

FILED
DEC 20 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 87472-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY DOBBS,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Dec 17, 2012, 11:00 am
BY RONALD R. CARPENTER
CLERK

E *CRB*

RECEIVED BY E-MAIL

APPEAL FROM THE SUPERIOR COURT FOR
COWLITZ COUNTY

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>INTEREST OF AMICUS CURIAE</u>	1
B. <u>ISSUES PRESENTED</u>	1
C. <u>ARGUMENT</u>	2
1. IF THE DEFENDANT HAS FORFEITED THE CONSTITUTIONAL RIGHT TO CONFRONTATION BY WRONGDOING, ANY HEARSAY OBJECTIONS HAVE BEEN FORFEITED AS WELL	2
2. FORFEITURE BY WRONGDOING APPLIES IN MANY CONTEXTS; NARROWING THE SCOPE OF THE DOCTRINE IN ONLY DOMESTIC VIOLENCE CASES WOULD WORK AN INJUSTICE AND IS UNSUPPORTED BY LAW	14
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington, 541 U.S. 36, 1
24 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 15

Davis v. Washington, 547 U.S. 813,
126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)..... 6

Giles v. California, 554 U.S. 353,
128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) 5, 6, 10, 11, 15,16

Reynolds v. United States, 98 U.S. 145,
25 L. Ed. 244 (1878)..... 3

United States v. Houlihan, 92 F.3d 1271
(1st Cir. 1996)..... 4, 5, 6, 7, 17, 18

United States v. Thevis, 665 F.2d 616
(5th Cir. Unit B 1982)..... 4

United States v. White, 116 F.3d 903
(D.C. Cir. 1997) 6

United States v. Zlatogur, 271 F.3d 1025
(11th Cir. 2001) 4

Washington State:

State v. Dobbs, 167 Wn. App. 905,
276 P.3d 334 (2012)..... 14, 15

State v. Foster, 135 Wn.2d 441,
957 P.2d 712 (1998)..... 9

State v. Mason, 160 Wn.2d 910,
162 P.3d 396 (2007)..... 10, 18

Other Jurisdictions:

Commonwealth v. Edwards, 444 Mass. 526,
830 N.E.2d 158 (2005) 5, 8, 9

State v. Byrd, 198 N.J. 319,
967 A.2d 285 (2009) 12

Vasquez v. People, 173 P.3d 1099
(Colo. 2007) 12, 13

Constitutional Provisions

Federal:

U.S. Const. amend. VI 5, 15

Statutes

Washington State:

RCW 4.04.010 11

Rules and Regulations

Federal:

Fed. R. Evid. 804 5, 12

Fed. R. Evid. 807 (1997) 13

Washington State:

ER 401 8

ER 402 8

ER 403 8

Other:

Ariz. R. Evid. 804 (2010)	5
Cal. Evid. Code Ann. § 1350 (West Supp. 2008)	5
Colo. R. Evid. 803	12
Colo. R. Evid. 804	12
Colo. R. Evid. 807 (1999)	13
Conn. Gen. Stat. Ann., Code Evid. § 8-6 (2008)	5
Del. R. Evid. 804 (2001)	5
Fla. Stat. Ann. § 90.804 (2012)	5
Haw. R. Evid. 804 (2007)	5
Idaho R. Evid. 804 (2008)	5
Ind. R. Evid. 804 (2009)	5
Ky. R. Evid. 804 (2004)	5
La. Code Evid. Ann. art. 804 (2009)	5
Md. Code Ann., Cts. & Jud. Proc. § 10-901 (2005)	5
Mich. R. Evid. 804 (2001)	5
Miss. R. Evid. 804 (2009)	5
N.D. R. Evid. 804 (2007)	5
N.J. R. Evid. 804 (2011)	12
N.M. R. Evid. 804 (2007)	5
Ohio R. Evid. 804 (2008)	5
Pa. R. Evid. 804 (2005)	5

Tenn. R. Evid. 804 (2003) 5
Vt. R. Evid. 804 (2004)..... 5
Wyo. R. Evid. 804 (2009) 5

Other Authorities

Richard D. Friedman, *Confrontation and the
Definition of Chutzpa*, 31 Israel L. Rev. 506 (1997)..... 14

A. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that impact prosecutors' ability to prosecute defendants who engage in wrongdoing that prevents witnesses from testifying at trial.

