

The PROSECUTOR

Forfeiture by Wrongdoing in a Post-Giles World

BY HERB TANNER, JR.

IN *GILES V. CALIFORNIA*, 128 S.Ct. 2678 (2008), the United States Supreme Court confirmed that the concept of forfeiture by wrongdoing of the Sixth Amendment's right of confrontation remains a powerful tool in the prosecution of domestic violence. At the same time the Court restricted the doctrine by setting out the requirement that the prosecutor show that the defendant acted with the intent to cause the unavailability of the witness.

THE DEATH OF BRENDA AVIE

Dwayne Giles shot and killed his ex-girlfriend, Brenda Avie, outside his grandmother's garage. No one else witnessed the shooting, but Giles's niece heard Giles and Avie speaking. Avie then yelled out, "Granny," several times and shots rang out. Giles's niece and grandmother ran outside to see Giles standing near Avie's body with a gun in his hand. Avie had been shot six times. Giles fled the scene. He was apprehended and arrested two weeks later and charged with murder.

At trial, he alleged he shot Avie in self-defense. He testified that he knew she was jealous, that she had threatened him and others, and that she had previously shot a man. He testified that, on the day of the shooting, Avie threatened to kill him and his new girlfriend. Giles then went into the garage and retrieved a gun; when he headed back toward the house, Avie charged at him. Fearing she had something in her hand, he closed his eyes and shot her. He claimed that he did not intend to kill her.

At trial, prosecutors admitted statements Avie had made to a police officer three weeks before the shooting. The officer was responding to a domestic violence report. Avie told officers that Giles accused her of having an affair, grabbed her by the shirt, lifted her off the floor, and punched her in the face

and head. After she broke free, Giles held a knife about three feet from her and threatened that he would kill her if he discovered she was cheating on him. Those statements were admitted under California Evidence Code §1370, which permits admission of hearsay describing the infliction or threat of physical injury when the declarant is unavailable and the statements are trustworthy.¹

Giles was convicted of first-degree murder. He appealed. The state argued, and the California Court of Appeals and Supreme Court of California both agreed, that Giles had forfeited his right to confront Avie by killing her, an intentional act that made her unavailable for cross-examination. Further, the California courts specifically found that Giles forfeited his Confrontation Right even though he did not murder Avie with the specific intent to make her unavailable to testify.

This concept, known as equitable forfeiture, was the issue directly addressed in the *Giles* case. In its simplest form, the concept is this: if a defendant does a wrongful act that leads to a declarant's unavailability, he will be deemed to have forfeited his right to confront the declarant so that he does not profit from his wrongdoing.

THE RECENT HISTORY OF FORFEITURE

The Groundwork: Testimonial v. Non-Testimonial

As described above, equitable forfeiture seems to have been a



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potentially powerful tool for prosecutors seeking to prosecute perpetrators of domestic violence, who so often ensure, by coercion or worse, that their victims do not testify at trial. To understand why the Supreme Court, in overruling the California decisions, chose to eliminate such a useful prosecutorial tool, one must first examine the rationale behind the holding in *Giles*. This logic stems from cases decided merely a few years before *Giles*, in which the circumstances under which the Sixth Amendment's Confrontation Clause could be invoked by a defendant were examined and outlined.

Prior to *Giles*, a body of case law was developing around the concept of equitable forfeiture. This kind of forfeiture applied only to those statements that were considered testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), a case decided during *Giles*'s appeal. *Crawford*, the progenitor of the line of cases leading to the decision in *Giles*, dealt with the defendant's stabbing of a man whom he believed to have raped his wife. The statement that the defendant's wife, Sylvia, had given to the police about the altercation was introduced at trial because Sylvia, asserting the marital privilege, refused to testify. The Supreme Court, with Justice Scalia writing the majority opinion, ruled that statements given to police officers during interrogations qualify as testimonial, and that defendants have the benefit of the Confrontation Clause when such evidence is introduced.

