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The Admission of Hearsay Testimony under the Doctrine of Forfeiture-by-Wrongdoing in Domestic Violence Cases: Advice for Prosecutors and Courts

By: ISLEY MARKMAN

I. INTRODUCTION

Two recent Supreme Court decisions about the Sixth Amendment Confrontation Clause, *Crawford v. Washington*¹ and *Giles v. California*,² have affected how prosecutors pursue domestic violence cases by limiting their ability to use out-of-court statements made by the victim in lieu of direct testimony from the victim at trial. The unwillingness of victims to testify is typical of domestic violence cases, and as a result, courts have recognized the unique need to admit hearsay testimony in these cases. In *Crawford*, the Court articulated two exceptions to the Confrontation Clause: the non-testimonial exception and the forfeiture-by-wrongdoing exception.³ Since that decision, many lower courts have broadly construed the non-testimonial category to admit out-of-court statements in domestic violence cases. I argue that instead, both prosecutors and lower courts should focus on the forfeiture-by-wrongdoing exception to admit hearsay testimony in domestic violence cases in which the victim is unavailable to testify, either because she is unwilling to cooperate with law enforcement or because she was killed by the batterer. Dicta from the Supreme Court in *Giles* and cases from New York state courts provide guidance on how this exception should accommodate the realities of a domestic violence relationship. As applied in these cases, the forfeiture-by-wrongdoing exception, in comparison to the non-testimonial exception, provides a more effective litigation strategy for prosecutors and is more protective of the rights of defendants.

In Part II, I discuss the expansion of hearsay exceptions to admit out-of-court statements by victims in domestic violence cases before the *Crawford* decision. In Part III, I summarize the *Crawford* decision and explain its effect on the admissibility of hearsay testimony in domestic violence cases. In Part IV, I examine lower court decisions admitting hearsay under the non-testimonial exception and argue that these decisions cut against the intent of *Crawford*. In Part V, using dicta from the Supreme Court in *Giles* and cases from New York as a guide, I explain how the forfeiture-by-wrongdoing exception can be adapted to admit hearsay in domestic violence cases in light of the unique nature of these personal relationships. Finally, in Part VI, I argue that for domestic violence cases, the forfeiture-by-

wrongdoing exception is both a better strategy for prosecutors and more protective of defendants' rights than the non-testimonial exception.

II. BEFORE *CRAWFORD V. WASHINGTON*

Before 2004, the Supreme Court's decision in *Ohio v. Roberts*⁴ governed the admissibility of hearsay statements under the Sixth Amendment Confrontation Clause.⁵ In *Roberts*, the Court decided that out-of-court statements are admissible notwithstanding the Confrontation Clause if the declarant is unavailable and the statements bear adequate "indicia of reliability."⁶ The Court explained, "[r]eliability can be inferred . . . in a case where the evidence falls within a firmly rooted hearsay exception [or where there are] particularized guarantees of trustworthiness."⁷

Under *Ohio v. Roberts*, prosecutors relied on various hearsay exceptions to admit out-of-court statements at trial. Under the "excited utterance" or "present sense impression" exceptions, codified in Federal Rules of Evidence 803(1) and (2) respectively, courts admitted victims' 911 calls and statements to responding officers, treating physicians, or friends and family made closely following the event of abuse while the victims were still under duress and when the statements pertained to that event.⁸ These hearsay exceptions apply regardless of the availability of the declarant. Prosecutors also relied on the forfeiture-by-wrongdoing hearsay exception, which is codified in Federal Rule of Evidence 804(b)(6).⁹ This exception, which only applies when the declarant is unavailable, allows the admission of hearsay when the defendant's actions render the victim unavailable as a witness and the defendant had the specific intent to cause that result.¹⁰ This exception was most easily applied in cases in which a criminal investigation or prosecution for prior domestic abuse was already pending, and the defendant subsequently threatened or actually harmed the victim to prevent her from testifying against him.

Other hearsay exceptions were expanded to accommodate the need for out-of-court evidence in domestic violence cases where victims were unavailable to testify. For example, in most cases, statements made by a victim to a doctor identifying a perpetrator are not admissible through the "Medical Diagnosis or Treatment" hearsay exception,¹¹ yet in domestic violence cases,

courts admitted these identifying statements as being reasonably pertinent to a medical diagnosis or treatment.¹² In addition, some state legislatures enacted special hearsay exceptions for domestic violence cases. Enacted in 1996 in reaction to the O.J. Simpson trial, in which the court excluded all evidence of past domestic abuse by the defendant, § 1370 of the California Evidence Code allows the admission of hearsay statements in domestic violence cases where: (1) the statement was recorded, written, or made to a law enforcement officer or physician; (2) the statement was made soon after the threat of or actual physical abuse and described the incident; (3) the circumstances of the statement indicate its trustworthiness; and (4) the declarant is unavailable to testify.¹³

Accordingly, before *Crawford*, prosecutors were easily able to prosecute domestic violence cases by admitting hearsay testimony from the victim when she was unavailable to testify at trial, often through the expansion of exceptions to the rule against hearsay.

III. *CRAWFORD V. WASHINGTON* AND ITS EFFECTS ON DOMESTIC VIOLENCE CASES

Recent Supreme Court decisions have affected the admission of hearsay evidence in domestic violence cases. In *Crawford*, the Court decided that the Sixth Amendment Confrontation Clause prohibits the admission of out-of-court testimonial statements made by a witness who does not appear at trial, unless that witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine her.¹⁴ Even testimonial statements admissible under well-established hearsay exceptions cannot be admitted if the declarant has not been cross-examined by the defendant.¹⁵ Thus with regard to testimonial statements, *Crawford* overturned *Roberts*.¹⁶

After *Crawford*, hearsay statements offered against a defendant in a criminal case potentially are admissible under the Sixth Amendment Confrontation Clause through two avenues. First, since *Crawford* applies only to testimonial statements, the admissibility of non-testimonial statements is still governed by the *Roberts* “indicia of reliability” test.¹⁷ Second, the forfeiture-by-wrongdoing doctrine, which provides an exception to both the rule against hearsay and the Confrontation Clause, allows prosecutors to introduce testimonial and non-testimonial out-of-court statements.¹⁸ As the Court stated in *Crawford*, “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”¹⁹ Therefore, “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”²⁰

