violence cases have typically engaged in campaigns of intimidation and manipulation on a regular basis over the course of their abusive relationships. They count on their ability to cow their victims into silence and they presume they can continue to do so in the legal sphere, avoiding accountability by merely ensuring the victim does not appear for trial. When the campaign succeeds, and the victim fails to appear at trial, these defendants count on dismissal of the case or acquittal after trial, boldly asserting their constitutional right of confrontation.

The legal jiu-jitsu known as forfeiture by wrongdoing provides the leverage to turn the power of the intimidation against the offender. The prospect of filing (or ruling on) a motion to admit evidence under the doctrine may inspire trepidation in prosecutors and judges, particularly in those jurisdictions without an evidence rule or caselaw to guide them. However, its legitimacy as a tool to counter witness intimidation is well established; the United States Supreme Court has expressed its approval of the doctrine on multiple occasions. The more frequently prosecutors file such motions, and the more frequently courts are called upon to rule on them, the more comfortable and confident both prosecutors and judges will become. Moreover, increasing the frequency with which this strategy is employed will result in a more robust body of appellate caselaw, which, in turn, will fill many of the gaps in the law that may now cause prosecu-

tors and judges to feel hesitant about employing the doctrine. Forfeiture by wrongdoing is an available and effective strategy to hold offenders accountable and increase victim safety by eliminating the payoff for offenders who engage in acts of intimidation.

AEquitas Attorney Advisors are prepared to assist prosecutors in their use of forfeiture by wrongdoing. Additionally, AEquitas welcomes the contribution of any motion briefs on forfeiture by wrongdoing that can be shared with fellow prosecutors (briefs will be redacted to remove identifying information). Please contact us at info@aequitasresource.org or at (202) 558-0040.

ENDNOTES

1 Teresa Garvey is an Attorney Advisor with AEquitas.

2 Intimidation can occur with virtually any type of crime, but it occurs most frequently in crimes where the offender is in a position to have ongoing contact with, and to exert ongoing influence over, the victim or witness. Among those most vulnerable to intimidation are victims of intimate partner violence, as well as victims and witnesses in cases involving gangs, drugs, or other types of organized criminal activity, including human trafficking. While victims may be the most frequent targets in domestic violence cases, other witnesses, including cooperating informants or co-defendants, may also be the subject of efforts to silence. *See* Garvey, Witness Intimidation: Meeting the Challenge (AEquitas 2013) at 7-19, http://www.aequitasresource.org/Witness-Intimidation-Meeting-the-Challenge.pdf.

3 These responses may due in part to a hesitancy on the part of prosecutors to argue (or judges to consider) an unfamiliar legal doctrine. It is common, too, for forfeiture by wrongdoing to be confused with asset forfeiture—a wholly unrelated proceeding for confiscation of property as contraband or as the fruit of illegal activity.

4 *See* Giles v. California, 554 U.S. 353, 359-61 (2008) (*Giles II*).

5 6 How. St. Tr. 769, 770 (H. L. 1666). (*Dictum*; the prior testimony was not admitted in that case because of testimony that the witness had avoided testifying of his own volition.)

6 *See Giles II* at 358-371. The dissent had a different view of the significance of these early cases. *See Giles II* at 381-401 (Breyer, J., dissenting). For a thoughtful analysis of the competing views of the historical underpinnings of the doctrine, *see* Ellen Liang Yee, *Forfeiture of the Confrontation Right in Giles: Justice Scalia's Faint-Hearted Fidelity to the Common Law*, 100 J. Crim. L. & Criminology 1495 (2010).

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

8 *Id.* at 158.

9 See, *e.g.*, People v. Giles, 152 P.3d 433, 442-43 (Cal. 2007) [*Giles I*], *vacated sub nom.* Giles v. California, 554 U.S. 353 (2008) (*Giles II*) (cases cited in discussion of "waiver" versus "forfeiture" theory and nomenclature).