B. ISSUES PRESENTED

1. The right to confrontation is a fundamental constitutional trial right. The hearsay rules codify procedural evidentiary principles. It is uncontested that under the doctrine of forfeiture by wrongdoing, a criminal defendant who engages in wrongdoing to prevent a witness from testifying against him has forfeited the right to confrontation, and the absent witness's prior statements are admissible in lieu of testimony. Should the defendant be allowed to object to the admissibility of such statements on hearsay grounds, thus elevating procedural evidentiary rules to a higher status than the right to confrontation?

2. The dissenting Court of Appeals judge suggests limiting the usual operation of the doctrine of forfeiture by wrongdoing in domestic violence cases. However, the forfeiture doctrine is an equitable principle that applies in many contexts, and there is no basis in law to limit its scope in domestic violence cases. Should this Court reject the suggestion that the forfeiture doctrine should be narrowed in its application in domestic violence cases?

C. ARGUMENT

1. IF THE DEFENDANT HAS FORFEITED THE CONSTITUTIONAL RIGHT TO CONFRONTATION BY WRONGDOING, ANY HEARSAY OBJECTIONS HAVE BEEN FORFEITED AS WELL.

Dobbs suggests that even if the right to confrontation has been forfeited due to purposeful wrongdoing that has caused the absence of a witness at trial, a defendant should retain the ability to object to the admission of the absent witness's out-of-court statements on hearsay grounds. Dobbs asserts that compliance with the hearsay rules is necessary to ensure that the statements admitted under the forfeiture doctrine are "reliable." Supplemental Brief, at 17-19. But rather than ensure "reliability," as Dobbs claims, any requirement that statements must satisfy the hearsay

rules in order to be admitted under the forfeiture doctrine would merely serve to elevate procedural evidentiary rules above a fundamental constitutional trial right, and would grant the defendant the windfall that the forfeiture doctrine was designed to prevent him or her from having in the first place.

The doctrine of forfeiture by wrongdoing was recognized in American case law over a century ago. Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 (1878). The doctrine has its roots in equity, and stems from the principle that a defendant who has wrongfully procured the unavailability of a witness cannot profit from that wrongdoing by asserting the right to confront the witness:

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. 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 that his constitutional rights have been violated.

Reynolds, 98 U.S. at 158.

The policy behind this doctrine is as simple as it is just: no one will be rewarded for subverting the justice system by depriving the prosecution, the court, and the jury of relevant evidence through bribery, intimidation, collusion, coercion, manipulation, or murder:

The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause, and make a mockery of the system of justice that the right was designed to protect.

United States v. Thevis, 665 F.2d 616, 630 (5th Cir. Unit B 1982)

(citations and internal quotations omitted), *superseded by rule on other grounds as stated in* United States v. Zlatogur, 271 F.3d

1025, 1028 (11th Cir. 2001). Put another way, forfeiture by wrongdoing serves "to ensure that a wrongdoer does not profit in a court of law by reason of his miscreancy." United States v. Houlihan, 92 F.3d 1271, 1282-83 (1st Cir. 1996).

Forfeiture by wrongdoing, distilled to its essence, dictates that a defendant who has wrongfully procured a witness's unavailability has forfeited both the right to confrontation and any hearsay objections, and the witness's out-of-court statements are admissible at trial in lieu of the live testimony that the defendant has

prevented. See Houlihan, 92 F.3d at 1282. Courts applying the forfeiture doctrine acknowledge that confrontation is a bedrock constitutional right; nonetheless, the “Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery.” Commonwealth v. Edwards, 444 Mass. 526, 535, 830 N.E.2d 158 (2005) (quoting Houlihan, 92 F.3d at 1282-83).

In 1997, forfeiture by wrongdoing was codified in the Federal Rules of Evidence as a hearsay exception. Fed. R. Evid.