Crawford was thought to have disastrous effects for domestic violence prosecutions because victims are so often unwilling to testify.²¹ According to one report, within

days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past. For example, during the summer of 2004, half of the domestic violence cases set for trial in Dallas County, Texas, were dismissed because of evidentiary problems under *Crawford*.²²

An anecdotal experience of mine highlights the issues raised by *Crawford*. While I was working as an intern in the Domestic Violence Unit of the King’s County District Attorney’s Office in Brooklyn, New York, an Assistant District Attorney (“ADA”) there was prosecuting a case in which the defendant had allegedly beaten and stabbed his wife and fired a gun in her presence upon suspecting that she was cheating on him. Although they had never legally separated, the defendant constantly moved in and out of their home. On a family vacation months prior to the incident at issue, the defendant physically assaulted his wife during a fight and local police forced him to leave their residence for the night. In her testimony to the grand jury, the victim asserted that the defendant, who had not been living with her at the time, showed up at her residence with a gun, beat her in the face, pushed a knife to her throat, fired a gun, and prevented her from seeking help or leaving the house for the entire night. A few days before trial, the victim, who was then residing in Florida, informed the ADA that she was unwilling to return to New York to testify at trial. Because grand jury testimony is objectively testimonial,²³ unless the ADA could prove forfeiture-by-wrongdoing the victim’s grand jury testimony was not admissible under *Crawford*. Without testimony from the victim or the grand jury testimony, the prosecution had no case to present at trial.

IV. DECISIONS AFTER *CRAWFORD*: NON-TESTIMONIAL HEARSAY

While *Crawford* became an impediment to the admission of grand jury testimony and other clearly testimonial evidence (e.g., *ex parte* testimony from a preliminary hearing), it did not have the disastrous effect that many feared. In domestic violence cases decided since *Crawford* where the victim was unavailable to testify, courts have narrowly construed the meaning of “testimonial” to conform to already-expanded hearsay exceptions. Consequently, many types of hearsay are just as admissible now as they were prior to *Crawford*.

The *Crawford* decision failed to provide a clear definition of “testimonial.” However, two years later in *Davis v. Washington* (and a consolidated case, *Hammon v. Indiana*) the Court explained that whether statements are testimonial depends upon their primary purpose.²⁴ *Davis* and *Hammon*, which parsed the potentially broad meaning of “testimonial,” were seen as a victory for domestic violence prosecutors. While the Court found that *Hammon*’s statements to responding officers were testimonial and therefore inadmissible under *Crawford*, the Court determined that the 911 call at issue in *Davis* was non-testimonial and could be admitted.²⁵

Despite the guidance provided by *Davis* and *Hammon*, the Court has yet to provide a clear test for testimonial statements. In *Crawford*, the Court presented possible formulations of the standard including (a) whether the declarant would expect her statements to be used in a prosecution, and (b) whether the statements were made under circumstances that would lead an objective witness to believe that they would be used later in trial. However, the Court declined to adopt either test.²⁶ In *Davis*, the Court seemed to focus on the intent of questioning officers in obtaining the statements but again did not clearly articulate a universal standard.²⁷ Instead, the Court provided a vague guide tied to the facts of the case:

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial 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.²⁸

The Court in *Davis* attempted to create a dichotomy between a plea for help and providing information for an investigation. In reality, however, such a clean divide is often fictional²⁹ and as case law shows, *Davis* failed to establish a bright-line distinction between testimonial and non-testimonial statements. Rather, *Davis* opened the door to admitting any statements that could be contextualized as responding to an “ongoing emergency.”³⁰

In the absence of clear guidance, many courts in domestic violence cases following *Davis* have narrowly construed the definition of “testimonial” in order to admit hearsay from 911 calls, statements to responding officers on the scene, and statements to non-police officers. First, courts have failed to parse and redact portions of 911 calls as directed by the *Davis* Court. In *Davis*, the Court pointed to the facts of the case and ex-

plained that “a conversation which begins as an interrogation to determine the need for emergency assistance” can “evolve into testimonial statements.”³¹ If so, the Court instructed, lower courts may need to redact those portions of the 911 call that have “become testimonial.”³² While some courts have closely followed these instructions and parsed 911 calls,³³ other courts have focused on the primary purpose of the call more generally and have found that responses to questions about the defendant’s identity and history were non-testimonial and therefore admissible.³⁴

Second, with regard to statements to responding officers, some cases have followed *Hammon* closely and found that a victim’s statements to responding officers on the scene and describing the incident are testimonial.³⁵ However, other courts have treated the span of the ongoing emergency more liberally, holding that statements to responding officers were not testimonial when the officers arrived at the scene promptly after the 911 call or when the victim was visibly upset, even if the danger was over or paramedics were already treating the victim.³⁶ One court even found statements made to officers at the police station to be “a plea for help in the face of a bona fide physical threat” and therefore non-testimonial.³⁷ Another court found statements

In the absence of clear guidance, many courts in domestic violence cases following Davis have narrowly construed the definition of “testimonial” in order to admit hearsay from 911 calls, statements to responding officers on the scene, and statements to non-police officers.

made to law enforcement officers in a formal setting and absent any danger or emergency to be non-testimonial.³⁸

Third, courts have admitted nearly all statements made to non-law enforcement officers. Even though “neither *Crawford* nor *Davis* limited testimonial statements to those obtained by law enforcement or their agents,”³⁹ lower courts have universally held that “statements made to non-government questioners who are not acting in concert with or as agents of the government are considered non-testimonial.”⁴⁰ This approach is logical with regard to statements to friends and family since presumably neither the victim nor the third party intended to make or elicit those statements for the purpose of a criminal prosecution. However, courts have found that statements made by a victim to doctors and counselors are non-testimonial, even when state law requires doctors to report the incident to the police.⁴¹ These cases stretch the limits of a common sense interpretation of “testimonial” and may run counter to dicta in *Davis*, which treated 911 operators as agents of the police.⁴²

In *Crawford*, the Supreme Court determined that a defendant’s Confrontation Clause right to test the evidence against him through cross-examination is not protected by judicial findings of reliability under state hearsay laws.⁴³ These lower court cases show that, at least in the context of domestic violence, this distinction has not effectively narrowed the types of statements that are admissible. While some types of hearsay statements are indisputably testimonial, courts read the vague *Davis* standard to admit a significant amount of hearsay evidence as non-testimonial and therefore as unaffected by *Crawford*.⁴⁴ Because of this ability to bypass *Crawford* in many cases, in practice the decision has not had the crippling effect on domestic violence prosecutions that many anticipated.

