

# PUTTING THE FORFEITURE BY WRONG- DOING DOCTRINE TO WORK

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Mesa City Prosecutor

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**OBJECTIVES – AT THE END OF THIS PRESENTATION YOU SHOULD HAVE GREATER UNDERSTANDING OF THE FOLLOWING:**

1. Why DV cases are extremely vulnerable to witness intimidation / influence.
  2. What happens to DV cases when the victim does not appear for trial.
  3. Confrontation Clause challenges in DV cases.
  4. History of Forfeiture by Wrongdoing.
-

OBJECTIVES – AT THE END OF THIS  
PRESENTATION YOU SHOULD HAVE GREATER  
UNDERSTANDING OF THE FOLLOWING:

5. Case-law on FBW.
  6. How to put on a FBW Hearing in Court.
  7. Using FBW evidence in your case in chief.
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**DV CASES ARE EXTREMELY VULNERABLE TO  
WITNESS INTIMIDATION / TAMPERING.**



VICTIM INTIMIDATION IS BOTH A LEGAL AND FACTUAL PROBLEM FOR THOSE WHO WANT TO HOLD THE DOMESTIC VIOLENCE OFFENDER ACCOUNTABLE.



LEGAL PROBLEM BECAUSE THE LEGAL  
RULES BAR MOST STATEMENTS WHEN THE  
DV VICTIM DOES NOT APPEAR AT TRIAL.

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FACTUAL PROBLEM, BECAUSE JURY FAILS  
TO HEAR FACTS OF THE DV CRIME FROM  
THE VICTIM

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ONE WAY TO ADDRESS BOTH THE LEGAL  
AND FACTUAL HURDLES COMMON IN DV  
CASE IS THE DOCTRINE OF FORFEITURE BY  
WRONGDOING

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# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

To solve the problem one needs to understand both the LEGAL and FACTUAL obstacles.

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# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

80-90% of domestic violence victims do not cooperate with the prosecution (likely higher).

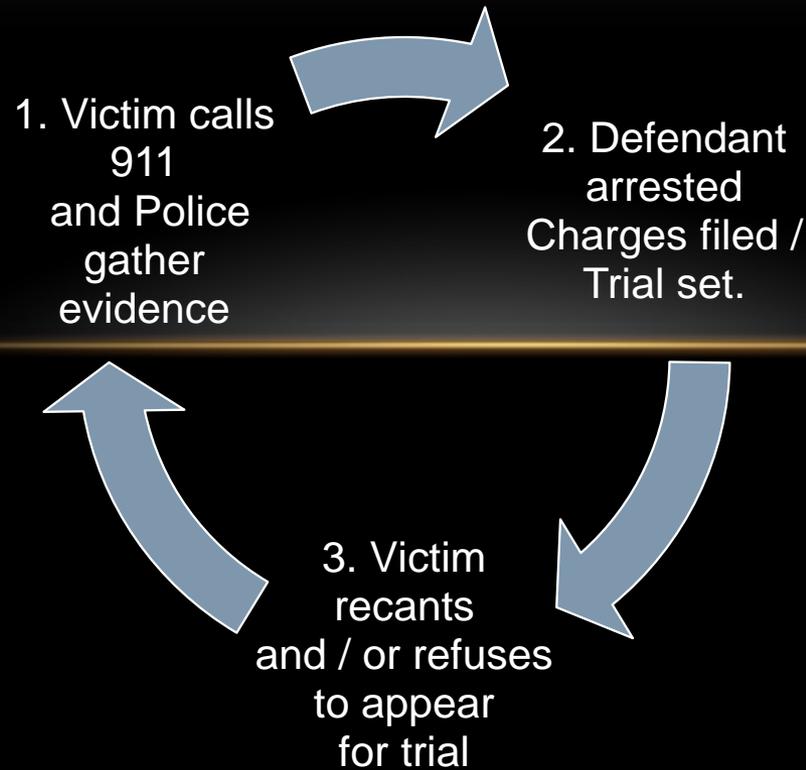
- Bridging the Gap between the Rules of Evidence and Justice for Victims of Domestic Violence, 8 Yale JL & Feminism 359, 367 (1996)

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

POWER AND CONTROL does not end with the defendant being arrested. In fact, it tends to continue and increase after arrest and until the termination of the case.

