



## What is Forfeiture by Wrongdoing?<sup>1</sup>

A legal concept that a defendant can *forfeit* their right to confront witnesses against them, if they engaged in *wrongdoing* to make them unavailable.

In human trafficking cases, prosecutors can use this doctrine of equity to introduce statements from victims and witnesses who are unavailable to testify at trial. Law enforcement and prosecutors should proactively combat witness intimidation in human trafficking cases, where traffickers have engaged in a course of conduct using force, fraud, and coercion to exploit their victims; however, when evidence of intimidation or tampering is identified, prosecutors have a powerful tool in forfeiture by wrongdoing to secure justice even where victims and witnesses are unable to participate.

## Proving Forfeiture by Wrongdoing

A hearing on a motion for Forfeiture by Wrongdoing must be heard outside the presence of the jury and the prosecutor must prove by a “**preponderance of the evidence**” (except in New York and Washington, where the standard is “clear and convincing evidence”) the following:

1

### The Witness is Unavailable

Unavailability can mean that the victim is:

- Missing and cannot be located despite diligent efforts
- Refusing to testify
- Testifying that they do not remember the subject of their prior statement
- Deceased or unable to testify due to infirmity or illness
- Claiming that privilege protects them from being compelled to testify

2

### The Defendant Engaged in Wrongdoing

Wrongdoing can mean any of the following:

- Overt or subtle threats
- Emotional appeals
- Physical violence
- Directing third parties or acquiescing in their efforts to procure a witness’s unavailability

Generally, the wrongdoing must have actually caused the witness’s unavailability, though some jurisdictions are more or less strict with how strong this nexus must be.

<sup>1</sup> See FED. R. EVID. 804(b)(6); note that there is variation between states on the exact requirements for forfeiture by wrongdoing. Prosecutors should make sure to carefully consult their jurisdiction’s rules and requirements.

3

## The Defendant Intended to Make the Witness Unavailable

The prosecutor need only prove that the defendant's actions were merely in part intending to make the witness unavailable, for example courts have found:

- It is sufficient for the prosecution to prove that wrongdoing was at least partially intended to procure the unavailability of the declarant (his wife).<sup>2</sup>
- The “[d]efendant need only intend ‘in part’ to procure the declarant's unavailability”.<sup>3</sup>
- To establish forfeiture by wrongdoing, prosecution “need only show that the defendant ‘was motivated in part by a desire to silence the witness’”.<sup>4</sup>
- That the trial court did not need to find that making the victim unavailable as a witness was the defendant's sole or primary purpose in marrying her; it is sufficient that it was a purpose in marrying her.<sup>5</sup>

### Case Example: *United States v. Pratt*<sup>6</sup>

**Facts:** The Defendant was convicted of eight counts related to sex trafficking and child sexual abuse material (CSAM). Agents recovered the minor victim after identifying an internet posting in which the defendant advertised the sexual services of the minor at a hotel. Agents met and spoke to the minor victim who made several statements incriminating the defendant. After being indicted, the defendant was instructed to have no contact with any witnesses or victims in the case. The defendant repeatedly violated the court order by calling his mother and having her put the victim on the phone. During these calls, the defendant repeatedly told the victim to not testify. Subsequently, the victim stopped working with law enforcement and could not be located. The prosecution moved to introduce the victim's statements to agents under the forfeiture by wrongdoing doctrine.

**Ruling:** The Court found that the defendant clearly engaged in wrongful conduct when he violated the court's order and contacted the victim from jail, and his intent to make the witness unavailable was demonstrated by the content of those phone calls, even if the threats were veiled. The Court concluded that “the threats become obvious against the backdrop of the graphic testimony of several women at trial who detailed how Pratt would beat prostitutes – including [the victim] – whom he considered disobedient.” The Court also felt that the lapse of time between the threats and trial did not lessen their impact, and stated, “given Pratt's history of abusing [the victim], we think it unlikely that time eroded the sense of threat.” The Court also noted, “[the victim's] personal feelings for Pratt—whom she considered her boyfriend—may have played a role too. But those feelings were tied up in the same abusive relationship.” They found that district court did not err by admitting the victim's statements under the doctrine of forfeiture by wrongdoing.

<sup>2</sup> *United States v. Montague*, 421 F.3d 1099 (10th Cir. 2005).

<sup>3</sup> *United States v. Gray*, 405 F.3d 227 (4th Cir.), cert. denied, 546 U.S. 912 (2005).

<sup>4</sup> *United States v. Dhinsa*, 243 F.3d 635 (2d Cir.), cert. denied, 534 U.S. 897 (2001).

<sup>5</sup> *Com. v. Szerlong*, 933 N.E.2d 633 (Mass., 2010).