V. DECISIONS AFTER *CRAWFORD*: FORFEITURE-BY-WRONGDOING

In many domestic violence cases, the hearsay statements that prosecutors seek to admit are *ex parte* testimony from a preliminary or grand jury hearing. Because these statements fall squarely within the definition of “testimonial,”⁴⁵ the government must rely upon the forfeiture-by-wrongdoing exception rather than the non-testimonial exception to admit the statements at trial. Although many argue that the criteria established in *Giles* is too restrictive, dicta from *Giles* and New York state cases demonstrate how courts can and should interpret the forfeiture-by-wrongdoing doctrine to admit hearsay evidence, particularly in light of the realities of domestic abuse. These cases are instructive both for lethal cases like *Giles*, where the act for which the defendant is on trial (*e.g.*, homicide) and the act that allegedly silenced the victim are the same, and for non-lethal

cases where the defendant took separate actions before trial to discourage the victim from testifying.

A. *GILES V. CALIFORNIA*

In *Giles*, the Supreme Court clarified *Crawford*’s implications for the doctrine of forfeiture-by-wrongdoing and held that the doctrine can be applied only when “the defendant engaged in conduct designed to prevent the witness from testifying.”⁴⁶ In that case, the defendant admitted to shooting the victim multiple times but claimed at trial that he had done so in self-defense.⁴⁷ The prosecutors sought to introduce statements that the victim made to a police officer responding to a domestic violence report three weeks before the shooting, in which she told the officer that the defendant physically assaulted and threatened to kill her.⁴⁸ The trial court admitted these hearsay statements on the theory of forfeiture-by-wrongdoing, but did not consider whether at the time of the murder the defendant had the specific intent to prevent the victim from testifying.⁴⁹ The California Supreme Court affirmed, agreeing that the defendant had committed an intentional criminal act that rendered the victim unavailable to testify.⁵⁰ The United States Supreme Court reversed and remanded.⁵¹ The majority explained that in cases in which the defendant merely has the intent to cause a person to be absent but not the specific intent to prevent her from testifying, the doctrine of forfeiture-by-wrongdoing does not apply.⁵² To hold otherwise, the Court reasoned, would require the judge to usurp the jury’s role by deciding whether the defendant murdered the victim.⁵³

Three of the opinions in *Giles* discussed the implications of the Court’s decision for lethal domestic violence cases. Justice Breyer, writing for the dissent, noted the following:

Each year, domestic violence results in more than 1,500 deaths and more than 2 million injuries; it accounts for a substantial portion of all homicides; it typically involves a history of repeated violence; and it is difficult to prove in court because the victim is generally reluctant or unable to testify.⁵⁴

Justice Breyer argued that only knowledge, and not purpose, should be required for the forfeiture-by-wrongdoing doctrine to apply because a knowledge requirement accords with the rationale of disincentivizing attempts by defendants to obstruct justice.⁵⁵ In contrast, Justice Breyer noted, a purpose requirement places too high a burden on the prosecution⁵⁶ and leads to absurd results.⁵⁷

In response to Justice Breyer, the majority and concurring opinions asserted that the forfeiture-by-wrongdoing doctrine, as interpreted by the Court, would continue to admit the hearsay testimony of a victim in domestic violence cases if the prosecution could demonstrate a pattern of domestic violence and a his-

tory of attempts by the defendant to control the victim.⁵⁸ Justice Scalia, writing for the majority, explained:

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.⁵⁹

Similarly, Justice Souter argued:

[T]he element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.⁶⁰

A majority of justices, therefore, suggested that evidence of a history of domestic abuse by the defendant against the victim would be sufficient to demonstrate that the defendant had the specific intent to silence the victim when he killed her, perhaps even absent a pending case at the time of the murder.⁶¹

While domestic violence groups had filed amicus curiae briefs arguing that a specific intent requirement “would cripple the truth-seeking purpose and integrity of adjudications and create an incentive for batterers to kill their victims,”⁶² after the case was decided these same groups highlighted the portions of the majority and concurring opinions addressing domestic violence as “a victory for the domestic violence community.”⁶³ The Court’s dicta appropriately reflected both the unique nature of domestic violence relationships, in which one person acts to control the other, and the reality of domestic violence prosecutions, in which the only evidence may be statements made by the victim to law enforcement about prior incidents of domestic abuse that would be considered testimonial and subject to *Crawford*.

In doing so, the Court provided an avenue for prosecutors and courts to use the forfeiture-by-wrongdoing exception to prosecute domestic violence cases effectively. With respect to lethal domestic violence cases, the Court explicitly invited prosecutors to present evidence of a history of domestic abuse to demonstrate that, by killing the victim, the defendant had the requisite specific intent to silence her. With respect to non-lethal cases, the dicta from *Giles* should also influence courts to consider the realities of domestic violence relationships. Several cases from New York provide a model for this approach.

B. NEW YORK CASES

New York courts have relied upon expert evidence to define which types of acts, other than overt threats or violence, qualify as wrongdoing in the domestic violence context. For example, even before *Crawford*, a New York state court in *People v. Santiago* recognized “that in domestic violence cases repeated abuse followed by repeated withdrawal of prosecution and the repeated grant of forgiveness to the abuser make such cases very different from the norm.”⁶⁴ In an evidentiary hearing to determine whether the defendant forfeited his Confrontation Clause rights, the prosecution presented the testimony of an expert in domestic violence and Battered Woman’s Syndrome.⁶⁵ The expert testified that “domestic violence is part of the effort by one partner to dominate and control the other” and that “[d]omestic violence is characterized by the three phases of behavior which are commonly referred to as the ‘cycle of violence.’ These are (1) the tension building phase, (2) the violent phase, and (3) the honeymoon phase.”⁶⁶ The tension building and violent phases are self-explanatory; the honeymoon phase “is characterized by acts of contrition by the abuser, his requests for forgiveness and his declarations of love . . . [which] exploit the complainant’s fantasies of happiness and harmony and her hope that, notwithstanding previous abuse, a loving relationship can and will continue.”⁶⁷ A victim of domestic abuse may be unwilling to testify because she feels threatened or blames herself for the abuse. More significantly, a batterer’s promise of a better future and reconciliation, which often occurs between arrest and trial and is characteristic of the “honeymoon phase,” may discourage a victim from seeking assistance or testifying against him.⁶⁸ In *Santiago*, the court found that the defendant had forfeited his right to confront the unavailable victim based upon the prosecution’s showing at the evidentiary hearing that the victim suffered from Battered Woman’s Syndrome, caused by the defendant, and that the defendant had made numerous “honeymoon” promises to the victim between his arrest and the trial.⁶⁹ Accordingly, the court permitted the prosecution to introduce the victim’s grand jury testimony.⁷⁰