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# TRADITIONAL VISUAL OF DV CYCLE TOO SIMPLISTIC

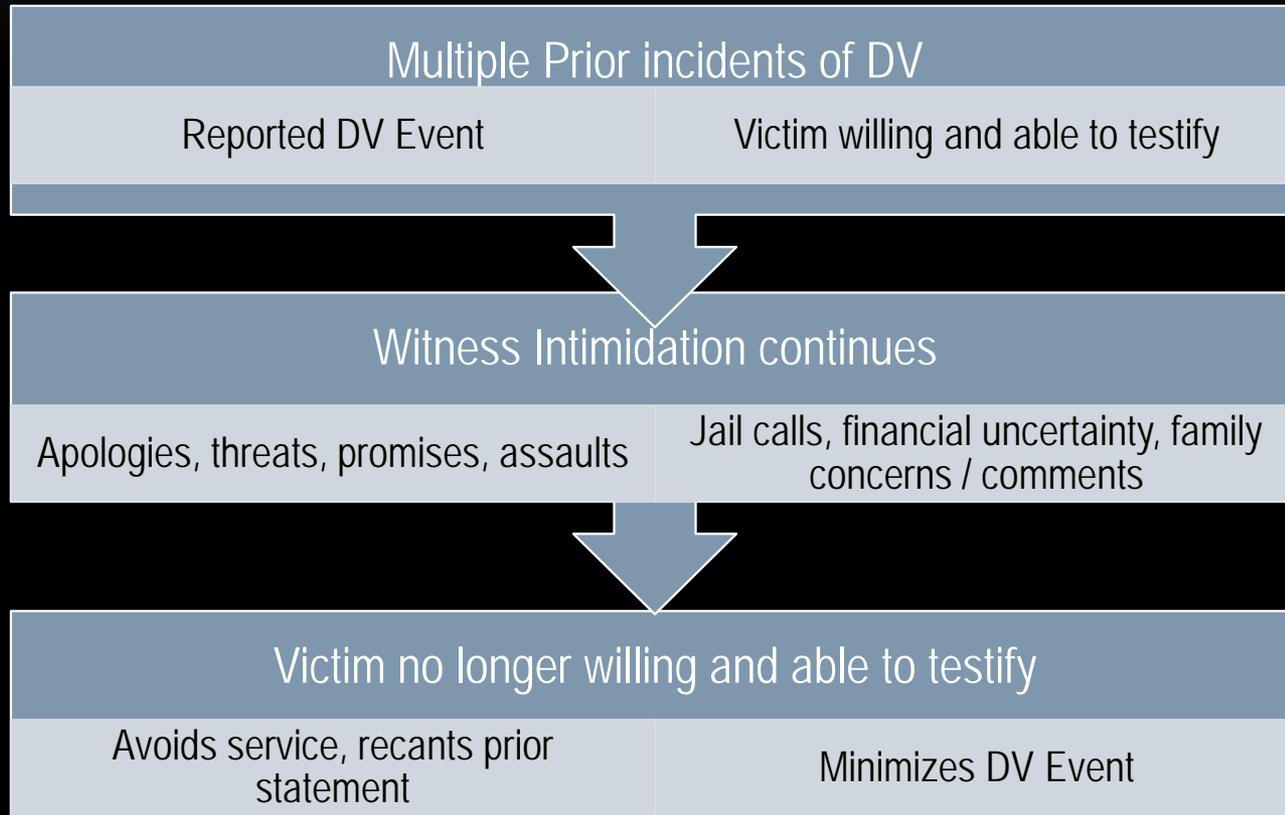


DOMESTIC VIOLENCE ISN'T A ONCE ONLY  
CRIME.

OPRAH: "HE WILL HIT YOU AGAIN."



# DOMESTIC VIOLENCE IS NOT A ONE-TIME EVENT



# VICTIM INTIMIDATION BEGINS BEFORE POLICE ARE CALLED

Phoenix PD's 4 Questions (excellent for developing 404(b), impeachment, and forfeiture material):

1. How frequently and seriously does your partner intimidate you? Describe.
2. How frequently does your partner demand you do things and verify you did them? Describe.



# VICTIM INTIMIDATION BEGINS BEFORE POLICE ARE CALLED

Phoenix PD's 4 Questions (excellent for developing 404(b), impeachment, and forfeiture material):

3. Describe the most frightening or worst event involving your partner.
4. Have you ever made it known to your partner that you wanted to leave? How did your partner react?



# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- What are the factual reasons that a victim or witness refuse to appear at trial?
  - In DV cases you must think past traditional mobster or gangster witness threats intimidation.
-

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Common Misconception:
    - Media has done a great job illustrating victim intimidation by mobsters and gangsters.
    - There is a lack of understanding regarding victim intimidation in DV cases.
    - Criminal Justice system uses great resources to protect witnesses in gang / organized crime cases.
-

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- CURRENT HELLS ANGELS CASE IN MARICOPA COUNTY SUPERIOR COURT
- Facts: Hells Angels killed woman in Mesa.
- At least one witness is in the Federal Witness Protection Program.
- Armed guards protect the witnesses in the Federal Witness Protection Program.
- Deputies outside the courtroom hold AR 15 assault rifles.
- Anyone who wishes to enter courtroom is searched.
- Criminal Justice system uses great resources to protect witnesses in gang / organized crime cases.

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION



## DOMESTIC VIOLENCE

because no woman should decide to vacuum when the game is on

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Factors Related to Increased Risk of Intimidation
  - The violent nature of the initial crime.
  - Previous personal connection to the defendant.
  - Geographical proximity to the defendant.
  - Cultural vulnerability – membership in easily victimized groups, such as the elderly, children, or recent or illegal immigrants.
    - National Institute of Justice, *Victim & Witness Intimidation*, 1995

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Witness tampering is most common DV & Child Abuse crime – yet it is hardly ever recognized, raised, or charged.
  - We can do a better job at recognizing witness intimidation in DV cases.
  - Right now we usually only know about intimidation when the intimidation isn't successful!
-

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- The person (victim) most likely to be in possession of evidence of witness tampering / intimidation may not know it!
- Because of this, many victims never report the illegal activity.