Further demarcation of the line between testimonial and non-testimonial statements occurred in *Davis v. Washington*, 547 U.S. 813 (2006), and *Hammon v. Indiana*, decided simultaneously by the Court. Scalia again wrote the majority opinion, ruling that the statements to a 911 operator by a victim were not testimonial in *Davis*, but that statements to a police officer after a domestic assault had occurred were testimonial in *Hammon*, since the batterer was not allowed to be present during the questioning. It is important to note that Scalia does not fault the officers for doing this, but merely rules that such testimony, if introduced, invokes the protections of the Confrontation Clause. These cases, along with *Crawford*, define testimonial evidence as anything that resembles in its purpose the sort of statements a witness would provide in court; that is, the statement must be given with the knowledge and purpose of aiding later prosecution. Thus, the 911 call in *Davis*, whose purpose was to procure emergency aid, was not ruled to be testimonial, but the interrogations conducted by police officers in *Hammon* were.

In *Giles*, the state conceded that the statements at issue were, in fact, testimonial. Relying on the decision in *Crawford*, and using Scalia's own language, the California Court of Appeals ruled that testimonial evidence in question was still admissible, because *Giles* had forfeited his right of confrontation by killing Avie. *Giles v. California*, 123 Cal. App. 4th 475 (2008). Justices Alito and Thomas, in separate concurring opinions in the Supreme Court's overruling of *Giles*, chided the state for that decision, expressing their opinion that the statements in question were non-testimonial. This highlights

the need for prosecutors to rigorously study the line between testimonial and non-testimonial statements drawn in *Davis* and *Hammon*, particularly concerning statements to the police and related officials.

Equitable Forfeiture not a Founding Era Exception

In his opinion in *Giles*, just as he did in *Crawford*, Justice Scalia examined the text of the Sixth Amendment and drilled deep into the historical record to rule that forfeiture required the defendant to act with the intent to make the declarant unavailable. The first task was to determine the scope of forfeiture at the time of the drafting of the Amendment. Beginning from the holding in a case decided in 1666, *Lord Morley's Case*, 6 How. St. Tr. 769 (H.L. 1666), the Court found that testimonial statements were admitted at the time of the founding if a "witness was 'detained' or 'kept away' by the 'means of procurement' of the defendant." Those words, "detained" and "procurement," suggest that the defendant must act with the *design* to keep the declarant from testifying against him.

This finding was bolstered by the fact that Justice Scalia could find no cases with circumstances similar to *Giles* that invoked forfeiture to admit unconfrosted statements:

The manner in which the rule was applied makes plain that unconfrosted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Prosecutors do not appear to have even *argued* that the judge could admit the unconfrosted statements because the defendant committed the murder for which he was on trial. *Giles v. California*, 128 S. Ct. 2678, 2684 (2008)

Moreover, the Court noted that for the first 194 years after ratification of the amendment, no case existed in which the prosecutor invoked the doctrine of equitable forfeiture in a murder case to admit unconfrosted statements of the victim. To the Court's way of thinking, if equitable forfeiture was understood as an exception at the time of the drafting, "one would have expected it to be routinely invoked in murder prosecutions like the one here, in which the victim's prior statements inculpated the defendant." (*Id.*)

The Court declined "to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter." (*Id.*) The California Court's judgment was vacated and the case remanded for further proceedings.

Forfeiture and Hearsay Objections

Prior to the decision in *Giles*, the invocation of forfeiture was

a far more nebulous concept. Even when forfeiture was invoked, it was not always entirely clear whether the offered evidence still had to satisfy some other hearsay exception. In *State v. Meeks*, 88 P.3d 789 (Kan. 2004), the Kansas Supreme Court held that the defendant forfeited his hearsay objections when he forfeited his Confrontation Clause objections. In *United States v. Garcia-Meza*, 403 F.3d 364 (CA 6, 2005), the Sixth Circuit only obliquely answers the question, acknowledging in a footnote that the defendant conceded that the proffered statements qualified as excited utterances, thereby suggesting that forfeiture of confrontation did not forfeit hearsay objections. (*Garcia-Meza*, n.2.)