A New York appellate court issued similar a decision following *Crawford*.⁷¹ In *People v. Byrd*, the trial court admitted the grand jury testimony of the victim after the prosecution demonstrated through an expert witness that the victim suffered from Battered Woman's Syndrome.⁷² Similar to the *Santiago* court, the trial court in *Byrd* court reasoned that the defendant's visits with, and hundreds of phone calls to, the victim while she was hospitalized after the incident of abuse were typical of the "honeymoon" phase of domestic violence and were intended to procure her silence.⁷³ The appellate court upheld the lower court's reasoning, asserting that testimony about Battered Woman's Syndrome and the victim's history of domestic abuse "was relevant to place defendant's actions in context to show that he had such a degree of control over [the victim] that seemingly innocuous calls or hospital visits would have a coercive effect on her."⁷⁴

The Supreme Court's decision in *Giles* did not limit nor implicitly overrule the decisions of the New York courts in *Santiago* and *Byrd*. *Giles*, a lethal domestic violence case, established that absent other evidence courts could not assume that by murdering the victim, the defendant had the specific intent to prevent her from testifying as a witness.⁷⁵ *Santiago* and *Byrd*, on the other hand, involved non-lethal incidents of domestic violence in which the defendants took additional action after arrest and before trial to discourage the victims from testifying. Moreover, the New York Court of Appeals already had imposed a specific intent requirement for forfeiture-by-wronging (like the U.S. Supreme Court did in *Giles*) before *Santiago* and *Byrd* were decided.⁷⁶ The *Santiago* and *Byrd* courts simply distinguished *Maher*.⁷⁷ If anything, *Giles* encouraged the type of evidence and arguments accepted in the New York cases by inviting "prosecutors to make salient the full spectrum of abuse that resulted in a live victim's absence from trial."⁷⁸

C. IN SUMMARY: LETHAL AND NON-LETHAL CASES

In light of the Court's invitation in *Giles*, lower courts across the country should tailor the forfeiture-by-wrongdoing doctrine to the realities of domestic violence relationships. In lethal domestic violence cases, evidence of a history of domestic violence should create the presumption that by killing the victim, the defendant had the specific intent to silence her. In non-lethal cases, this same history of violence alone may be sufficient to support a finding that the defendant intended to

silence the victim even if that victim is still alive. Alternatively, lower courts should admit hearsay testimony pursuant to a finding that, in light of the defendant's history of domestic violence with the victim, the defendant intended to procure the victim's silence through specific actions taken after the defendant's arrest that are characteristic of the "honeymoon" phase.

VI. A COMPARISON OF THE TWO CONFRONTATION CLAUSE EXCEPTIONS: FORFEITURE-BY-WRONGDOING AND NON-TESTIMONIAL STATEMENTS

As the Supreme Court in *Giles* and lower courts across the country have acknowledged, domestic violence crimes are notoriously hard to prosecute. Not only are these crimes significantly underreported, but also victims often recant their earlier statements and refuse to testify at trial.⁷⁹ When victims refuse to testify, typically the prosecution's only potential evidence is out-of-court statements. In recognition of these inherent problems

In non-lethal cases, this same history of violence alone may be sufficient to support a finding that the defendant intended to silence the victim even if that victim is still alive.

in domestic violence cases, many courts have narrowly construed the category of testimonial statements vaguely defined in *Crawford* and *Davis* to admit hearsay evidence. Yet despite the Court's apparent invitation in *Giles*, with the exception of a few cases from New York, lower courts have yet to use the forfeiture-by-wrongdoing exception to admit hearsay statements on the ground that the defendant's history of domestic violence toward the victim or subsequent "honeymoon" acts effectively prevented the victim from testifying. It is unclear whether courts have rejected this argument or whether prosecutors have failed

to advance it.⁸⁰ Regardless, this approach should change; prosecutors and courts should rely on the forfeiture-by-wrongdoing doctrine because it is a more effective prosecution strategy and is more protective of defendants' rights.

A. BENEFICIAL PROSECUTORIAL STRATEGY

The forfeiture-by-wrongdoing doctrine is a better prosecution strategy than the non-testimonial exception. First, the doctrine applies to a broader spectrum of evidence than the non-testimonial exception. When a defendant forfeits his Confrontation Clause rights with regard to the victim, all out-of-court statements made by the victim are potentially admissible. This means that all types of hearsay, including testimony from preliminary and grand jury hearings, are admissible upon a singular

showing of forfeiture. In contrast, the non-testimonial exception can only be used to admit certain categories of hearsay and requires prosecutors to prove that each individual out-of-court statement is non-testimonial.

Second, the use of expert testimony to prove forfeiture-by-wrongdoing in domestic violence cases may increase awareness of domestic violence issues over time. As experts have recognized, Battered Woman's Syndrome can both explain victims' unwillingness to testify and their hesitation or recantation if and when they do testify. If lower courts across the country are willing to hear testimony about the cycles of domestic violence and Battered Woman's Syndrome in determining evidentiary issues, this may further public awareness about the prevalence and effects of domestic violence.⁸¹ In turn, increased public awareness may help jurors understand why some victims seem hesitant on the witness stand and why others refuse to testify altogether. Laws have the power to inform and change our social mores.⁸² By educating the public about the nature of domestic violence, it is less likely that jurors will misinterpret a victim's hesitance or absence as a lack of credibility.⁸³

B. PROTECTIVE OF DEFENDANTS' RIGHTS

An increased reliance on the forfeiture-by-wrongdoing doctrine rather than the non-testimonial exception will also be more protective of defendants' rights. First, as discussed *supra* Part III, the Supreme Court in *Crawford* explicitly separated the Confrontation Clause inquiry from the reliability inquiry of state hearsay law.⁸⁴ By broadly construing the meaning of "non-testimonial" under *Davis* to include categories of statements admissible under hearsay exceptions, lower court decisions have eroded this distinction and cut against defendants' Sixth Amendment rights as outlined in *Crawford*.⁸⁵ As the Court explained,