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

Most explicit acts of intimidation take place where police exert little control; at the witness's home, school, or work or while the witness is running errands or socializing.

Fyfe & McKay 2000

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Recognize these common methods and modes of witness intimidation in DV cases:
  - Custody of children
  - Child Support
  - Threat of protracted litigation



# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Recognize these common methods and modes of witness intimidation in DV cases:
  - Stalking
  - Homicide



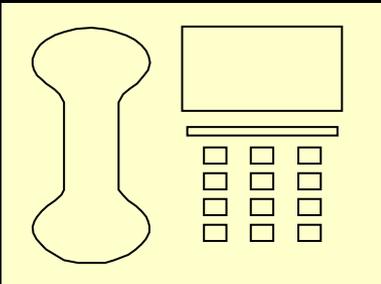
# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Witness tampering is most common DV & Child Abuse crime – yet it is hardly ever recognized, raised, or charged.
- Common methods and modes of witness intimidation in DV cases:
  - Threats -- prior and subsequent
  - Assaults – prior and subsequent
  - Threats and assaults to 3<sup>rd</sup> party
  - Criminal Damage



# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Witness tampering is most common DV & Child Abuse crime – yet it is hardly ever recognized, raised, or charged.
- Common methods and modes of witness intimidation in DV cases:
  - Jail calls
  - Immigration
  - Flowers



# JAIL TAPES





## JAILHOUSE PHONE CALLS REVEAL WHY DOMESTIC VIOLENCE VICTIMS RECANT

"The existing belief is that victims recant because the perpetrator threatens her with more violence. But our results suggest something very different," said Amy Bonomi, lead author of the study and associate professor of human development and family science at Ohio State University.

<http://researchnews.osu.edu/archive/vicrecant.htm>



## JAILHOUSE PHONE CALLS REVEAL WHY DOMESTIC VIOLENCE VICTIMS RECANT

"Perpetrators are not threatening the victim, but are using more sophisticated emotional appeals designed to minimize their actions and gain the sympathy of the victim. That should change how we work with victims."

<http://researchnews.osu.edu/archive/vicrecant.htm>

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Witness tampering is most common DV & Child Abuse crime – yet it is hardly ever recognized, raised, or charged.
- Common methods and modes of witness intimidation in DV cases:
  - Plea for forgiveness
  - “Keeping the family together”
  - If you tell, it will ruin my career.
  - Social media and text messages



# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Witness tampering is most common DV & Child Abuse crime – yet it is hardly ever recognized, raised, or charged.
- Common methods and modes of witness intimidation in DV cases:
  - Court manipulation
  - 3<sup>rd</sup> party interference
  - Loss of home

15509351  
WARRANTY DEED  
STATUTORY FORM  
FOR INDIVIDUALS  
Ja 115122443

KNOW ALL MEN BY THESE PRESENTS: That JERRONE J. PATRYLAK, JR. AND ELIZABETH C. LEWIS - PATRYLAK, HUSBAND AND WIFE

whose street number and post office address is: 3784 DARTMOUTH, OXFORD, MI. 48371  
Convey and Warrant to: CHARLES E. WARD AND BILLY V. WARD, HUSBAND AND WIFE

whose street number and postoffice address is: 1451 HARRIS, FERRISDALE, MI. 48229

The following described premises situated in the TOWNSHIP OF DEWALON, County of OAKLAND and State of Michigan, to wit:

North 200 feet of Southwest 1/4 of Southwest 1/4 of Section 26, Township 4 North, Range 9 East, Section 23 Township 4 North, Range 9 East, Michigan recorded on beginning a plat in the West line of lot, that is North 00 degrees 23 minutes 18 seconds West 133.50 feet from the Southwest corner of Section 26, thence North 90 degrees 23 East 133.45 feet, thence South 89 degrees 27 minutes 00 seconds East 200.00 feet, thence South 89 degrees 27 minutes 22 seconds West 133.90 feet to the point of beginning

Conveyance to wit: 3784 DARTMOUTH

The Real No. (S)-38-300-001

for the sum of ONE HUNDRED TWENTY-TWO THOUSAND NINE HUNDRED AND 00/100th (\$122,000.00) Dollars

subject to: (1) Existing building and use restrictions, easements, and zoning ordinances, if any

Dated this 20th day of June, 1988

Signed and sealed in presence of  
CONNIE PLAMONDON  
ELIZABETH C. LEWIS - PATRYLAK  
ELIZABETH C. LEWIS - PATRYLAK

STATE OF MICHIGAN  
COUNTY OF OAKLAND

The foregoing instrument was acknowledged before me this 20th day of June, 1988, by JERRONE J. PATRYLAK, JR. AND ELIZABETH C. LEWIS - PATRYLAK, HUSBAND AND WIFE.

