

Intimate Partner Sexual Abuse

Adjudicating This Hidden Dimension of Domestic Violence



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INTRODUCTION

Developing Issues

The Unavailable Complainant

In most domestic violence cases, including those involving intimate partner sexual abuse, a victim who has appealed to the justice system for help will later recant or



otherwise fail to assist the prosecution at some point in the proceedings. It is well understood that fear of the abuser is the primary reason why victims are unwilling to cooperate with the government.

Because the period following separation from an abuser is the most dangerous time for a victim and her children (see [Module II. Risk Assessment](#)) and because cooperation with a criminal proceeding is understood by both abuser and victim to be a means of separation, participation in the process increases danger to the victim. It is reasonable for a victim to conclude that criminal prosecution of an abuser will leave her less, rather than more, safe.

For that reason, as one court has noted:

"[D]omestic violence cases inherently present a combination of circumstances that obstruct, yet simultaneously intensify the need for, successful criminal prosecutions: low victim cooperation and high same-victim recidivism. See Tom Lininger, [Prosecuting Batterers After Crawford](#) (PDF 402KB), 91 VA. L. REV. 747, 768-781 (2005)."

— *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311, 323 (W. Va. 2006), 22006 W. Va. LEXIS 66 at 379.

The *Mechling* court also noted other reasons a victim might avoid prosecuting an abuser, including:

- economic dependence on the batterer;

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- *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006); W. Va., 2006 W. Va. LEXIS 66.

- concern that an immigrant batterer will be deported upon conviction;
- fear of criticism from family or community who might regard a victim's participation in the prosecution as a betrayal;
- apprehension that involvement in the criminal justice system will lead to the loss of child custody to a state child protective services agency
- emotional connections to the batterer.

Id. at 380.

Battered women also fear that involvement in the court justice system will lead to loss of custody to the batterer himself. Immigrant victims fear that it is they who will be deported.

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THE CONFRONTATION CLAUSE

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The Confrontation Clause And Evidence-Based Prosecutions

Even when a victim herself refuses to testify in court against an abuser, there may be other sources of evidence originating with the victim that might support a criminal conviction, such as a call to 911 for assistance or statements to a health care professional who treated the victim following an assault. The effort to move forward with a criminal domestic violence proceeding in the absence of the victim's testimony is known as "evidence-based prosecution." Two recent Supreme Court decisions addressed the impact such prosecutions may have on a defendant's right to confront and cross-examine the witnesses against him.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that admissibility of a non-testifying victim's out-of-court



statement turns on whether the statement is "testimonial" or "non-testimonial" in nature. A testimonial statement is one made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52. Where testimonial evidence is at issue, the Sixth Amendment requires availability and a prior opportunity to cross-examine the witness. In *Crawford*, therefore, the Confrontation Clause precluded introduction of the non-testifying wife's recorded statement given to police in anticipation of prosecution, where the defendant had not had an opportunity to cross-examine the declarant.

Subsequently, in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*, 546 U.S. 1213, 126

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- *Crawford v. Washington*, 541 U.S. 36 (2004).
- *Davis v. Washington and Hammon v. Indiana*, 546 U.S. 1213, 126 S. Ct. 2266 (2006), 2006 U.S. LEXIS 1835.

S. Ct. 2266 (2006), 2006 U.S. LEXIS 1835, the Court considered further the scope of "testimonial" statements in two cases arising from domestic violence prosecutions. The Court held that a statement is "non-testimonial" when made under circumstances objectively indicating that the primary purpose of the statement was to secure police assistance to meet an ongoing emergency. Statements are "testimonial" when the circumstances objectively indicate that there was no such ongoing emergency, and that the primary purpose of the statement was to establish or prove past events potentially relevant to later criminal prosecution. This type of statement is made during "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 126 S. Ct. at 2276 (citing *Crawford*, 541 U.S. at 53). Whether a statement is testimonial is an objective question, not subjective.

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In *Davis*, the Court upheld admission of the victim's call to a 911 operator immediately following the defendant's assault on her. Her statements, made in order to obtain police help in the immediate aftermath of the assault, were non-testimonial in nature. In *Hammon*, however, the victim's statements were made after the immediate "emergency" of the assault had passed, to a police officer investigating the crime. Those statements, recorded as part of an effort to assemble a case for arrest and prosecution, were "testimonial" in nature. Their admission in the absence of the declarant's availability for cross-examination was error.