804(b)(6).¹ The rule provides that out-of-court statements are admissible if “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.” Id. Significantly, the United States Supreme Court has repeatedly recognized that this rule “codifies the forfeiture doctrine” as it existed at common law. Giles v. California, 554 U.S. 353, 367, 128 S. Ct. 2678,

¹ Notably, an evidence rule very similar to the federal rule was approved by the WSBA Rules Committee, and this Court recently ordered that the proposed rule be published for comment (see Appendix). Many other states have already adopted rules modeled on the federal rule. See, e.g., Ariz. R. Evid. 804(b)(6) (2010); Cal. Evid. Code Ann. § 1350 (West Supp. 2008); Conn. Gen. Stat. Ann., Code Evid. § 8-6(8) (2008); Del. R. Evid. 804(b)(6) (2001); Fla. Stat. Ann. § 90.804(2)(f) (2012); Haw. R. Evid. 804(b)(7) (2007); Idaho R. Evid. 804(b)(5) (2008); Ind. R. Evid. 804(b)(5) (2009); Ky. R. Evid. 804(b)(5) (2004); La. Code Evid. Ann. art. 804(B)(7) (2009); Md. Code Ann., Cts. & Jud. Proc. § 10-901 (2005); Mich. R. Evid. 804(b)(6) (2001); Miss. R. Evid. 804(b)(6) (2009); N.D. R. Evid. 804(b)(6) (2007); N.M. R. Evid. 804(b)(5) (2007); Ohio R. Evid. 804(b)(6) (2008); Pa. R. Evid. 804(b)(6) (2005); Tenn. R. Evid. 804(b)(6) (2003); Vt. R. Evid. 804(b)(6) (2004); Wyo. R. Evid. 804(b)(7) (2009).

171 L. Ed. 2d 488 (2008) (quoting Davis v. Washington, 547 U.S. 813, 833, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

Even before this evidence rule was adopted, however, federal courts held that a defendant forfeited hearsay objections in addition to the right to confrontation. As one court stated, “[t]he same equity and policy considerations apply with even more force to a rule of evidence without constitutional weight,” and thus, any hearsay objections are necessarily forfeited along with confrontation rights. United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997).

One of the leading federal cases on the forfeiture doctrine soundly rejected the same arguments that Dobbs suggests in this case. In Houlihan, the three defendants – two Irish mob bosses and their enforcer – were charged with numerous crimes including racketeering and murder. Some of the prosecution’s evidence at trial consisted of the out-of-court statements of George Sargent, an underling in the defendants’ criminal enterprise who had begun cooperating with the authorities, and who was murdered as a result of that cooperation. Houlihan, 92 F.3d at 1277-78. In lieu of Sargent’s live testimony, which obviously was not possible, the government offered testimony from a state trooper who had

interviewed Sargent, and a tape recording of another interview with Sargent that had been conducted by the Boston Police. Id. at 1278. This evidence was obviously testimonial hearsay.

After a lengthy analysis of the forfeiture doctrine as it relates to the right to confrontation, the Houlihan court then turned to the question of the defendants' hearsay objections. The court held that "[o]n the facts of this case . . . Houlihan's and Nardone's misconduct waived not only their confrontation rights but also their hearsay objections," and expressly rejected the notion that Sargent's statements were inadmissible because they constituted "unreliable" hearsay. Houlihan, 92 F.3d at 1281. The court also rejected the argument that the defendants' due process rights were violated by the admission of "unreliable evidence." Id. at 1282.²

In sum, the Houlihan court ultimately held that any out-of-court statements that would have been admissible as live testimony are admissible under the forfeiture doctrine:

To sum up, since courts should not reward parties for their own misdeeds, a prior out-of-court statement made by a witness whose unavailability stems from the wrongful conduct of a party, aimed at

² Notably, the court further held that when forfeiture applies, the prosecution *retains* the ability to lodge hearsay objections: "It is only the party who wrongfully procures a witness's absence who waives the right to object to the adverse party's introduction of the witness's prior out-of-court statements." Id. at 1283.

least in part at achieving that result, is admissible against the party as long as the statement would have been admissible had the witness testified.