10 Although the Rule itself is currently titled, "Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability," the Rules Committee at one point titled it "Forfeiture by Wrongdoing" and substituted the word "forfeiture" for "waiver" in the Note that accompanied the rule. Note to Fed. R. Evid. 804(b)(6) (1997 Amendment).

11 Crawford v. Washington, 541 U.S. 36, 62 (2004) (emphasis added).

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

13 *Id.* at 832-34.

14 *Giles II*, *supra*.

15 *Giles I*, 152 P.3d at 437; *see* Cal. Evid. Code § 1370.

16 *Giles I*, 152 P.3d at 441-44. The Court further held that the appropriate burden of proof to prove the defendant's responsibility for the witness's absence was a preponderance of the evidence. *Id.* at 445-46.

17 *Giles II, supra*, 554 U.S. at 357-368.

18 *Id.* at 377 (emphasis added).

19 *Id.* at 380 (Souter, J., concurring) (emphasis added).

20 *See, e.g.*, People v. Kerley, 233 Cal.Rptr.3d 135, 174-75 (Cal. Ct. App. 2018); People v. Peterson, __ N.E.3d __ (Ill. 2017), 2017 WL 4173338 at 10 (opinion not yet released for publication); State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006); United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001); United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996).

21 State v. Byrd, 967 A.2d 285, 295-96 (N.J. 2009).

22 Procedural requirements for recognition of a "new" rule of evidence in a jurisdiction might mandate that those procedures be followed before the doctrine is actually applied. *See* note 53, *infra*.

23 *See* State v. Dobbs, 320 P.3d 705, 712 (Wash. 2014) ("Forfeiture by wrongdoing requires clear, cogent, and convincing evidence."); Md. Cts. & Jud. Proc. § 10-901 (requiring proof of forfeiture by clear and convincing evidence, along with other specific requirements); State v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995) (concluding that the "more exacting standard" of clear and convincing evidence is "the one most protective of the truth-seeking process" and thus the appropriate standard to adopt for forfeiture motions).

24 *See, e.g.*, Vasquez v. People, 173 P.3d 1099, 1106 (Colo. 2007) (requiring a showing of reliability, which may be satisfied by showing the statement is admissible under a codified hearsay exception); *Byrd*, *supra*, 967 A.2d. at 304 (requiring different standards of reliability depending on whether or not the statement was recorded, signed by the witness, or given under oath); State v. Thompson, 45 A.3d 605, 614-15 (Conn. 2012) (requirement that statement be sufficiently reliable to satisfy due process concerns).

25 *Crawford, supra,* 541 U.S. at 62.

26 *Byrd*, *supra*, 967 A.2d. at 304.

27 Vasquez v. People, 173 P.3d 1099, 1106 (Colo. 2007).

28 See, e.g., State v. Henry, 820 A.2d 1076, 1085-90 (Conn. App. Ct. 2003) ("waiver by misconduct" served not only as a waiver of confrontation but as a waiver of any hearsay objection); State v. Dobbs, 320 P.3d 705, 712 (Wash. 2014) (forfeiture applies equally to hearsay objection in this case tried before codification of forfeiture rule); Commonwealth v. Szerlong, 933 N.E.2d 633, 638-39 (Mass. 2010) (forfeiture applies to right of confrontation and hearsay objection).

29 *Giles, supra,* 554 U.S. at 364-65.

30 Fed. R. Evid. 804(a), (b)(6); *Davis, supra*, 547 U.S. at 533.

31 *E.g.*, Hendrix v. State, 813 S.E.2d 339 (Ga. 2018) (witness threatened just before trial took the stand but refused to testify).

32 *See* State v. Maestas, 412 P.3d 79 (N.M. 2018) (after being threatened, victim invoked Fifth Amendment to avoid testifying).

33 *E.g.,* Fed. R. Evid. 804(a).

34 *E.g.,* Ohio v. Roberts, 448 U.S. 56, 74-77 (1980), *abrogated on other grounds by Crawford, supra*; Barber v. Page, 390 U.S. 719 (1968); Bryant v. State, 951 So.2d 732, 741-44 (Ala. Crim. App. 2003); State v. Harris, 404 P.3d 926, 932-33 (Or. 2017); State v. Iseli, __ P.3d __, 293 Or.App. 27 (2018).