[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused . . . Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.⁸⁶

Second, because the forfeiture-by-wrongdoing exception is applied only in cases in which the defendant has taken affirmative actions to deny the prosecution the ability to call one of its witnesses, reliance on this exception means that a defendant's own actions will determine whether he receives constitutional protection. In contrast, the applicability of the non-testimonial exception depends on the conduct of the police and the alleged victim (*e.g.*, whether the victim called 911 or how soon officers arrived at the crime scene). Affording a defendant control over his own constitutional right to confront witnesses against him

is more just in the sense that it conforms constitutional rights to the moral content of the defendant's actions. In addition, by conditioning the defendant's Sixth Amendment rights on the actions of others, the non-testimonial exception may create perverse incentives for law enforcement:

Rather than resolving emergencies before conducting an investigation, police officers might be inclined to gather as much information as possible during a pending emergency in order to evade the Confrontation Clause. 911 operators, for instance, might be instructed to press callers for information about their assailants during the emergency rather than guide them to safety and then ask questions.⁸⁷

Third, reliance on the forfeiture-by-wrongdoing doctrine instead of the non-testimonial exception in domestic violence cases will also protect the rights of criminal defendants in other types of cases. In acknowledgement of the difficulty of prosecuting domestic violence cases, courts have favored admitting hearsay testimony.⁸⁸ However, a broadly construed non-testimonial exception in domestic violence cases not only opens the door to the admission of more hearsay in domestic violence cases, but it also leads to the admission of hearsay that would otherwise violate the Confrontation Clause in all other types of cases. For example, as discussed *supra* Part IV, courts dealing with the difficulties presented by domestic violence cases have taken a liberal view as to when a victim's statements to responding officers should be considered non-testimonial. While these liberal classifications of non-testimonial hearsay theoretically may be confined to domestic violence cases, because the unique nature of domestic violence relationships was not part of the courts' rationales in these decisions, it is more likely that these rules will be applied to other crimes (*e.g.*, burglary). In contrast, expansive interpretations of the forfeiture-by-wrongdoing doctrine in domestic violence cases would be based entirely on the realities and patterns of domestic violence. They would, therefore, be more likely to remain limited to domestic violence cases, in which the admission of hearsay is especially necessary.

C. OBJECTIONS AND RESPONSES

Although there are likely many objections to the position I have taken in this paper, I will respond only to two particularly compelling objections. First, because the forfeiture-by-wrongdoing doctrine is an equitable remedy rather than a rule based on the reliability of evidence, there is a danger that expanding the doctrine would allow the admission of a flood of unreliable hearsay in domestic violence trials. This danger is compounded by the fact that forfeiture-by-wrongdoing is also a hearsay exception, and therefore, most state hearsay laws will not filter out these out-of-court statements.⁸⁹ However, the admissibility of all evidence is subject to Federal Rule of Evidence 403

(or corresponding state rules), which permits judges to exclude evidence if its probative value is substantially outweighed by its prejudicial effect.⁹⁰ Thus, even if a defendant has forfeited his Confrontation Clause rights, judges through Rule 403 may act as gatekeepers to prohibit the entry of unreliable evidence.

Second, some feminist scholars have criticized policies adopted by law enforcement that require mandatory arrest and prosecution in domestic violence cases.⁹¹ These scholars argue that mandatory intervention policies may increase future violence against the victim⁹² and, more importantly, strip domestic violence victims of the ability to choose whether or not their case will be prosecuted.⁹³ Wendy McElroy championed the *Crawford* decision as an equitable solution to this problem: “Domestic violence victims who wish to press charges can benefit from increased sensitivity while those who decline to press charges can exercise control by refusing to cooperate with authorities. The wishes of the victim may once again become legally significant.”⁹⁴ By admitting hearsay in domestic violence cases through the forfeiture-by-wrongdoing exception, courts will allow prosecutors to pursue cases without the consent and participation of victims. Of course, this criticism applies equally to courts’ reliance on the non-testimonial exception.

VII. CONCLUSION

The unwillingness of domestic violence victims to testify at trial due to the psychological effects of domestic violence or specific actions by batterers is a notorious impediment to prosecuting domestic violence cases. In addition, domestic violence cases, which often come down to the defendant’s word versus the victim’s, are nearly impossible to prosecute without hearsay testimony when the victim has been killed because there is no other way to present the victim’s side of the story.

Courts have historically looked for ways to stretch existing law to admit hearsay evidence in domestic violence cases. Before *Crawford*, when the admissibility of evidence under the Confrontation Clause depended on whether the statements at issue fell within an established hearsay exception or were otherwise trustworthy, courts expanded many hearsay exceptions to admit out-of-court victim statements. After *Crawford* and *Davis*, in which the Court held that the admissibility of statements under the Confrontation Clause depended on whether the statements were deemed testimonial, lower courts proceeded to stretch the meaning of “non-testimonial” to admit out-of-court statements in accordance with these already-expanded hearsay exceptions.

This has been a mistake. Instead of further expanding the non-testimonial exception, courts should adapt the forfeiture-by-wrongdoing doctrine to account for the realities of domestic abuse. In both lethal and non-lethal domestic violence cases,

courts should accept evidence of a history of domestic abuse as probative of the defendant’s specific intent to prevent the victim from testifying. Additionally, in non-lethal cases, courts should follow decisions from New York and recognize that actions taken by the defendant after his arrest and leading up to trial that are typical of the “honeymoon” phase of domestic abuse may procure a victim’s silence in the same way as overt threats. If prosecutors assert these arguments and courts are willing to accept them, several beneficial effects will follow. First, use of the forfeiture-by-wrongdoing doctrine will be more protective of defendants’ rights. Second, it will aid prosecutors by facilitating the admission of a broader spectrum of hearsay. Finally, it may have positive effects on society at large by increasing public awareness about Battered Woman’s Syndrome and the cycle of violence inherent in domestic violence relationships.

¹ 541 U.S. 36 (2004) (holding that Confrontation Clause prohibits admission of testimonial, out-of-court statements by a witness unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness).

² 554 U.S. 353 (2008) (holding that forfeiture-by-wrongdoing is not an exception to the Sixth Amendment’s confrontation requirement unless the defendant specifically intended to prevent the witness from testifying at trial).

³ *Crawford*, 541 U.S. at 62, 68.