Now, however, there is a far clearer standard for whether hearsay objections can apply when the defendant has forfeited his Sixth Amendment rights; simply put, they do not apply. This is because the operative standard—once *Giles* eliminated equitable forfeiture—became forfeiture by wrongdoing, as outlined in the Federal Rules of Evidence Rule 804(b)(6) and its state law counterparts. Under 804(b)(6) the prosecutor must show that the defendant committed a wrongful act with the intent of making the declarant unavailable, and that it did make the declarant unavailable. If successful, *all* hearsay was admitted, testimonial or not, without regard to whether any other hearsay exception applied.

Practical Implications

The line between testimonial and non-testimonial statements is particularly important in the wake of the elimination of equitable forfeiture in the *Giles* decision. Forfeiture by wrongdoing, as noted above, only applies to statements determined to be testimonial under the standards of *Crawford*, *Davis*, and *Hammon*; should a prosecutor be able to prove that a statement is non-testimonial, then forfeiture need not be addressed for that statement. The current system, then, requires that a prosecutor first discern carefully between testimonial and non-testimonial statements. Should a statement qualify as testimonial, the focus must then shift to arguing and proving that the defendant committed a wrongful act by which he intended to make, and succeeded in making, the declarant/victim unavailable. (FRE 804(b)(6).)

PROVING FORFEITURE POST-GILES

What is Sufficient Wrongdoing?

Prosecutors are not fighting this battle unarmed. There is a body of case law, federal and state, that helps define the limits of forfeiture by wrongdoing. Notably, *U.S. v. Scott*, 284 F.3d 758 (CA 7, 2002), examined the definition of wrongdoing:

Rule 804(b)(6) requires, first, that Scott engage in “wrongdoing.” That word is not defined in the text of Rule 804(b)(6), although the advisory committee’s notes point out that “wrongdoing” need not consist of a criminal act. One thing seems clear: causing a person not to

testify at trial cannot be considered the “wrongdoing” itself; otherwise the word would be redundant. So we must focus on the actions procuring the unavailability. Scott argues his actions were not sufficiently evil because they were not akin to murder, physical assault, or bribery. Although such malevolent acts are clearly sufficient to constitute “wrongdoing,” they are not necessary... Rather, it [Rule 804(b)(6)] contemplates application against the use of coercion, undue influence, or pressure to silence testimony and impede the truth-finding function of trials. We think that applying pressure on a potential witness not to testify, including by threats of harm and suggestions of future retribution, is wrongdoing.²

We know from experience that batterers sometimes enlist their families and friends to pressure victims not to participate. A past history of that pressure, prior cases in which the victim did not participate, a prior history of domestic violence, indirect or third-party contact with the victim are all relevant and may justify a finding that the defendant acquiesced in wrongdoing sufficient to effect forfeiture of the right of confrontation.

What is Sufficient Wrongdoing in Domestic Violence Cases?

What happens when the principles of forfeiture by wrongdoing are applied to the incredibly complex domestic violence case? What impact, if any, will the complex dynamics of domestic violence have on whether or not a defendant is found to have engaged in wrongdoing with the intent to make the victim/witness unavailable?

The decision in *Giles* includes guidance on this issue by highlighting the “relevance” of evidence of domestic violence:

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.³

Likewise, Justice Souter’s partial concurrence, joined by Justice Ginsburg, speaks of the role evidence of domestic violence might play in determining forfeiture:

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Examining the early cases and commentary, however, reveals two things that count in favor of the Court's understanding of forfeiture when the evidence shows domestic abuse. The first is the substantial indication that the Sixth Amendment was meant to require some degree of intent to thwart the judicial process before thinking it reasonable to hold the confrontation right forfeited; otherwise the right would in practical terms boil down to a measure of reliable hearsay, a view rejected in *Crawford v. Washington*, 541 U.S. 36 (2004). The second is the absence from the early material of any reason to doubt that the 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.⁴

Although both Justices frame their respective determinations in the context of domestic violence culminating in murder, there is no reason to suggest that evidence of domestic violence becomes less relevant if the defendant does not succeed in killing the victim. *Giles* was a murder case, and both Justices are speaking directly to the facts before them. The context and dynamics of the relationship remain relevant when the victim/witness is unavailable because she⁵ doesn't respond to a subpoena, or is otherwise unavailable.