35 While there appears to be no caselaw addressing the issue, some prosecutors report they have successfully invoked the forfeiture rule where the victim recants on the stand (apparently on the theory that the recantation represents a form of unavailability). To the extent a victim is recanting on the stand, he or she can be cross examined about the prior statement, so the Sixth Amendment's Confrontation Clause is not implicated; however, in the absence of an exception, the jurisdiction's hearsay rules might bar the prior statement's admission. It is possible that a court could be persuaded to admit the prior statement on a forfeiture-type theory (where the recantation can be shown to be the result of the defendant's wrongdoing) as an exception to the hearsay rule, but such an argument is beyond the scope of the traditional forfeiture doctrine as discussed in this article.

36 Erin Gaddy, *Why the Abused Should Not Become the Accused*, The Voice, Vol. 1 No. 8, http://www.ncdsv.org/images/NDAA_WhyAbusedShouldNotBecomeAccused_TheVoice_vol_1_no_8_2006.pdf.

37 Two of the primary grant programs under the Violence Against Women Act to improve criminal justice response to intimate partner violence, administered Department of Justice, Office on Violence Against Women (OVW), identify the arrest of victims as sufficiently dangerous that its routine practice may result in a loss of federal funding. *See* OVW Fiscal Year 2017 STOP Formula Grant Solicitation at 8-9, available at https://www.justice.gov/ovw/page/file/967326/download (identifying forced testimony by victims of domestic violence against their abuser as an "activit[y] that compromise[s] victim safety and recovery"); OVW Fiscal Year 2017 Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program (formerly known as the Grants to Encourage Arrest and Enforcement of Protection Orders Program) at 13, available at https://www.justice.gov/ovw/page/file/922506/download (requiring that applicants for grant funds "demonstrate that their laws, policies, or practices and their training programs discourage dual arrests of offender and victim").

38 *See Iseli, supra.*

39 *See* note 35, *supra*.

40 It is important to enlist the aid of an advocate to ensure that the victim's safety and well-being are not compromised. In some cases, it may be safer to adopt a different strategy for proving the case.

41 *E.g.*, United States v. Yida, 498 F.3d 945, 960 (9th Cir. 2007); United States v. Wilson, 36 F.Supp.2d 1177, 1181-82 (N.D. Calif. 1999).

42 The Uniform Act has been adopted by every state in the United States, as well as the U.S. Virgin Islands. *See* http://www.uniformlaws.org/Act.aspx?title=Attendance%20of%20Out%20of%20State%20Witnesses.

43 *See* State v. Roman, 590 A.2d 686, 688 (N.J. Super. Ct. App. Div. 1991); Breeden v. State, 622 A.2d 160, 171-73 (Md. Ct. Spec. App. 1993) (discussing cases in other jurisdictions coming to same conclusion); *but see* Lovett v. Commonwealth, 103 S.W.3d 72 (Ky. 2003) (resort to Uniform Act not required to show unavailability where witness was in rehabilitation program in another state and compelling attendance would create undue hardship for witness).

44 United States v. Tirado-Tirado, 563 F.3d 117, 123-25 (5th Cir. 2009).

45 State v. Hallum, 606 N.W.2d 351, 356 (Iowa 2000); Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982) ("The theory of the cases appears to be that the disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal

right to object at the trial itself, is a wrongful act. Wrongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant's direction to a witness to exercise the fifth amendment privilege.").

46 *See, e.g., Hallum, supra,* 606 N.W.2d at 356-58 (finding defendant exercised emotional control and influence to prevent his brother from testifying at trial); Carr v. State, __ N.E.3d __, 2018 WL 3520892 (Ind. 2018) (hundreds of calls in which defendant talked to victim about not testifying and offered her money, a car, and a place to stay, as well as professing his love for her, were part of an "intensive campaign" to persuade her not to testify); *Szerlong, supra* (marrying victim so she would invoke her spousal privilege not to testify); *see also* Amy E. Bonomi, Rashmi Gangamma, Chris R. Locke, Heather Katafiasz, & David Martin, *"Meet me at the hill where we used to park": Interpersonal Processes Associated with Victim Recantation*, 73 Soc. Sci. & Med. 1054 (2011) (showing how emotional manipulation influences victims to recant their reports of abuse).