Id. This is the only logical and just result, given that the very purpose of the forfeiture doctrine is to supply the prosecution with some pale substitute for the live testimony that the defendant has wrongfully prevented.³ Continued application of the hearsay rules in this context would thwart that purpose.

Most states have adopted this same application of the forfeiture doctrine, whether via an evidence rule or decisional law. Massachusetts, like Washington, is one of the latter. In Commonwealth v. Edwards, 444 Mass. 526, 830 N.E.2d 158 (2005) – a leading state case on the forfeiture doctrine, and one of the most comprehensive – one of the co-defendants in an attempted murder case had persistently tampered with the state's key witness, who then flatly refused to testify at trial despite being granted immunity and being held in contempt. Edwards, 444 Mass. at 528-31. In lieu of the witness's live testimony, the state offered the witness's former grand jury testimony. This evidence was obviously hearsay: "Without question, Crockett's grand jury

³ On the other hand, this rule also properly excludes evidence that would *not* be admissible as testimony. Thus, statements that are irrelevant, misleading, cumulative, more prejudicial than probative, or otherwise inadmissible as testimony would not be allowed. See, e.g., ER 401, 402, 403.

testimony consists of hearsay, and we shall assume it is not admissible under any exceptions to the hearsay rule." Edwards, 444 Mass. at 532 (citation and footnote omitted). After conducting an extensive analysis, both under the federal and Massachusetts constitutions,⁴ the court concluded:

We hold that a defendant forfeits, by virtue of wrongdoing, the right to object to the admission of an unavailable witness's out-of-court statements on both confrontation and hearsay grounds on findings that (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability.

Edwards, 444 Mass. at 540.

Again, this is the only just result, because the forfeiture doctrine's purpose is to prevent the defendant from profiting from his own wrongdoing and to provide the prosecution with a substitute for the live testimony that the defendant has suppressed. In other words, the out-of-court statements take the place of what the witness should have said on the witness stand but for the defendant's wrongful acts. Indeed, this Court has already reached

⁴ Significantly, the Massachusetts Constitution's confrontation clause is identical to Washington's. See State v. Foster, 135 Wn.2d 441, 490, 957 P.2d 712 (1998) (Johnson, J., dissenting) (noting that Washington's confrontation clause was indirectly derived from the Massachusetts constitution, and that both constitutional provisions contain the same language).

the same conclusion, at least impliedly, by holding that testimonial statements whose admissibility under the hearsay rules was highly questionable were still admissible under the forfeiture doctrine. State v. Mason, 160 Wn.2d 910, 919-27, 162 P.3d 396 (2007). And more recently, the United States Supreme Court specifically rejected the notion that hearsay objections are preserved when confrontation rights are forfeited. Giles, 554 U.S. at 364-65.

In Giles, while explaining that a showing of the defendant's intent was historically required for a forfeiture of confrontation rights, the Court noted that the statements of murder victims were admitted *without* such a showing only in very limited circumstances:

The manner in which the rule was applied makes plain that unfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying – as in the typical murder case involving accusatorial statements by the victim – the testimony was excluded unless it was confronted or fell within the dying-declarations exception [to the hearsay rule].

Giles, 554 U.S. at 361-62 (emphasis in original). After analyzing several cases illustrating these principles, the Court rejected the state's explanation for this conundrum as follows:

The State offers another explanation for the above cases. It argues that when a defendant committed some act of wrongdoing that rendered a witness unavailable, he forfeited his right to object to the witness's testimony on confrontation grounds, but not on hearsay grounds. No case or treatise we have found, however, suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights. And the distinction would have been a surprising one, because courts prior to the founding excluded hearsay evidence in large part *because* it was unconfro

Giles, 554 U.S. at 364-65 (citations omitted) (emphasis in original).

As these passages from Giles illustrate, the historical application of the forfeiture doctrine at common law dictated that a defendant who wrongfully procured a witness's unavailability with the purpose of keeping the witness from testifying had forfeited *both* the right to confrontation and any objection on hearsay grounds.⁵ Again, this historical application is well-grounded in both policy and logic, for to hold otherwise would both reward the defendant for wrongdoing and elevate the hearsay rules to a higher status than the right to confrontation – a hierarchical inversion that the United States Supreme Court plainly rejects.