⁴ 448 U.S. 56 (1980).

⁵ *Id.* at 56, 73, 77 (holding that the introduction of transcript from preliminary hearing was constitutional where witness was unavailable and witness’ testimony at preliminary hearing had been subjected to questioning similar to cross-examination and thus “bore sufficient ‘indicia of reliability’”).

⁶ *Id.* at 65.

⁷ *Id.* at 66.

⁸ See *Commonwealth v. Snell*, 705 N.E.2d 236, 244 (Mass. 1999) (admitting testimony from neighbor about victim’s plea for help immediately after incident); *Werley v. State*, 814 So.2d 1159, 1161 (Fla. Dist. Ct. App. 2002) (admitting 911 call following incident of domestic violence under excited utterance exception); *Impson v. State*, 721 N.E.2d 1275, 1282 (Ind. Ct. App. 2000) (admitting domestic violence victim’s statements to police officers following incident of abuse under excited utterance exception).

⁹ See discussion *infra* Part III (explaining that the forfeiture-by-wrongdoing exception is both an exception to the rule against hearsay and an exception to a defendant’s rights under the Confrontation Clause).

¹⁰ See FED. R. EVID. 804(b)(6) (“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.”).

¹¹ FED. R. EVID. 803(4) (“Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”).

¹² See *United States v. Joe*, 8 F.3d 1488, 1494-95 (10th Cir. 1993) (“[T]he identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case . . . All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must

know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a member of the victim's family or household. . . . In short, the domestic sexual abuser's identity is admissible under Rule 803(4) where the abuser has such an intimate relationship with the victim that the abuser's identity becomes 'reasonably pertinent' to the victim's proper treatment."); accord Moore v. City of Leeds, 1 So.3d 145, 150 (Ala. Crim. App. 2008) (holding that victim's statement to physician that injury was result of altercation with husband was admissible under hearsay exception for medical diagnosis); State v. Williams, 154 P.3d 322, 327-28 (Wash. Ct. App. 2007) (holding that victim's answers to forensic nurse's questionnaire identifying former boyfriend as attacker were admissible because the statements were reasonably pertinent "to promote treatment" and "the medical professional reasonably relied on the statement for purposes of treatment"); People v. Swinger, 689 N.Y.S.2d 336, 339 (N.Y. Crim. Ct. 1998) (holding that victim's statements to hospital doctor that husband had assaulted her were admissible under business records exception). But see Clark v. State, 199 P.3d 1203, 1205 (Alaska Ct. App. 2009) (finding that defendant's hearsay objection to portion of hospital records identifying defendant, the victim's boyfriend, as the perpetrator, would have been valid had it been timely raised).

¹³ CAL. EVID. CODE § 1370 (West 2011). Oregon passed a similar statute after Crawford in 2006. See OR. REV. STAT. § 40.460(26) (2009) (requiring nearly identical elements as § 1370). For arguments in favor of enacting domestic violence exceptions to the hearsay rule instead of expanding other hearsay exceptions in domestic violence cases, see Nancee A. Barth, *I'd Grab at Anything, And I'd Forget*, 41 J. MARSHALL L. REV. 937, 965 (2008) (post-Crawford); Neal A. Hudders, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L.J. 1041, 1053 (2000) (pre-Crawford).

¹⁴ Crawford, 541 U.S. at 50-51. See discussion *infra* Part IV (explicating the Supreme Court's definition of "testimonial statements").

¹⁵ *Id.* at 50-51 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.").

¹⁶ *Id.* at 63 ("The unpardonable vice of the Roberts test . . . is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.").

¹⁷ *Id.* at 68; Roberts, 448 U.S. at 65.

¹⁸ Crawford, 541 U.S. at 62.

¹⁹ *Id.*

²⁰ Davis v. Washington, 547 U.S. 813, 833 (2006).

²¹ See Tom Lininger, *Prosecution Batterers After Crawford*, 91 VA. L. REV. 747, 769-70 (2005) (providing anecdotal and statistical data about the impact of Crawford).

²² *Id.* at 749-50 (emphasis added); accord David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, SLATE, Mar. 12, 2004, available at <http://slate.msn.com/id/2097041> (contending that Crawford "shifted the balance of power from prosecutors to reluctant complainants, giving alleged victims more control over the cases of their own victimization and greater freedom from the paternalistic philosophy of prosecution that the Roberts rule enabled").

²³ Crawford, 541 U.S. at 68 ("Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

²⁴ Davis, 547 U.S. at 822.

²⁵ *Id.* at 826-28.

²⁶ Crawford, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of "testimonial.").

²⁷ See generally Davis, 547 U.S. at 826-829.

²⁸ *Id.* at 822.

²⁹ This is especially true in domestic violence cases. See Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of*

Confrontation, 85 N.C. L. REV. 1, 23 (2006) ("Often, a battered woman's safety depends entirely on the intervention of law enforcement: she needs police protection because, without assistance, the violence will continue. To posit a clean divide between the crime and the exigency it creates, and the crime's aftermath, is to import a model of crime characterized by discrete instances of one-time, episodic violence.").

³⁰ For example, if the batterer is still at large and the victim fears that he may return to cause further harm, information provided to the police could be characterized as a plea for help to prevent further harm. See Scott G. Stewart, *The Right of Confrontation, Ongoing Emergencies, and the Violent-Perpetrator-at-Large Problem*, 61 STAN. L. REV. 751, 753-54 (2008) (explaining that lower courts have used a balancing test to determine whether the facts tip the scale toward ongoing emergency or past criminal conduct).

³¹ Davis, 547 U.S. at 828 (internal quotations omitted).

³² *Id.* at 829.

³³ See, e.g., State v. Camarena, 344 Or. 28, 39-42 (Or. 2008) (finding that complainant's initial 911 responses, including statement identifying her boyfriend as assailant, were testimonial because were necessary to resolve ongoing emergency but that trial court erred in admitting remainder of the 911 conversation).

³⁴ See, e.g., State v. Pugh, 225 P.3d 892, 896 (Wash. 2009) (finding entirety of 911 call to be non-testimonial). In Pugh, the Washington Supreme Court construed Davis to create a four part test to determine the primary purpose of police questioning: "(1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation." *Id.*

³⁵ See, e.g., Rankins v. Commonwealth, 237 S.W.3d 128, 128 (Ky. 2007) (holding victim's statements explaining incident to police officer who arrived on the scene minutes after were testimonial).