47 While there are relatively few cases construing the "acquiescence" basis for forfeiture, the Fourth Circuit has applied it to the defendant's participation in a conspiracy that has within its scope the silencing of the witness, where action to accomplish that object is reasonably foreseeable. United States v. Dinkins, 691 F.3d 358, 383-86 (4th Cir. 2012). Similarly, it seems likely that the failure of a defendant to protest when an associate proposes some action to silence the witness would be sufficient to attribute such action to the defendant on an "acquiescence" theory.

48 Although intimidation can affect victims and witnesses in many kinds of cases, other victims especially vulnerable to such tactics include those involved in cases of human trafficking, child abuse, elder abuse, and gang violence. See Garvey, *supra* n. 3.

49 *Byrd, supra,* 967 A.2d at 295.

50 *See* Garvey, *supra* n. 3 at 20-25; Franklin Cruz and Teresa Garvey, Improving Witness Safety and Preventing Witness Intimidation in the Justice System - Benchmarks for Progress (AEquitas & The Justice Management Institute 2014).

51 The need to resort to forfeiture or other strategies for prosecution without victim testimony is reduced when the victim remains engaged in the criminal justice process and is offered services, including safety planning. *See* Garvey, *supra* n. 3 at 32-37. Expediting the proceedings helps reduce the opportunity for witness intimidation, as does arranging for frequent contact between the victim and an advocate or investigator who can respond to victim safety issues and other needs the victim may have. *Id.* at 42-43.

52 *See, e.g., Byrd, supra,* at 967 A.2d at 298-304 (following New Jersey's Evidence Act in proposing adoption of new rule of evidence); Mortimer v. State, 100 So.3d 99 (Fla. Dist. Ct. App. 2012) (finding that trial court's application of forfeiture doctrine was error due to need to follow procedural requirements to adopt a new rule of evidence, but affirming conviction in view of recent formal adoption of forfeiture rule, which obviated need for remand).

53 AEquitas provides research assistance and consultation for help in preparing motions, as well as sample briefs. Contact us at info@aequitasresource.org or at (202) 558-0040.

54 *See, e.g., Davis*, *supra,* remanding for a possible hearing on forfeiture after ruling the *Hammon* victim's prior statement was inadmissible because it was testimonial.

55 *See, e.g.,* State v. Weathers, 724 S.E.2d 114 (Ct. App. N.C. 2012) (witness unable to continue testifying after defendant sent individual into courtroom to intimidate witness during direct examination; court held hearing and determined defendant had forfeited his right to cross examine).

56 *E.g.,* Fed. R. Evid. 104(a); N.J. R. Evid. 104(a).

57 *Davis, supra,* 547 U.S. at 833; *contra*, Md. Code, Cts. & Jud. Proc. §10-901(b)(1) (requiring that Maryland Rules of Evidence be "strictly applied" at hearing on forfeiture by wrongdoing).

58 *See* Hammond v. Commonwealth, 366 S.W.3d 425, 433 (Ky. 2012) (disapproving reliance on "stack of documents" to support forfeiture motion; prosecution should have called "the police investigator who prepared the documents or was otherwise sufficiently apprised of their creation and content, and competent as a witness to authenticate them and answer questions posed by the court or the opposing party.")

59 Fed. R. Evid. 404(b) or its equivalent.

60 *See generally*, Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 Colum. J. Gender & L. 67 (1998).

61 *See, e.g., State v. Henry*, 820 A.2d 1076, 1090-93 (Conn. App. Ct. 2003); *State v. Valencia*, 924 P.2d 497, 506 (Ariz. Ct. App. 1996)

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