Scalia's words are pure dicta, written in response to Justice Breyer's dissent. It is not essential to the holding, although still important as a guidepost for the California Supreme Court in considering, on remand, the intent of the defendant in that case. Although acts of domestic violence are often "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" it does not follow that all acts of domestic violence will justify forfeiture, i.e., a history of domestic violence plus unavailability does not automatically result in forfeiture.

Intent to Make Unavailable: "Engaging" in Murder

The essence of the *Giles* opinion is that prosecutors must show that the defendant engaged in or encouraged wrongdoing with the intent to make the witness/declarant unavailable. This is difficult enough, but the difficulty is compounded by the fact that a defendant may act with multiple intentions or may

not express his true intent. There will be cases in which the defendant threatens harm if the victim reports the battering to police; and there will be cases where the batterer has retaliated with increased violence for the victim having reported. Most cases, however, are likely to fall in the grey area of mixed and unexpressed intention.

Courts have considered the issue of multiple intents in forfeiture proceedings. In *United States v. Dhinsa*, 243 F.3d 635 (CA 2, 2001), the defendant was on trial for racketeering and the murder of two potential witnesses. Dhinsa contracted for the murder of one, Manmohan Singh, before there were any charges or court proceedings against him. Manmohan had confronted Dhinsa about the murder of his brother, and Dhinsa was afraid he would cooperate with police. At trial, the government offered Manmohan's hearsay statements as proof of Dhinsa's involvement in his murder. Dhinsa objected on several grounds, including that the government did not prove that Dhinsa intended to procure the unavailability of Manmohan, in part because no case involving Manmohan was pending at the time of his murder.

The Second Circuit first confirmed that the government must prove that the defendant acted with the intent to make a witness unavailable to establish forfeiture. On the issue of intent, the court had this to say: "The government need not, however, show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant 'was motivated *in part* by a desire to silence the witness.'"⁶

The Supreme Court of Tennessee reached a similar result in *State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006), a domestic violence murder case. The defendant began his relationship with the victim, LaKisha Thomas, after he was released from prison on parole. The relationship was characterized by Ivy's persistent threats and violence towards Thomas; about which she made several statements to friends. On June 6, 2001, police responded to Thomas's apartment and took her statement detailing that Ivy had pistol-whipped her in the face and head. Thomas had a laceration on her head and a black eye.

After the officer left Thomas's apartment, she and a friend drove to the Memphis court so she could swear out a warrant against Ivy. Ivy followed Thomas to and from the courthouse. He confronted Thomas in a parking lot, threatening her in front of several witnesses. Two days later, before the warrant could be served, Ivy shot and killed Thomas.

At trial the prosecutor entered some of Thomas's statements under Tennessee Rules of Evidence Rule 804(b)(6), arguing that Ivy killed Thomas in part to keep her from going forward with the assault charge. Ivy objected, and the Court of Criminal Appeals concluded that the trial court erred in admitting the statements under Rule 804(b)(6). The appellate court found that a preponderance of the evidence did not establish that Ivy acted with the intent to procure Thomas's absence as a witness. Relying on *Dhinsa*, the Supreme Court of Tennessee overruled the appellate court:

The preponderance of the evidence supported the trial court's finding that Ivy killed Thomas to prevent her from contacting police about his aggravated assault on June 6, 2001. Ivy followed Thomas as she drove to and from the Criminal Justice Center in Memphis, Tennessee, to swear out a warrant against him that was never served. He killed her only two days later. Given these facts, we disagree with the Court of Criminals Appeals' view that Rule 804(b)(6) required that Ivy had to know about the issuance of an arrest warrant for the aggravated assault; moreover, there was no requirement that Ivy's sole intention had to be preventing Thomas from testifying against him in a proceeding based on the aggravated assault. Ivy, 188 S.W.3d 132,147 (Tenn. 2006).