CONNIE PLAMONDON, Notary Public, County, Michigan  
ACTING IN OAKLAND

City Treasurer's Certificate - liber & page stamp  
MICHIGAN REAL ESTATE TRANSFER TAX here  
\$ 1.00 DEED  
\$ 2.00 REDEMPTION  
\$ 100.00 TOWNSHIP TAX (OWNERS)  
\$ 1.00 TO STATE S.A. EXCEPT 10% MICHIGAN DEBT

After recording return to:  
CHARLES E. WARD  
BILLY V. WARD  
FERRISDALE, MI. 48229

Drafted by:  
MICHAEL ALLINGHAM  
815 N. 15  
ORTONVILLE, MI. 48861

STW J. ALLEN, CLERK REGISTER OF DEEDS  
100  
3 DOWNTOWN  
-125.50  
-127.50  
T. (05) RD

My Deed was not recorded in the register of Deed it was missing the liber and page number from the recorded stamp.

Provided by LOFTIS TITLE COMPANY  
O.K. - J.S. X

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

- Witness tampering is most common DV & Child Abuse crime – yet it is hardly ever recognized, raised, or charged.
- Common methods and modes of witness intimidation in DV cases:
  - Loss of income
  - Loss of what's familiar
  - Divorce

**Marriage License**

State of Washington, County of King

**T**o any person legally authorized to solemnize marriages:

The following named individuals have applied for a marriage license in accordance with R.C.W., Chapter 26.04, and you are hereby authorized to solemnize the marriage of:

DANIEL SAVAGE and AMY JOAN JENNIGES

March 08, 2004 and May 06, 2004

(Date (Not to be earlier)) between (Date (Not to be after))

Solemnization is not authorized unless it occurs between these dates.  
You are required by law to return the Washington State Department of Health Certificate of Marriage form to King County within thirty days after solemnizing the marriage.

License is not valid outside the State of Washington.

20040305700016  
Witness my hand and official seal

By *Dean C. Logan*  
Dean C. Logan  
King County  
Records, Elections and Licensing Services Division

NOTARY SEAL

King County

NOTARY SEAL

Ronald C. Sims  
King County Executive

This copy to be retained by person performing ceremony.

# PROBLEM IN DOMESTIC VIOLENCE CASES: VICTIM INTIMIDATION

Police and prosecutors needs to prepare each case as if the victim will not appear for trial because of witness tampering / intimidation.

# WHAT HAPPENS WHEN DV VICTIM DOES NOT APPEAR FOR TRIAL?

Unable to proceed without victim statements --case gets dismissed  
– offender not held accountable.

Offenders who are successful become more bold and more sophisticated.

# WHAT HAPPENS WHEN DV VICTIM DOES NOT APPEAR FOR TRIAL?

- V likely still in danger (offender empowered), victim further defeated.
- V loses faith in the criminal justice system.



# WHAT HAPPENS WHEN DV VICTIM DOES NOT APPEAR FOR TRIAL?

- When and if there is an admissible statement then the case may still go forward without the victim with the use of a hearsay and Confrontational Clause exception.



**HEARSAY!**

# WHAT HAPPENS WHEN DV VICTIM DOES NOT APPEAR FOR TRIAL?

- Specter of missing victim without forfeiture evidence leaves impression that V doesn't care about case, why should court?



# CONFRONTATION CLAUSE CHALLENGES IN DV CASES

The Sixth Amendment's Confrontation Clause provides that, "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

# CONFRONTATION CLAUSE CHALLENGES IN DV CASES

History -- 6<sup>th</sup> Amendment right to confrontation was first found to apply to the States via the 14<sup>th</sup> Amendment in 1965 (Pointer v. Texas)

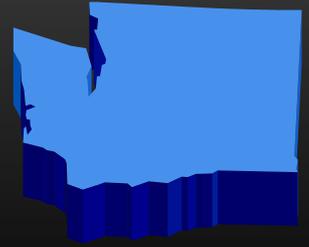
# CONFRONTATION CLAUSE CHALLENGES IN DV CASES

Right to confront one's accuser is a concept that dates back to Roman times.

Confrontation Clause bars "testimonial" statements of a witness who does not appear for trial, unless that witness was unavailable to testify and the defendant had a prior opportunity for cross examination.

# CRAWFORD V. WASHINGTON

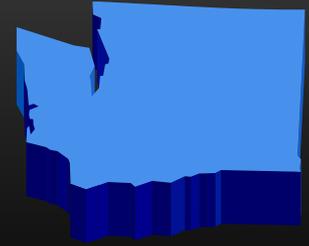
## 541 US 36 (2004)



- Facts:
  1. Wife made recorded statements that incriminate husband.
  2. Wife doesn't testify at husband's trial, claiming marital privilege (unavailable).
  3. State introduced wife's statements under hearsay exception of Statement Against Penal Interest.
  4. Defendant never able to **cross examine** wife.