Courts across the country are examining what types of evidence are non-testimonial in nature and therefore admissible in an evidence-based domestic violence prosecution.

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FORFEITURE BY WRONGDOING

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Forfeiture By Wrongdoing

- *State v. Wright*, 726 N.W. 2d 424 (2007).

Even when a prior statement is unequivocally testimonial in nature, it might still be used to support an evidence-based prosecution if the unavailability of the witness is due to the defendant's intimidating behavior. Under such circumstances, if the People establish that the defendant intentionally engaged in wrongdoing in order to procure the witness' unavailability, the defendant has forfeited the right to confrontation. *Davis* at 126 S. Ct. 2281; *see also*, *State v. Wright*, 726 N.W.2d 424 (2007).

The Supreme Court addressed the issue of forfeiture by wrongdoing in the context of domestic violence cases at the conclusion of its opinion in *Davis*:

"This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.... [W]hen 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.... While defendants have no duty to assist the state in proving their guilt, they do have a duty to refrain from acting in ways that destroy the integrity of the criminal-trial-system. We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.' That is, one who obtains the absence of a witness by wrongdoing forfeits the right to confrontation."

— 126 S.Ct. at 2279-2280.

What kind of conduct should be held to constitute forfeiture by wrongdoing? As West Virginia's highest court observed in *State v. Mechling*:

"[T]he most obvious situation is where the accused directly confronts the victim after being charged, and intentionally coerces the victim into changing

his or her statement, or simply not testifying.
Another likely situation where an accused may trigger forfeiture is when, after being charged, the accused engages in further abuse or intimidation of the victim which is not explicitly intended to alter, but has the effect of altering the victim's testimony."

— 219 W. Va. 366 (2006) at 381.

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Where defendants are taped calling their victims from jail and threatening to harm them if they go forward, the forfeiture by wrongdoing is readily apparent. But often the defendant engages in post-arrest abuse or intimidation without stating an explicit intent to keep his victim from testifying. His purpose must be inferred from his actions, such as an overwhelming number of phone calls made from jail to the victim in which he sweet-talks her about wanting to be together again.

Most often, whether or not the abuser has post-charge contact with the victim, the years of violence have left her too traumatized or frightened or overwhelmed by the effects of battering to testify. Moreover, a battered woman's understanding of what constitutes a threat may make no sense to an outside observer. As the California Court of Appeals observed:

"Battered women...may perceive danger and imminence differently from men...A subtle gesture or a new method of abuse, insignificant to another person, may create a reasonable fear in a battered woman."

— *People v. Romero*, 26 Cal. App. 4th 315, 26 Cal. App. 315, 13 Cal Rptr.2d 332, 336 n. 6 (Cal. Ct. App. 1992) at n. 6. (quoting Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self Defense* 8 HARVARD WOMEN'S L.J. 121 (1985).)

For example, a woman trying to break with her abuser tells him to have no contact with her and obtains an order of protection. A few days later a florist delivers to her workplace a bouquet of roses with a loving card from her abuser. An outsider sees a simple gift of flowers, but in fact this is stalking. The woman rightly understands this as a message from the abuser that she is wrong to think she can escape him and that going forward with her case is a very dangerous idea.

See Andrew King-Reis, [Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions](#) (PDF

Articles

- Andrew King-Reis, [Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions](#), 39 CREIGHTON LAW REVIEW 441 (2006).

Cases

- *People v. Romero*, 26 Cal. App. 4th 315, 26 Cal. App. 315, 13 Cal Rptr 2d 332 n. 6 (Cal. Ct. App. 1992) at n. 6.

1.79MB), 39 CREIGHTON LAW REVIEW 441 (2006).

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Given the reality of how abusers actually intimidate their victims and how battered women respond in situations of long-term abuse, determining what constitutes forfeiture by wrongdoing is of major importance to securing victims' safety, holding perpetrators accountable and protecting the integrity of court proceedings. The West Virginia Supreme Court of Appeals described the challenge presented as follows:

"[T]he most difficult forfeiture situation for courts to assess will be those circumstances where the victim responds to a batterer's actions that precede the domestic violence charge – that is, where the accused's earlier conduct and threats (statements like 'don't you ever call the police or else!') cause the victim to decline to testify, claim a lack of memory, or be absent from the trial.

In order for forfeiture to be proven in domestic violence actions, prosecutors, law enforcement officers and courts must secure evidence – possibly from third parties – prior to trial, indicating that these victims are too frightened to testify about the intimidating and coercive character of the accused's actions. If a victim is too scared to testify against the accused, for fear of retribution, the victim will probably also be too scared to testify in any pre-trial forfeiture proceeding.