This is not the same as saying that every murder is perpetrated at least in part by an intent to make the victim unavailable. That is tantamount to finding intent irrelevant in murder cases, which was the rationale the *Giles* court used in overruling the California courts. In *Dhinsa*, it was clear that the defendant feared the damage to his criminal enterprise that Manmohan's potential cooperation could cause. In *Ivy*, the defendant feared his return to prison. While both defendants may have had multiple intentions, the successful use of forfeiture hung on proving that the murder was intended, at least in part, by the desire to make the witnesses unavailable.

Forfeiture by Coercive, but not Illegal, Conduct

In *State v. Hallum*, 606 N.W.2d 351 (Iowa 2000), the defendant was on trial for murder. The defendant's half-brother, a juvenile, was called as a witness in the case. He had already been convicted in juvenile court for his own role in the murder. He attempted to use the Fifth Amendment to avoid testifying, but his claim was invalid and he was jailed for contempt as a result. The defendant and the witness traded letters, and the witness was wavering on his refusal to testify because of the pressures of staying in jail. The defendant wrote back exhorting him to "hang in there" and to be sure not to say "anything important over the phone." The witness persisted in his refusal, and the court found that the defendant had forfeited his Confrontation Rights.

The Iowa Court determined first that wrongful conduct justifying forfeiture is not limited to an illegal act or threats, force or intimidation. Misconduct warranting forfeiture includes "'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.'"⁷⁷

The Iowa Court concluded that the defendant wrongfully procured the unavailability of the witness by encouraging and influencing him not to testify. The defendant therefore forfeited his right to confront the witness at trial.

Acquiescing in the Wrongdoing of Another

It is not unheard of for a defendant's family or friends to

approach victims of domestic violence and encourage, cajole, or threaten the victim in an effort to keep them off the stand. FRE 804(b)(6) provides that a defendant forfeits his confrontation rights if he "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness"⁷⁸ The definition of the term "acquiesce" is important to the analysis.

The Michigan Court of Appeals considered a forfeiture claim under MRE 804(b)(6), nearly identical to the federal version, in *People v. Kyle Jones*,⁹ 270 Mich App 208 (2006), lv. den. 477 Mich 866 (2006). Jones was on trial for murder. A witness, Troup, testified at trial that he knew both the victim and the defendant. He freely answered questions about events leading up to the murder. However, when the questions began to focus on the defendant's involvement, Troup refused to testify further, claiming that he was getting death threats. None of the threats came directly from the defendant.

The court held an *in camera* hearing on Troup's refusal. Troup told the court that he had heard that the defendant's cousin, Lockett, would kill him if he testified against the defendant; this was one of three death threats against him. Two of the defendant's female cousins, who were members of the same gang as the defendant, were in court during Troup's testimony, and Troup was afraid that they would tell Lockett. Lockett had been charged with witness intimidation in another case involving a gang leader like the defendant.

The next witness, Officer Johnson, testified that he received a call from Troup's mother that a gang member came to her door looking for Troup. The gang member claimed he received a letter from the defendant telling him to beat up Troup to keep him from testifying. Officer Johnson also testified to the threats made against another witness by members of the defendant's gang, and that the gang was known for its involvement in violent crime.

After the *in camera* hearing the trial court ruled that the defendant forfeited his confrontation right based on the history of witness intimidation by those involved, their personal relationships, and their affiliation with the defendant's gang. The Court of Appeals affirmed, ruling that it was not an abuse of discretion for the trial court to infer that the defendant played a role in making Troup unavailable.

It is unclear how heavily the letter weighed in the decision on forfeiture. Even with the letter, there was no direct evidence that the defendant directed his gang mates to threaten Troup with death if he testified, or even that the defendant knew about the death threats.