³⁶ See, e.g., United States v. Arnold, 486 F.3d 177, 179-80 (6th Cir. 2007) (finding that victim's statements to police describing defendant's gun were non-testimonial because "the primary purpose, measured objectively, of the question [the police] asked her for 'a description of the gun' was to avert the crisis at hand, not to develop a backward-looking record of the crime"); People v. Byron, 88 Cal. Rptr. 3d 386, 389-91 (Cal. Ct. App. 2009) (finding that both the 911 call and victim's statements to responding officer made at her apartment were non-testimonial, even though by the time the officer had arrived "an ambulance and paramedics were already present and [the victim] was on a gurney waiting to be taken to the hospital"); State v. Williams, No. L-08-1371, 2009 Ohio App. LEXIS 5807, at *14 (Ct. App. Dec. 31, 2009) (finding statements to officers non-testimonial where "the officers arrived within three minutes of the 911 call [and] [t]he victim came running across the courtyard and was 'visibly upset' and 'shaking'" and distinguishing case in which officers arrived two hours after domestic violence call).

³⁷ People v. Saracoglu, 62 Cal. Rptr. 3d 418, 427 (Ct. App. 2007).

³⁸ Crawford v. Commonwealth, 686 S.E.2d 557, 568-69 (Va. Ct. App. 2009) (admitting statements made in affidavit to law enforcement to gain a protective order because "the primary purpose of the affidavit was not to 'prove past events potentially relevant to later criminal prosecution' but rather to obtain a civil, preliminary protective order").

³⁹ Rankins, 237 S.W.3d at 131 n.6.

⁴⁰ State v. Her, 750 N.W.2d 258, 265 (Minn. 2008).

⁴¹ See State v. Bella, 220 P.3d 128, 133 (Or. Ct. App. 2009) (finding that, notwithstanding physician's statutory duty to report injuries to medical examiner, the "primary purpose" of physician's questions to victim was for medical diagnosis, and thus victim's statements identifying boyfriend as

perpetrator were non-testimonial); *State v. Sandoval*, 154 P.3d 271, 272 (Wash. Ct. App. 2007) (affirming admission of victim's statements to physician and finding that primary purpose was for diagnosis and treatment rather than criminal prosecution where police were not present and physician and victim did not discuss a criminal investigation). Post-*Crawford* scholarship has argued that this approach runs counter to *Crawford*. See, e.g., Myrna S. Reader, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions*, 20 A.B.A. CRIM. JUST. 24, 30 (2005) ("To the extent that the doctor has a reporting duty in domestic violence cases, which occurs in a few jurisdictions, the argument can be made that any statement is testimonial, either because the doctor is an agent of the police or because an objective witness would view the statements as available for prosecution. In addition, if a doctor adopts the protocols suggested to aid health care providers to 'help victims' by selecting what to record and implicitly what to ask, and how to record the statements, it is also arguable that the resulting recording of victims' statements becomes testimonial.").

⁴² *Davis*, 547 U.S. at 823 n.2 ("If 911 operators are not themselves law enforcement operators, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.").

⁴³ *Crawford*, 541 U.S. at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.").

⁴⁴ See G. Michael Fenner, *Today's Confrontation Clause (After Crawford and Melendez-Diaz)*, 43 CREIGHTON L. REV. 35, 66 (2009) ("[W]hether the United States Constitution requires that a witness be presented for confrontation is not a categorical decision. It is an ad hoc decision. It is, however, an ad hoc decision made in a universe where, because of the close affinity between the Confrontation Clause and the hearsay rule, much of the discussion is bound to place the statements into categories taken from the list of hearsay exceptions."); John M. Levanthal & Liberty Aldrich, *The Admission of Evidence in Domestic Violence Cases after Crawford v. Washington: A National Survey*, 11 BERKELEY J. CRIM. L. 77, 85-86 (2006) (examining post-*Crawford*, pre-*Davis* decisions, finding that "while some courts have reasoned that *Crawford* should dramatically restrict the introduction of victims' out-of-court statements in domestic violence cases, many courts have held that such statements are still admissible," and noting many questions unresolved by *Davis*).

⁴⁵ See *supra*, note 23.

⁴⁶ *Giles*, 554 U.S. at 368.

⁴⁷ *Id.* at 356.

⁴⁸ *Id.* at 356-57.

⁴⁹ *Id.* at 357.

⁵⁰ *Id.*

⁵¹ *Giles*, 554 U.S. at 377.

⁵² *Id.*

⁵³ *Id.* at 365, 374, 379.

⁵⁴ *Id.* at 405 (Breyer, J., dissenting).

⁵⁵ *Id.* (Breyer, J., dissenting) ("Regardless of a defendant's purpose, threats, further violence, and ultimately murder, can stop victims from testifying.").

⁵⁶ *Id.* at 406 (Breyer, J., dissenting) ("To the extent that it insists upon an additional showing of purpose, the Court . . . grants the defendant not fair treatment, but a windfall.").

⁵⁷ See *Giles*, 554 U.S. at 388 (Breyer, J., dissenting) (noting that under the majority's standard, a defendant's statements to his wife would not be admissible if he kills her in a fit of rage, but would be admissible if he assaults his wife and then threatens to harm her if she goes to the authorities).

⁵⁸ *Id.* at 377.

⁵⁹ *Id.*

⁶⁰ *Id.* at 380 (Souter, J., concurring).

⁶¹ See Deborah Tuerkheimer, *Forfeiture after Giles: The Relevance of 'Domestic Violence Context'*, 13 LEWIS & CLARK L. REV. 711, 719 (2009).

⁶² Amicus Brief for Respondent at 28, *Giles v. California*, 554 U.S. 353 (2008) (No. 07-6053). Various other groups that advocate on behalf of female and child victims of abuse also wrote briefs in support of the respondent.

⁶³ *Giles v. California: United States Supreme Court (2008)*, DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (Feb. 3, 2011), available at <http://www.dvleap.org/Programs/RightsLitigationProject/Cases/GilesvCalifornia.aspx>.

⁶⁴ *People v. Santiago*, No. 2725-02, 2003 WL 21507176, at *15 (N.Y. Sup. Ct. Apr. 7, 2003).