The U.S. Supreme Court has suggested that the government must meet a preponderance-of-the-evidence standard to establish forfeiture, and suggested that if a hearing on forfeiture is required, hearsay evidence may be considered by the trial court. *Davis*, 547 U.S. ____, 2006 U.S. LEXIS 4886 at 32."

— *State v. Mechling*, 219 W. Va. at 326.

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- *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006); W. Va., 2006 W. Va. LEXIS 66.

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A hearing such as the *Mechling* court describes is exemplified by a pre-*Crawford* case, *People v. Santiago*, 2003 NY Slip Op. 51034U; 2003 N.Y. Misc. LEXIS 829.

An unmarried couple lived together for many years. The woman was subjected to repeated violence. She several times obtained orders of protection, which the defendant violated with impunity because she would not testify against him. In this instance the victim was again unwilling to testify and the prosecution sought to use the victim's Grand Jury testimony and other out-of-court statements. "The People's theory is that defendant's longstanding pattern of physical and emotional abuse toward [the victim] effectively forced her to become unavailable as a witness for the people at trial." *Id.* at *2.

The judge held a hearing at which extensive evidence of the defendant's on-going violence against the victim was detailed. Police officers testified to violence they actually witnessed and violence the victim described in several Incident Reports. Her hospital medical records were examined. The domestic violence counselor at the victim's precinct testified to several calls from the victim. Records from the Department of Corrections were reviewed showing that the victim visited the defendant in jail ten times and that he called her more than 100 times. The defendant testified and on cross-examination described these phone calls in which, while he did not threaten her if she testified, he made clear that she held the power to get him out by declining to do so. Finally, an expert witness testified as to why a woman so repeatedly and violently abused would refuse to testify against her abuser.

At the conclusion of this hearing the court stated:

"The complainant's decision not to cooperate with this prosecution is, without a doubt, strongly, if not totally influenced by the long history of domestic abuse that appears to affect all the decisions made by the complainant with respect to the defendant. It is true that the evidentiary consequences would be different in this case if the complainant's choice not

Cases

- *People v. Santiago*, 2003 NY Slip Op. 51034U; 2003 N.Y. Misc. LEXIS 829.

to go forward were premised exclusively on feelings of love and loyalty to the defendant. However, the violent domestic history of these two people, and defendant's recent persistent importuning of the complainant to withdraw from this prosecution, have made clear that Angela R.'s choice with respect to continuing this prosecution was not made without fear of the defendant and the complex mix of emotions one might expect to find in a person suffering from Battered Women's Syndrome. Indeed, abuse of the complainant by the defendant is the recurrent theme in the relationship between these two parties. Thus, in my view, there is clear and convincing evidence that the defendant's misconduct procured the complainant's unavailability as a witness in this prosecution and, as a fitting consequence, the People should be allowed to present evidence of the complainant's prior statements and Grand Jury testimony regarding this incident to the trial jury."

— *Id.* at 52.

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Whether this type of reasoning will prevail in the post-*Crawford* period is an evolving question.

In *Santiago* the court had extensive documentation of the intimidation because of the victim's repeated encounters with the healthcare and criminal justice systems. A record like this will not often be available. Many victims do not seek medical care for their injuries, lie about their cause when they do, and suffer violence silently for many years before seeking assistance from the courts. An expert witness such as the forensic nurse who testified in *Santiago* may be essential to a determination of whether the victim has been so intimidated by the batterer that she cannot go forward.



Standard of Proof for Forfeiture

In *Davis*, the Supreme Court also noted that while it was taking "no position on the standards necessary to demonstrate such forfeiture," federal courts follow the Federal Rules of Evidence and usually adhere to the preponderance-of-the-evidence standard and states tend to follow suit. 126 S. Ct. 2266, 2280. However, several federal and state courts have adopted a clear and convincing standard, at least in some instances. See, e.g., *United States v. Houlihan*, 887 F. Supp. 352 (1995); *People v. Geraci*, 649 N.E. 2d 817 (N.Y. 1995).