Past Domestic Violence plus Coercive Conduct as Wrongdoing

Many forfeiture cases, including *Giles*, deal with witnesses who are murdered. However, forfeiture certainly is not limited to murder cases; forfeiture can be established in other cases, including domestic battery cases. What role, if any, does evidence of prior domestic violence play in establishing forfeiture in cases where the declarant is unavailable, but still alive? In

United States v. Montague, 421 F.3d 1099 (CA 10, 2005), the Tenth Circuit considered such a case. The defendant in *Montague* was convicted of being a felon in possession of a firearm. The case came to the attention of police when defendant's wife, Deanna, filed a domestic violence complaint against him. Deanna told police there were two guns in the house and one in Montague's truck. Some months after defendant's arrest, Deanna told authorities and family members that she had framed her husband by retrieving his mother's guns and planting them in his house. However, she changed back to her original version of events shortly afterward, saying that she would not lie for him.

She testified at the grand jury that her husband did own and possess the guns, and that she had lied about framing him because she did not want him to go to jail. She also testified that, in contravention of the court's no contact order, she met with Montague five times at prison and spoke with him on the phone. She testified that they spoke about changing her version of events, and that she would avoid trouble with Montague as long as she did change her story.

When Deanna refused to testify at trial by invoking the marital privilege, the government offered her grand jury testimony and argued that Montague had forfeited his right of confrontation. The court had a brief evidentiary hearing at which the defendant stipulated that Deanna's daughters would testify to defendant's abusive history and the pre-trial contact.

The Tenth Circuit affirmed, citing the trial court's reliance on the contact in violation of the order, a fact that particularly troubled the trial court, as well as on the daughters' testimony and the prior history of violence.

The defendant specifically objected to the evidence of prior violence arguing that he could not have knowingly and intentionally waived his confrontation rights through misconduct committed before he could have anticipated this prosecution. However, in the court's view "this history was relevant to provide a better understanding of Montague's relationship with his wife. Although evidence of Montague's pre-prosecution conduct may be insufficient to warrant application of the wrongdoing/forfeiture exception, our focus is upon his post-incarceration communication with his wife and whether that conduct procured her unavailability as a witness."¹⁰

A history of domestic violence standing alone will be relevant but insufficient in most cases to establish forfeiture. Prosecutors must establish the link between that behavior and the victim's unavailability. The question of what and how much more is needed is still open. Montague's history of violence put his subsequent contact in context, helping to establish that it necessarily carried undertones of the previous abuse. In some cases, evidence of that relationship context may be sufficient to explain why the victim refuses to testify. The defendant's prior wrongdoing makes it clear that dangerous or deadly retribution would follow her testimony; thus, her decision is to save her life by making herself unavailable. The courts, however, in the interest of preventing any erosion of

the Sixth Amendment's power, are unlikely to create a blanket domestic violence exception to the Confrontation Clause.

Burden of Proof

Among the unresolved issues in *Giles* is the appropriate burden of proof for invoking forfeiture. In *Davis*, the Supreme Court took no position on the issue, but noted that the federal courts have "generally held the government to the preponderance-of-the-evidence standard." There is indeed a split in the federal circuits and the states, but the majority applies the preponderance standard. Only the Fifth Circuit, California and New York apply a clear-and-convincing standard.

GOING FORWARD WITH FORFEITURE

How much impact *Giles* will have is unclear. There are number of things that are more or less certain; things prosecutors should keep in mind as they fashion forfeiture arguments.

In Michigan, and in the 12 other states with statutes or rules similar to FRE 804(b)(6), if forfeiture is successful *all hearsay of the declarant is admitted*, so long as it is relevant and meets the balancing test of 403. The statements need not satisfy any other hearsay exception. States without a rule of evidence like FRE 804(b)(6) have split on whether the prosecutor must establish both forfeiture and that the statement is admissible under hearsay exceptions.

It is wise to request a pre-trial hearing on forfeiture. During that hearing, the rules of evidence do not apply. (FRE 104(a) and FRE 1101(d)(1).) Hearsay evidence, including the statements of the unavailable witness, can and should be considered. This goes a long way towards solving the problem that much of the evidence of the defendant's wrongdoing is in the hands of the unavailable witness. Although there will be cases where the victim will testify in the forfeiture hearing but not the trial, in most cases the hearing on forfeiture will have to proceed without the victim. The rules give us the tools to go forward.