⁵ Arguably, the fact that the United States Supreme Court has rejected the notion that a defendant retains the ability to object on hearsay grounds under the common law forfeiture doctrine means that Dobbs's argument falls under Washington law as well. See RCW 4.04.010 ("The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.").

Nonetheless, Dobbs suggests that the hearsay rules should still apply, citing Vasquez v. People, 173 P.3d 1099, 1106 (Colo. 2007).⁶ Supplemental Brief, at 18. Vasquez is inapposite.

In Vasquez, the Colorado Supreme Court did hold “that where a defendant forfeits his right to confront a witness, the reliability of the evidence must still be ensured according to the standards of the Colorado Rules of Evidence.” Vasquez, 173 P.3d at 1106. However, the court made clear that the applicable evidence rule was “the residual exception to the hearsay rule,” Colo. R. Evid. 807 (formerly Colo. R. Evid. 804(b)(5)). Vasquez, 173 P.3d at 1106. This rule provides that “[a] statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule” if the trial court finds that the statement is material, that it is more probative than other evidence that the proponent has obtained through “reasonable efforts,” and that the interests of

⁶ Dobbs also cites State v. Byrd, 198 N.J. 319, 967 A.2d 285 (2009), for this proposition. Supplemental Brief, at 18. The Byrd court held that New Jersey should adopt a hearsay exception codifying forfeiture by wrongdoing as soon as possible. Byrd, 198 N.J. at 324-25. New Jersey subsequently adopted such a rule. N.J. R. Evid. 804(b)(9) (2011). The holding in Byrd, with which WAPA certainly agrees, does not support Dobbs’s position that statements admitted pursuant to the forfeiture doctrine must comply with *existing* hearsay rules. Dobbs also cites two federal cases, both of which have been superceded by the adoption of Fed. R. Evid. 804(b)(6) (1997). Supplemental Brief, at 18. These cases are not helpful, either.

justice will be served by admitting the statement. Colo. R. Evid. 807 (1999). This “residual hearsay” rule, which is modeled on an equivalent federal rule,⁷ has never been adopted in Washington.

Thus, Vasquez lends no support to the notion that statements offered in Washington courts under the doctrine of forfeiture by wrongdoing are inadmissible unless they meet the requirements of a hearsay exception under Washington law. Rather, the Vasquez court held that statements offered in Colorado courts should be admitted in accordance with Colorado’s “residual hearsay” exception – a broad evidentiary rule that simply does not exist in Washington.⁸

In sum, this Court should explicitly hold that when the State proves that a defendant has engaged in wrongdoing with the purpose of preventing a witness from testifying at trial, the defendant has forfeited not only the constitutional right to confront that witness, but any hearsay objections as well. Only this rule will achieve the purposes inherent in the forfeiture doctrine: 1) to prevent a defendant from profiting from wrongful acts that subvert

⁷ See Fed. R. Evid. 807 (1997).

⁸ In addition, the Vasquez court acknowledged that its ruling was contrary to the majority rule, *i.e.*, that all hearsay objections are forfeited along with the right of confrontation. Vasquez, 173 P.3d at 1106.

the integrity of the criminal justice system; and 2) to provide the State with something resembling a substitute for the live testimony that the witness should have given but for the defendant's wrongful acts. To hold otherwise would elevate procedural evidence rules to a higher status than a bedrock constitutional right, and would work an injustice on the people of Washington by granting the defendant an evidentiary windfall for engaging in purposeful misconduct.

2. FORFEITURE BY WRONGDOING APPLIES IN MANY CONTEXTS; NARROWING THE SCOPE OF THE DOCTRINE IN ONLY DOMESTIC VIOLENCE CASES WOULD WORK AN INJUSTICE AND IS UNSUPPORTED BY LAW.