While courts generally agree that a defendant cannot be found to have forfeited his right to confrontation unless he intended to prevent the victim from testifying against him, courts have struggled with what conduct may be considered in making that determination. For example, in a case of intimate partner homicide where the defendant

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- *People v. Giles*, 40 Cal. 4th 833 (2007).
- *U.S. v. Montague*, 421 F.3d 1099 (10th Cir. 2005).
- *U.S. v. Natson*, 469 F. Supp.2d 1253 (Mid. Dist. Ga. 2006).
- *People v. Geraci*, 649 N.E. 2d 817 (N.Y. 1995).
- *United States v. Houlihan*, 887 F. Supp. 352 CD. Man. 1995.

claimed he shot his former girlfriend in self-defense, the court allowed prior statements from the victim to police about a domestic violence incident. On appeal, the question before the court was whether the defendant had forfeited his right to cross-examine the witness by killing her. The defendant was convicted and he appealed, urging that these were obviously testimonial statements, and that since he killed his former girlfriend in self-defense rather than to keep her from testifying, they should not have been admitted. On appeal the question was whether the defendant had forfeited his right to cross-examine the witness by killing her, no matter what his proffered reason, and the California Court of Appeal and Supreme Court held that he had. *People v. Giles*, 123 Cal. App. 4th 475, 19 Cal. Rptr. 3d 843, 2004 Cal. App. LEXIS 1786 (Cal. App. 2d Dist., 2004); 152 P.3d 433, 55 Cal. Rptr. 3d 133, 2007 Cal. LEXIS 1913.

As of this writing the case is before the U.S. Supreme Court, *Giles v. California*, cert. granted, 2008 U.S. LEXIS 748 (U.S., Jan. 11, 2008) (No.07-6053).

Once forfeiture has been established, the prosecution must present sufficient evidence to persuade a jury of the defendant's guilt in the absence of a testifying complainant. The jury pool may need to be questioned during *voir dire* as to how the absence of a complainant may affect their view of the case.

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THE UNAVAILABLE COMPLAINANT

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How to Encourage Victims to Testify

A court confronted with an unavailable complainant can take several steps to attempt to make the court process safer for the complainant and thereby make her more willing to testify. The Judicial Center of New Mexico offers several suggestions summarized below. For the complete text of these suggestions, go to: Judicial Education Center of New Mexico, Domestic Violence Benchbook, § 10.7.2, available [here](#).

1. Subpoena the victim, or if she is already in court, order her to return on another date. Doing so will demonstrate to both the victim and the accused that the court, not the victim is in control of the trial proceedings.
- 
2. Ascertain from the victim the reason(s) she may be reluctant to testify. Based on her answers, the court can decide whether she is acting freely, or is under duress from the accused's coercive actions.
 3. Continue the case for a period of hours or days to allow the victim to seek help from counselors, inquire about a victim/witness program, and learn about her options. She will also need to create a safety plan.
 4. If it is permitted in your jurisdiction, allow the victim's advocate to be present in the court with her.
 5. If the prosecutor cannot be present at a hearing and the burden of proof is on the victim and/or the arresting officer, apprise the victim of the elements of the crime so she can testify only to those, and allow her extra time to answer questions if she is unable to provide chronological answers.

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KEY POINTS

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EVIDENTIARY ISSUES: KEY POINTS

The Unavailable Complainant

- In most domestic violence cases, including those involving intimate partner sexual assault, a victim who has appealed to the justice system for help will refuse to assist the prosecution at some point in the proceedings primarily because of fear
- Even when the victim refuses to testify, there may be other sources of evidence originating with the victim that might support a criminal conviction, such as a call to 911 or statements to a health care professional. The effort to move forward with a criminal proceeding in the absence of the victim's testimony is known as an "evidence-based prosecution."
- Two recent Supreme Court decisions addressed the impact of such prosecutions on a defendant's right to confront and cross-examine the witnesses against him: *Crawford v Washington*, 541 U.S. 36 (2004) and *Davis v. Washington and Hammon v. Indiana*, 547 U.S. 1213 (2006).
- These cases established that where a proffered statement is "testimonial" in nature – recorded as part of an effort to assemble a case for arrest and prosecution – the confrontation clause requires that the declarant must be available for cross-examination. If, however, the statement is "non-testimonial" – for example, made in the course of the emergency itself – the statement is admissible as hearsay.
- Even when a prior statement is unequivocally testimonial, it might still be used to support an evidence-based prosecution if the witness' unavailability is the result of a defendant's intimidation. If the People establish that the defendant intentionally engaged in wrongdoing in order to procure the witness' unavailability, the defendant has forfeited the right to confrontation. *Davis, supra*.

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