Establishing forfeiture will require expanding the investigation of the defendant. Evidence of the charged conduct can be relevant. Past conduct, too, is relevant. Post-incident behavior and contact in contravention of bond conditions are also critical to the analysis. Most jurisdictions now have the capability to record calls made from jail, which should uncover even more evidence of wrongful contact and establish forfeiture.

Batterers are master manipulators. Without the proper context, a phone call from the jail to the victim can look and sound innocuous. Context is critical to establishing the batterer's true intent, and to weave the logical thread through to explaining why and how the batterer's conduct has made the victim choose not to participate. Expert testimony can provide an explanation of context.

There is a role here for an expert on both batterer behavior and survivors' responses to battering. One who works with batterers in a Batterer Intervention Program can explain how

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the batterer's conduct proves his intent. An expert on the reaction of survivors to battering can provide the causal link between what the batterer does and the victim's unavailability. For example, a call to the victim, judged through the eyes of a survivor of domestic violence, may well carry with it an implied but no less real threat of future violence. The appropriate expert can explain how that call, harmless on its face to one who hasn't experienced coercive control at the hands of the defendant, can drive the victim to become unavailable.

CONCLUSION

Giles confirms that forfeiture by wrongdoing remains a powerful tool in evidence-based prosecutions. *Giles* also confirms that prosecutors should not readily concede that statements of an unavailable victim are testimonial. The Sixth Amendment is only concerned with testimonial statements. The prosecutor need not argue forfeiture if the statements are non-testimonial. Of course, if the proffered statements are testimonial, forfeiture becomes the proper argument. Evidence of the batterer's past violence, coercive control and post-arrest conduct—especially contact with the victim—are all relevant and persuasive in establishing that the defendant acted with the intent and result of making the victim unavailable.

ENDNOTES

¹ 1370. (a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:

(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(2) The declarant is unavailable as a witness pursuant to Section 240.

(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.

(4) The statement was made under circumstances that would indicate its trustworthiness.

(5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official
(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

² *Cf. Steele v. Taylor*, 684 F.2d 1193, 1201 (CA 6, 1982) (noting that wrongful conduct includes the use of force and threats, and "persuasion and control" by a defendant.

³ *Giles v. California*, 128 S.Ct. 2678 (2008).

⁴ *Id.*

⁵ See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Inmate Partner Violence in the U.S. (1993-2004), available at <http://www.ojp.usdoj.gov/bjs/intimate/offender.htm> (indicating that in 2004, 96.9% of victims of intimate partner violence were female where the offender was male); see also U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Inmate Partner Violence in the U.S. (1993-2004), available at <http://www.ojp.usdoj.gov/bjs/intimate/table/women.htm> (indicating that in 75.3% of cases in 2004, offenders of intimate partner violence were male, regardless of the victim's gender).

⁶ *United States v. Houlihan*, 92 F.3d [1271] at 1279; See also, [*United States v. Johnson*, 219 F.3d [349] at 356. "As Rule 804(b)(6) and our prior precedents do not require such a finding of sole motivation, we decline to read one into the rule."

⁷ *Hallum*, citing *Steele v. Taylor*, 684 F.2d 1193, at 1201, 1203 (6th Cir. 1982) (finding that defendants had procured witness's unavailability when one of the defendants had used "his influence and control over [the witness] to induce her not to testify"); and *People v. Pappalardo*, 576 N.Y.S.2d 1001, at 1004 (Sup. Ct. 1991). ("As the cases in this area demonstrate, the specific method used by a defendant to keep a witness from testifying is not determinative.")

⁸ Federal Rule of Evidence 804(b)(6).

⁹ Michigan's Rule of Evidence substitutes "encouraged" for "acquiesced."

¹⁰ *United States v. Montague*, 421 F.3d 1099, 1104 (CA 10, 2005).