The dissenting Court of Appeals judge suggests narrowing the scope of the doctrine of forfeiture by wrongdoing by eliminating "reflexive forfeiture"⁹ in domestic violence cases. State v. Dobbs, 167 Wn. App. 905, 919-21, 276 P.3d 334 (2012) (Van Deren, J., dissenting). This suggestion should be soundly rejected, as it would reward domestic violence perpetrators, and only domestic

⁹ "Reflexive forfeiture" is the nomenclature that some commentators have used for the well-established principle that the wrongdoing the defendant engaged in to cause the witness's absence may also be the basis for criminal charges the defendant faces at trial. See Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 Israel L. Rev. 506, 521-35 (1997) (discussing "reflexive forfeiture" at length and in different contexts).

violence perpetrators, by eliminating a well-settled principle that applies in other contexts.

As a preliminary matter, a close examination of the split opinions in Giles reveals that five members of the United States Supreme Court would hold that evidence of a pattern of abuse in a domestic violence relationship, in and of itself, would suffice in most cases to prove that the defendant intended to prevent the victim from coming to court. This is directly contrary to the view expressed in the Dobbs dissent.

Justice Souter, joined by Justice Ginsberg, stated the following in his concurrence:

Examining the early cases and commentary, however, reveals two things that count in favor of the Court's understanding of forfeiture when the evidence shows domestic abuse. The first is the substantial indication that the Sixth Amendment was meant to require some degree of intent to thwart the judicial process before thinking it was reasonable to hold the confrontation right forfeited; otherwise the right would in practical terms boil down to a measure of reliable hearsay, a view rejected in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The second is the absence from the early material of any reason to doubt that *the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.* If the evidence for admissibility shows a continuing relationship of this

sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger.

Giles, 554 U.S. at 380 (Souter, J., concurring) (emphasis supplied). Justice Breyer, joined by Justices Stevens and Kennedy in dissent, quoted the above passage from Justice Souter's concurrence with approval. Id. at 404-05 (Breyer, J., dissenting). Accordingly, five justices would hold that the abusive and controlling nature of the defendant's relationship with the victim is evidence proving that the defendant's motive for engaging in wrongdoing is to prevent the victim from cooperating with a prosecution.

Moreover, although Justice Scalia's opinion on behalf of the Court stated that there is not "a special, improvised Confrontation Clause for those crimes that are frequently directed against women," the opinion further stated that "[t]he domestic-violence context is relevant" because "[a]cts 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." Giles, 554 U.S. at 377. Thus, every member of the United States Supreme Court recognizes that evidence of the ongoing abuse, intimidation, and

manipulation that are so often the hallmarks of a domestic violence relationship is relevant evidence for trial courts to consider in determining whether the forfeiture doctrine applies.

Given that recognition, it makes no sense to treat domestic violence cases differently from other cases where "reflexive forfeiture" is concerned. Indeed, many of the leading cases in which "reflexive forfeiture" has been applied are not domestic violence cases, but the legal principles are exactly the same.

For example, as discussed at some length above, Houlihan was a federal racketeering prosecution that involved "reflexive forfeiture." Nonetheless, the Houlihan court soundly rejected the notion that the forfeiture doctrine should apply only to witnesses who are about to testify rather than potential witnesses who are reporting crimes to the authorities:

When a defendant murders an individual who is a percipient witness to acts of criminality (or procures his demise) in order to prevent him from appearing at an upcoming trial, he denies the government the benefit of the witness's live testimony. In much the same way, when a defendant murders such a witness (or procures his demise) in order to prevent him from assisting an ongoing criminal investigation, he is denying the government the benefit of the witness's live testimony at a future trial. In short, the two situations are fair congeners: as long as it is reasonably foreseeable that the investigation will culminate in the bringing of charges,

the mere fact that the homicide occurs at an earlier step in the parvane should not affect the operation of the waiver-by-misconduct doctrine. Indeed, adopting the contrary position urged by the appellants would serve as a prod to the unscrupulous to accelerated the timetable and murder suspected snitches sooner rather than later. We see no justification for creating such a perverse incentive, or for distinguishing between a defendant who assassinates a witness on the eve of trial and a potential defendant who assassinates a potential witness before charges officially have been brought.

Houlihan, 92 F.3d at 1279-80.