# CRAWFORD V. WASHINGTON

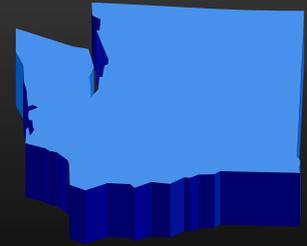
## 541 US 36 (2004)



- Holding:
  1. Where non-testimonial hearsay is at issue it is wholly consistent with the framer's design to afford the States flexibility in their development of hearsay laws.
  2. Where testimonial evidence is at issue, however the 6<sup>th</sup> Amendment demands what the common law required: (1) unavailability; and (2) a prior opportunity for cross examination.

# CRAWFORD V. WASHINGTON

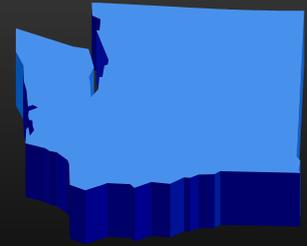
## 541 US 36 (2004)



- However:
  - 'Testimonial' not clearly defined.
    - At a minimum testimonial evidence includes statements made:
      - At preliminary hearing.
      - Before grand jury.
      - During a former trial.

# CRAWFORD V. WASHINGTON

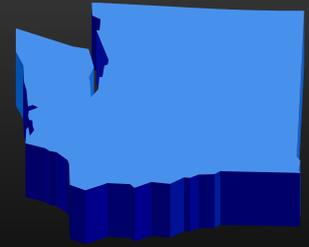
## 541 US 36 (2004)



- However:
  - 'Testimonial' not clearly defined.
    - At a minimum testimonial evidence includes statements made:
      - Police Interrogations.
      - Affidavits
      - Prior testimony with no cross examination

# CRAWFORD V. WASHINGTON

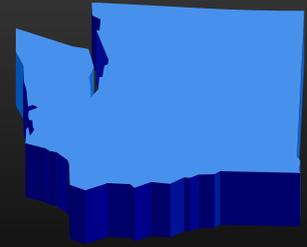
## 541 US 36 (2004)



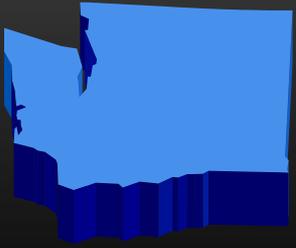
- Non-testimonial:
  - An off-hand overheard remark.
  - A casual remark to an acquaintance.
  - Business records.

# CRAWFORD V. WASHINGTON

## 541 US 36 (2004)



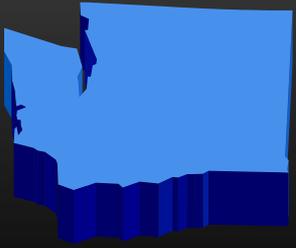
- Non-testimonial:
  - Statements in furtherance of a conspiracy.
  - Dying declarations (not clearly decided)
  - RULE OF FORFEITURE OF WRONGDOING



DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813 (2006)



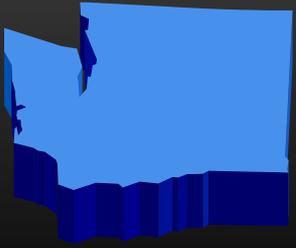
Two companion DV cases go to the Supreme Court after Crawford where the meaning of 'testimonial' in two different DV cases would be dispositive.



DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813 (2006)



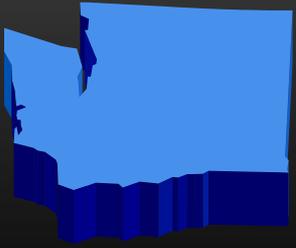
- Davis: Victim Michelle McCottry phoned 911 and made a number of statements to emergency operator while in the midst of a DV disturbance.
- Victim's statements implicated the defendant.
- At trial, the victim did not appear and the 911 call was admitted into evidence.



DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813 (2006)



- Hammon: Police respond to domestic disturbance. When they arrive, victim is outside by herself. There was physical evidence of a domestic fight. The victim and suspect were interviewed separately, and the victim told her side of the story and filled out a battery affidavit.
- At trial the victim did not appear and the affidavit was used to convict the defendant.

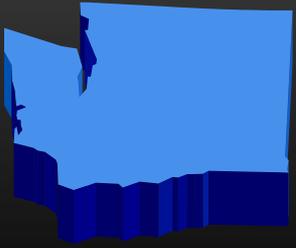


DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813 (2006)



- Holding:

Statements are non-testimonial and are thus admissible when made in the course of a police interrogation under circumstances objectively indicating that the **primary purpose** of the investigation is to enable police assistance to meet an ongoing emergency.

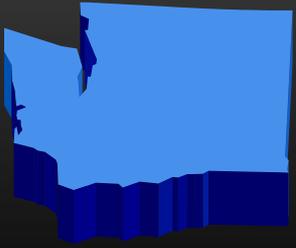


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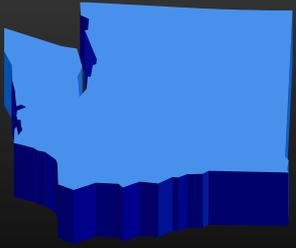


DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813 (2006)



- Holding:

Statements are testimonial and inadmissible when the “circumstances objectively indicate that there is no such ongoing emergency, and that the **primary purpose** of the interrogation is to establish or prove **past events** potentially relevant to later criminal prosecution.



DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813 (2006)



- Were the statements in Davis testimonial or non-testimonial?  
--- NON-TESTIMONIAL (admissible)
  
- Were the statements in Hammon testimonial or non-testimonial?  
--- TESTIMONIAL (inadmissible)

# MICHIGAN V. BRYANT



## FACTS:

- Bryant and Covington argued.
- Bryant shot Covington through a door.
- Covington drove himself to gas station.

# MICHIGAN V. BRYANT



## FACTS:

- Police were called.
- Police questioned Covington at the gas station as to what happened.
- Covington made statements and died from the gunshot

# MICHIGAN V. BRYANT



## Important to Note:

- Actual trial was before Crawford decision.
- When prosecutor attempted to enter Bryant's statements at trial, the defense objected.
- State said that Bryant's statements were admissible as a Dying Declaration and Excited Utterances.

# MICHIGAN V. BRYANT



## Important to Note:

- However, the prosecutor only laid the foundation for the Excited Utterances.
- Supreme Court unable to consider this as a dying declaration case.

# MICHIGAN V. BRYANT



## Procedural History:

Since statements were made after the fact to the police, the Michigan Supreme Court, following *Davis / Hammon* held that Covington's statements were TESTIMONIAL.....

# MICHIGAN V. BRYANT



## Procedural History:

- The US Supreme Court held that Covington's statements were NOT TESTIMONIAL and reversed and remanded case.

# MICHIGAN V. BRYANT



Whether a Statement to the Police is testimonial or not depends on:

- (1) The Primary Purpose of the interrogator; and
- (2) Circumstances objectively indicate an ongoing emergency; and
- (3) Formality of the statements to the police; and
- (4) Any and all other circumstances.

# MICHIGAN V. BRYANT



Remember in Davis / Hammon – statements to the police, **after the emergency** was over were testimonial.

# MICHIGAN V. BRYANT



The court reasoned that since a gun was used, the shooter was presumably loose, this was an ongoing emergency.



# MICHIGAN V. BRYANT ( A GAME CHANGER?)

## (Majority)

Police are likely to have mixed motives (Primary Purpose) – those to collect evidence for trial, and those to protect public with unknown shooter loose.

- (1) Protect themselves
- (2) Protect the public
- (3) Preserve Evidence

# MICHIGAN V. BRYANT



Victims may have mixed motives:

(1) Excited Utterance best:

“statements made as excited utterances presumable lack the TESTIMONIAL PURPOSE that would subject them to the requirement of confrontation.”

# MICHIGAN V. BRYANT



## Ongoing Emergency factors:

- (1) Scope of potential victims (not good for DV cases).
- (2) Type of weapon used.
- (3) Extent of Injuries

# MICHIGAN V. BRYANT



Ongoing Emergency factors:

(4) Location.

(5) Magnitude of response.

(6) Ongoing stream of information.

(7) Passage of time.

# SUMMARY-- CONFRONTATION CLAUSE CHALLENGES IN DV CASES

- Testimonial statements that haven't been subject to cross examination are not coming in. Period.
- Non-Testimonial statements not subject to cross examination are admissible subject to hearsay rules.
- To determine whether testimonial or non-testimonial, use the Primary Purpose test.
- Marshal all facts that show lack for formality, emergency, cry for help, or statements made to non-law enforcement to demonstrate non-testimonial.

# SUMMARY-- CONFRONTATION CLAUSE CHALLENGES IN DV CASES

- Police should seek out family, friends, and neighbors of victims who may have spoken with victim about her domestic abuse.
- Those statements to non-law enforcement are likely non-testimonial AND are likely relevant to a FBW hearing.

# HISTORY OF THE FORFEITURE BY WRONGDOING DOCTRINE



Lord Morley's Case

1666

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# LORD MORLEY'S CASE

"The accused has a right to 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 he has kept away."

Lord Morley's Case, 6 St Trls 770 (1666) England.

# REYNOLDS V. UNITED STATES

## 98 US 145 (1878)

1<sup>st</sup> US Supreme Court case on forfeiture by wrongdoing.

After hearing testimony that the suggested that the defendant had kept his wife away from home so she could not be subpoenaed to testify, the trial court permitted the government to introduce the testimony of the defendant's wife from a previous trial.

No one should be permitted to take advantage of his wrong, an dis "the outgrowth of a maxim based on the principles of common honesty."

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# REYNOLDS V. UNITED STATES

## 98 US 145 (1878)

"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."

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# REYNOLDS V. UNITED STATES

## 98 US 145 (1878)

“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 his constitutional rights have been violated.”