⁶⁵ There are other scenarios in which courts admit expert evidence about the type of crime at issue to explain the behavior of victims or witnesses. Many jurisdictions allow experts on Battered Woman's Syndrome to testify about why battered women commonly recant their statements about abuse to bolster the credibility of a witness or explain hesitations at trial. See, e.g., *State v. Jose G.*, 963 A.2d 42, 47 (Conn. 2009); *People v. Morgan*, 68 Cal. Rptr. 2d 772 (Cal. Ct. App. 1997); *State v. Griffin*, 564 N.W.2d 370, 374, 376 (Iowa 1997). Scholars have also argued that the forfeiture-by-wrongdoing doctrine should be broadly construed in cases of child abuse to avoid compelling the victim to testify, acknowledging that in most instances of child sexual abuse, the perpetrator instructs the victim not to tell, which, even if not an overt threat, should permit the admission of hearsay testimony instead of direct evidence. See Tom Harbinson, *Using the Crawford v. Washington "Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, available at <http://www.ncds.org/images/In%20Child%20Abuse%20Cases%20-Harbinson.pdf>.

⁶⁶ *Santiago*, 2003 WL 21507176 at *2.

⁶⁷ *Id.* at *2, 4.

⁶⁸ *Id.* at *12 (explaining coercion inherent in the honeymoon phase of the cycle of violence).

⁶⁹ *Id.* at *14.

⁷⁰ *Id.* at *16. The court also supported its decision on policy grounds, asserting that "given the frequency with which battered women seek to withdraw as witnesses, if the witness's earlier statements become admissible . . . considerable public benefit can be anticipated." *Id.* at *2.

⁷¹ *People v. Byrd*, 855 N.Y.S.2d 505, 506-07 (N.Y. App. Div. 2008).

⁷² *Id.* at 507.

⁷³ *Id.* at 508.

⁷⁴ *Id.* at 510. In *Byrd*, the Battered Woman's Syndrome expert also testified at trial to explain the victim's refusal to testify. *Id.*

⁷⁵ See generally *Giles*, 554 U.S. at 358-69.

⁷⁶ See *People v. Maher*, 677 N.E.2d 728, 731 (N.Y. 1997). On facts similar to those in *Giles*, the *Maher* court concluded that there was no evidence that in killing his estranged lover, the defendant was at all motivated by a desire to prevent her from testifying in court. *Id.*

⁷⁷ See *Byrd*, 855 N.Y.S.2d at 510 (noting that Byrd was "in part" motivated by a "desire to silence the witness"); *Santiago*, 2003 WL 21507176, at *1 n.2 ("It should be noted that the People's use of an unavailable witness's prior statements in their direct case is not permitted if the only acts of misconduct which brought about the unavailability are the very acts charged in the indictment.").

⁷⁸ Tuerkheimer, *supra* note 61, at 725. Tuerkheimer's article makes many of the same arguments about the dicta in *Giles* and the possibilities that the decision presents for domestic violence prosecutors. The main thrust of her argument is to alert lower courts and prosecutors to this framework of future advocacy invited by *Giles*, noting that "lower courts have yet to grapple with the Court's observations—however fragmented and however inadequate—regarding the evidentiary significance of the relationship be-

tween batterer and victim.” *Id.* at 728. I agree with Tuerkheimer and expand on her approach by arguing, *infra* Part VI, that admitting hearsay in domestic violence cases through the forfeiture-by-wrongdoing doctrine is preferable to admitting hearsay through the expansion of the non-testimonial exception.

⁷⁹ See *Giles*, 554 U.S. at 405 (Breyer, J., dissenting); Tuerkheimer, *supra* note 61, at 713 n.15 (“About 80 to 85 percent of victims ‘actually recant at some point in the process.’”).

⁸⁰ See Tuerkheimer, *supra* note 61, at 728.

⁸¹ Of course, these evidentiary hearings, in which expert testimony about domestic violence and Battered Woman’s Syndrome is presented, are held *in limine*. Accordingly, a court’s acceptance of this testimony would only increase general public awareness and would not educate the jury in any particular case.

⁸² In *Giles*, Justice Breyer noted the interaction between the law and social views on the issue of domestic violence. *Giles*, 554 U.S. at 396 (Breyer, J., dissenting) (“[Two-hundred] years ago, it might have been seen as futile for women to hale their abusers before a Marian magistrate where they would make such a statement.” (citing *State v. Rhodes*, 61 N.C. 453, 459 (1868) (*per curiam*) (“We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.”))).

⁸³ In the King’s County case, discussed *supra* Part III, the ADA requested a material witness order, and the victim eventually returned to New York to testify. She testified that she was not in court willingly, and her conduct on the stand corroborated her reluctance. While the defendant’s testimony clearly stated his account of what had happened, the victim did not clearly explain hers. When the ADA asked the victim to see if her husband was in the court room, the victim paused for about ten seconds, unwilling to look in the direction of the defendant, and did so only after pressure from the ADA. In his closing argument, defense counsel cited the fact that the prosecution had to use a court order to get the victim to testify as indication that her original story was untrue and that she did not want to testify for the prosecution because the prosecution’s claims were untrue. In the end, the jury accepted the defense’s argument and doubted the victim’s credibility, only convicting the defendant of third degree assault.

⁸⁴ *Crawford*, 541 U.S. at 61.

⁸⁵ *Id.* at 62 (“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”).

⁸⁶ *Id.* at 50-51.

⁸⁷ *Leading Cases*, 120 HARV. L. REV. 213, 217 (2006).

⁸⁸ I take this policy preference as a given in light of the treatment of domestic violence cases by courts across the country in the past ten to fifteen years. For a criticism of this policy, however, see *infra* notes 92 and 93.

⁸⁹ See, e.g., FED. R. EVID. 804(b)(6).

⁹⁰ See FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

⁹¹ Mandatory arrest policies require police officers to arrest a suspect if an officer has probable cause to believe that an assault or battery has taken place, even without a warrant. So-called ‘no-drop’ policies require prosecutors to prosecute domestic violence cases even against the wishes of victims.

⁹² See Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 555 (1999).

⁹³ See Wendy McElroy, *Supreme Court Ruling May Impact Domestic Violence Cases*, FOX NEWS, Mar. 31, 2004, available at <http://www.foxnews.com/story/0,2933,115672,00.html> (“Victims should always have the final say over whether to prosecute. This control is especially important in cases that involve intimate relationships such as husband and wife, parent and child. A legal system that strips domestic violence victims of choice is committing an act of violence against them that may be home damaging than the original crime.”).

⁹⁴ *Id.*

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