<sup>6</sup> *United States v. Pratt*, 915 F.3d 266 (4<sup>th</sup> Cir. 2019).

## Forfeiture Hearing Checklist:

- If the witness is not present, **proffer to the court that the witness is unavailable**: this may require calling witnesses or entering exhibits to establish the declarant's unavailability.<sup>7</sup>
- **Proffer due diligence** in trying to secure the witness's presence in court. This may include calling witnesses to describe all efforts made to locate the witness and secure their presence in court, including why certain efforts may not have been pursued.
- Confirm **standard of proof** and that **hearsay is admissible**, including affidavits
- **Introduce jail phone calls**: While not necessary, many forfeiture by wrongdoing cases rely on jail phone calls where defendants are recorded while communicating with the witness, or to co-defendants or other associates about making the witness unavailable.
- **Call witnesses**: these might include investigators, patrol officers, 911 dispatchers, family members, friends, co-workers, and advocates (where the victim has waived confidentiality/privilege if applicable or has otherwise given the advocate permission to testify).
- **Question witnesses as to:**
  - First-hand knowledge—what they have personally observed (instances of coercion, intimidation, or control, threats from the defendant that they have heard or seen);
  - Statements by the victim and defendant; or
  - Any other sources of information (pictures, letters, journal entries, emails, voicemail messages, postings on social networking websites, or other sources).
- **Question witnesses, where appropriate, about:**
  - History of the relationship between the defendant and the witness, whether personal or professional;
  - The Defendant's behavior since arrest (contact with the victim via phone, in person, through third parties, social media, or other electronic means);
  - Protective Orders/No-Contact Orders, and any possible violations;
  - Defendant's criminal history of abuse/intimidation (arrests, convictions, dropped charges); and
  - Where charges were dropped previously, any actions by the defendant that caused the victim to drop the charges on those occasions.<sup>8</sup>

"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."

*Reynolds v. United States*, 98 US 145, 158 (1878).

<sup>7</sup> Generally, a prosecutor may prove unavailability, a preliminary fact, through hearsay affidavits under FED. R. EVID. 104(a) or its local equivalent; however note that some state courts have found that the rules of evidence do apply at a Forfeiture by Wrongdoing hearing, so prosecutors should make sure they are familiar with the rules of their jurisdiction.

<sup>8</sup> Additional resources dealing with forfeiture by wrongdoing can be accessed on the AEQUITAS website at [www.aequitasresource.org/resources](http://www.aequitasresource.org/resources).



## Case Preparation<sup>9</sup>

Anticipate possible witness intimidation, tampering, or manipulation.

Collaborate with law enforcement and community partners to provide support to victims.

Educate victims about intimidation and manipulation by their traffickers.

Maintain current contact information and addresses for witnesses, send subpoenas for court dates, and use officers to personally serve witnesses when needed.

Interview the victim and all witnesses about any intimidation or manipulation.

Train law enforcement to thoroughly investigate and document all victim encounters.

Prosecute defendants for forfeiture crimes including: violating judicial or protective orders, obstruction, and witness intimidation.

Draft motions in advance when facts support forfeiture even if the victim continues to participate in the prosecution.

If the unavailability of a witness becomes apparent after trial begins, request a hearing outside the presence of the jury.

Consider presenting expert testimony to explain how seemingly loving or innocuous acts are intended to, and do, influence victims.

<sup>9</sup> For more detailed considerations about preparing a case for a forfeiture by wrongdoing motion, see AEQUITAS, *Forfeiture by Wrongdoing*, THE PROSECUTORS' RESOURCE (2012), [https://aequitasresource.org/wp-content/uploads/2018/09/The\\_Prosecutors\\_Resource\\_Forfeiture\\_by\\_Wrongdoing.pdf](https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf); For more information on using experts in human trafficking cases, see Webinar by International Association of Chiefs of Police and AEQUITAS, *Working with Experts to Combat Common Defenses in Human Trafficking Cases*, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, [https://learn.theiacp.org/products/working-with-experts-to-combat-common-defenses-in-human-trafficking-cases#tab-product\\_tab\\_overview](https://learn.theiacp.org/products/working-with-experts-to-combat-common-defenses-in-human-trafficking-cases#tab-product_tab_overview) (uploaded December 21, 2020); and see: Webinar by International Association of Chiefs of Police, Jane Anderson, and Miiko Anderson, *Prosecution Foundations: Educating the Judge and Jury About the Realities of Human Trafficking*, AEQUITAS, [https://www.youtube.com/watch?v=gWt78Z\\_qjEg](https://www.youtube.com/watch?v=gWt78Z_qjEg) (uploaded November 2023).