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# CRAWFORD V. WASHINGTON

## 541 US 36, 62 (2004)

- Supreme Court acknowledged the existence of the rule of forfeiture of wrongdoing.
  - Supreme Court said that FBW extinguishes confrontation claims on essentially equitable grounds.
-

DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813, 832-834 (2006)

- Many different groups petitioned the Supreme Court in this case to give greater flexibility in the use of testimonial evidence for DV cases.
- Supreme Court acknowledged: This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at all.
- When this occurs, the Confrontation Clause gives the criminal a windfall.

DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813, 832-834 (2006)

- “But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.”

DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813, 832-834 (2006)

- “While defendants have no duty to assist the State with proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal – trial system.”

DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813, 832-834 (2006)

- “We reiterate what we said in Crawford: that the “rule of forfeiture by wrongdoing .....extinguishes confrontation claims on essentially equitable grounds.”

DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813, 832-834 (2006)

- “That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”

DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813, 832-834 (2006)

- “Federal courts using the Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance of the evidence standard.”
- AZ Rules follow the Federal Rules of Evidence unless there is a deliberate departure from them.

DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813, 832-834 (2006)

- "... if a hearing on forfeiture is required .... hearsay evidence, including the unavailable witness's out of court statements, may be considered"

**HEARSAY!**  
(admissible)

DAVIS V. WASHINGTON  
HAMMON V. INDIANA  
547 US 813, 832-834 (2006)

- “Crawford, .... did not destroy the ability of the courts to protect the integrity of their proceedings.”

**HEARSAY!**  
(admissible)

GILES V. CALIFORNIA  
128 S. CT. 2678 (2008)

Earlier abuse, or threats of abuse intended to dissuade the victim from resorting to outside help would be HIGHLY RELEVANT to this inquiry (*forfeiture by wrongdoing*) , as would evidence of ongoing criminal proceedings at which the victim would be important to testify.

GILES V. CALIFORNIA  
128 S. CT. 2678 (2008)

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 stop her from reporting abuse to the authorities or cooperating with a criminal prosecution rendering her prior statements admissible under the forfeiture doctrine.

GILES V. CALIFORNIA  
128 S. CT. 2678 (2008)

No case or treatise that we have found however, suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights.

This means that when judge makes finding that defendant forfeited his right to confrontation, that finding also includes to object to admissibility on hearsay grounds as well.

GILES V. CALIFORNIA  
128 S. CT. 2678 (2008)

"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 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." --Souter's concurrence

# GILES V. CALIFORNIA

## 128 S. CT. 2678 (2008)

Forfeiture by wrongdoing is one of two exceptions to the Confrontation Clause that existed during the founding of our country.

However – Giles limits forfeiture by wrongdoing to only those cases where the defendant's conduct was designed to keep the witness away from trial AND the witness does not appear for trial.

# GATLIN V. UNITED STATES (DC 2007)

Court rejected defendant's argument for heightened standard of proof, post-Crawford, declaring that a preponderance standard was appropriate.

# PEOPLE V. SANTIAGO (NY SUP CT 2003)

Prosecutor sought admission of battered woman's out-of-court and grand jury testimony alleging ten years of severe violence by her common law husband. The court found defendant's blatant witness intimidation caused her recantation, the victim's prior statements would be allowed at trial under the FBW doctrine.

# PEOPLE V. SANTIAGO (NY SUP CT 2003)

- Defendant calls V and tells her how much he loves her, how much he wants to see her again, and how bad it is in jail....
  - **HOLDING:** The hallmark of DV cases is hope for a brighter future with the abuser held by the victim, who is weakened by past abuse and seduced by untrustworthy gestures of love.

# PEOPLE V. BYRD

## 51 AD 3D 267

- **FORFEITURE BY WRONGDOING DOES NOT REQUIRE THREATS!!**
- Defendant calls V and tells her how much he loves her, said he was sorry and wanted to stay together as a family.
  - **HOLDING:** Standard met.

# PEOPLE V. JERNIGAN

## 41 AD 3D 331

- Defendant calls V 59 times from jail – content not clear but no threats made. Long DV history.
  - **HOLDING:** People proved defendant wrongfully made use of his relationship with the victim to pressure her not to testify.

STATE V. VALENCIA  
186 ARIZ. 493, 498 (APP. 1996)

“Waiver by Misconduct” – Arizona’s common law rule

“If a defendant silences a witness by violence or murder, the defendant cannot assert his Confrontation Rights in order to prevent the admission of prior testimony from that witness.”

STATE V. VALENCIA  
186 ARIZ. 493, 498 (APP. 1996)

Standard of proof for forfeiture hearings: Preponderance of the Evidence.

"Prior to admitting testimony pursuant to this principle, the trial court must hold a hearing at which the government has the burden of proving by a preponderance of the evidence that the defendant was responsible for the witness's absence."

STATE V. PRASERTPHONG  
210 ARIZ. 496, 502 (2005)

With a judicial finding of wrongdoing, Defendant waives both his Confrontation Rights and any hearsay objection.

"Under this doctrine, if the defendant is responsible for silencing a witness, the defendant is deemed to have waived both his Confrontation Clause and his hearsay objections to the admission of that witness's statements."

STATE V. KING  
212 ARIZ. 372, 389 (APP 2006)

We note that courts recognize a forfeiture by wrongdoing analysis by which a trial court may find defendant has forfeited his right to Confrontation if the State establishes that the defendant procured or induced the unavailability of the witness.

# NEW RULE CODIFIED COMMON LAW EXCEPTION IN ARIZONA

New Rule Effective January 2010– Rule 804(b)(6): Witness  
Unavailable, Hearsay exception:

A statement offered against a party that has engaged or  
acquiesced in wrongdoing that was intended to, and did, procure  
the unavailability of the declarant as a witness.

# NEW RULE CODIFIED COMMON LAW EXCEPTION IN ARIZONA

804(b)(6) broken down:

- Statement offered against a party
  - Where that party has engaged or acquiesced in wrongdoing
  - The wrongdoing was intended to and did procure the unavailability of the declarant as a witness
-

# HOW TO PUT ON A FORFEITURE BY WRONGDOING HEARING



# HOW TO PUT ON A FORFEITURE BY WRONGDOING HEARING

1. Police should collect evidence relevant to FBW during initial police visit.
    - PPD's 4 questions – prior abuse and threats will be “highly relevant” when victim fails to appear in the current case.
    - Note these factors in the police report.
    - Other potential factors previously mentioned should be documented as well.
    - Remember around 90% or greater will not cooperate
  2. Listen to jail calls.
  3. Look for other non-police witnesses (evidence based prosecution)
-

# HOW TO PUT ON A FORFEITURE BY WRONGDOING HEARING

4. Police should disclose evidence of wrongdoing as it is discovered. A close relationship with victim or her family is helpful.
  5. Prosecutor should disclose evidence of wrongdoing as it becomes available.
-

# HOW TO PUT ON A FORFEITURE BY WRONGDOING HEARING

6. File a motion for Forfeiture by Wrong-doing.
    - State standard of proof (preponderance).
    - State hearsay admissible (Rule 104)
    - State wrongdoing.
    - Put alternative theories of admissibility.
      - Victim shows – 404(b) for defendant (Clear and convincing)
-

# HOW TO PUT ON A FORFEITURE BY WRONGDOING HEARING

## 7. Witnesses for FBW hearing:

- DV expert (Police Detective)
- Beat / patrol officer.....?
- Family?
- Friends?
- Neighbor?
- Remember – hearsay is admissible.....

# HOW TO PUT ON A FORFEITURE BY WRONGDOING HEARING

- You must use a Domestic Violence Expert (DV Detective) to explain how on DV victims are easily influenced by the perpetrator.
  - Use specific examples / potentials from your case.
-

# STANDARD OF PROOF IN FORFEITURE BY WRONGDOING HEARINGS

- PREPONDERANCE OF THE EVIDENCE
  - Davis – generally held to the preponderance of the evidence standard
  - Giles – court cited commentators general opinions of the application of the federal rule, which is a preponderance of the evidence standard of proof.
  - AZ Rules of Evidence follow federal rules.
-

# PREPONDERANCE OF THE EVIDENCE STANDARD FOR FBW HEARINGS

- Preponderance of the evidence is a relatively low standard of proof.
- It is higher than Probable Cause, but lower than Clear and Convincing and Beyond Reasonable Doubt.
- It is the lowest level of proof used in mainly in civil trials – “More Probably True”.
- “On any claim, the party who has the burden of proof must persuade you, by the evidence, that the claim is more probably true than not true. This means that the evidence that favors that party outweighs the opposing evidence.”

# STANDARD OF PROOF IN FORFEITURE BY WRONGDOING HEARINGS

- PROBABLE CAUSE
  - REASONABLE CAUSE
  - PREPONDERANCE OF THE EVIDENCE
  - PROOF EVIDENT PRESUMPTION GREAT
  - CLEAR AND CONVINCING
  - BEYOND REASONABLE DOUBT
-

# HOW TO PREPARE FOR A FBW HEARING

- Hearsay is admissible at FBW Hearing
  - AZ Rule of Evidence 104(a): Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the ADMISSIBILITY OF EVIDENCE shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is NOT BOUND BY THE RULES OF EVIDENCE except those with respect to privilege.

# IF YOU “LOSE” THE FORFEITURE BY WRONGDOING HEARING ALL IS NOT LOST

At the time of the hearing, prosecutors should ask the court to make an additional finding that defendant's other acts be admitted in the case in chief under 404(b).

This will require the court to find that the other acts have been proven as to the Clear and Convincing standard of proof.

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# IF YOU "LOSE" THE FORFEITURE BY WRONGDOING HEARING ALL IS NOT LOST

Evidence developed can be used to show motive, absence of mistake, knowledge, consciousness of guilt or identity.

When victim appears and is recanting, FBW evidence developed should be used to impeach the recanting witness.

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# SOME OF THE BENEFITS OF PURSUING FORFEITURE OF WRONGDOING

- More offenders held accountable.
  - Victims empowered.
  - More plea agreements (after or right before FBW) instead of dismissals.
  - Juries get to hear the whole story.
-

THANK YOU.

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