Although Houlihan is not a domestic violence case, the principles set forth above apply performe in Dobbs's case. Dobbs's escalating campaign of threats and violence was similarly directed at preventing Ms. Rodriguez's cooperation with the authorities, although criminal charges had not yet been filed and a trial had not yet been scheduled. That Dobbs and Rodriguez had an intimate relationship, whereas George Sargent and his mob bosses did not, is not a principled reason to adopt a narrower version of the forfeiture doctrine in domestic violence cases.

Similarly, in Mason, this Court adopted the forfeiture doctrine in a case where the defendant murdered the victim of a kidnapping and attempted robbery that the defendant had perpetrated less than a month before the murder. Mason, 160 Wn.2d at 915-16.

Again, although the wrongdoing alleged for forfeiture purposes and the criminal charge against the defendant were the same (*i.e.*, murder), this Court had no trouble concluding that the forfeiture doctrine applied in a "reflexive" manner. *Id.* at 924-27. Again, there is no principled basis to treat domestic violence cases differently. This is particularly true given that the State must still establish that the defendant intended to cause the victim not to cooperate with the authorities, which operates as a limiting principle on forfeiture by wrongdoing in *all* cases.

Indeed, the "reflexive forfeiture" principle could apply in any case where the State brings charges (whether witness tampering, witness intimidation, assault, bribery, or murder) on the basis of the wrongdoing that also triggers the forfeiture doctrine. Limiting this well-established principle to cases that do not involve domestic violence would constitute poor public policy and grant a particular group of violent offenders an unjust windfall. Indeed, narrowing the scope of the forfeiture doctrine in domestic violence cases would serve only to provide a windfall to a particular group of defendants solely on the basis of their relationship to their victims. Such a distinction has no support in the law, and this Court should reject it.

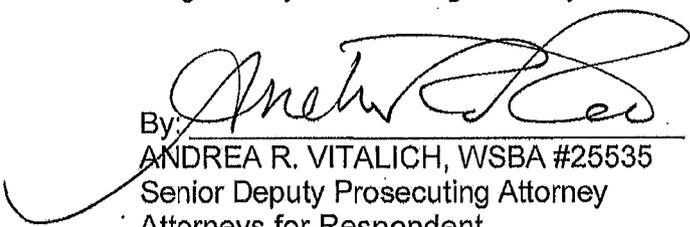
D. CONCLUSION

The doctrine of forfeiture by wrongdoing exists to prevent criminal defendants from profiting from their subversion of the criminal justice system by keeping the witnesses against them out of the courtroom. Defendants who engage in such conduct should not profit from it by retaining the ability to object to the admission of statements on hearsay grounds. This Court should also reject the dissenting Court of Appeals judge's invitation to narrow the scope of the forfeiture doctrine in domestic violence cases. The doctrine serves to provide a remedy against wrongdoing that strikes at the integrity of the criminal justice system in many different contexts, and there is no principled basis to treat domestic violence cases differently. The Court of Appeals should be affirmed.

DATED this 17th day of December, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANDREA R. VITALICH, WSBA #25535
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE ADOPTION OF THE)
AMENDMENTS TO ER 804-HEARSAY)
EXCEPTIONS; DECLARANT UNAVAILABLE, ER)
901-REQUIREMENT OF AUTHENTICATION OR)
IDENTIFICATION AND CR 34-PRODUCING)
DOCUMENTS, ELECTRONICALLY STORED)
INFORMATION, AND THINGS OR ENTRY UPON)
LAND FOR INSPECTION AND OTHER)
PURPOSES; APR TITLE, APR 1-9; APPENDIX)
APR 12, REGULATION 14; APR 13, APR 15, APR)
15 PROCEDURAL RULES 6, 9, 13, APR 17; APR)
18; APR 20, APR 20.1, APR 20.2, APR 20.3, APR)
20.4, APR 20.5, APR 21, APR 22, APR 23, APR 24,)
APR 24.1, APR 24.2, APR 24.3, APR 24.4, APR 24.5,)
APR 25, APR 25.1, APR 25.2, APR 25.3, APR 25.4,)
APR 25.5, AND APR 25.6; RPC 5.5-)
UNAUTHORIZED PRACTICE OF LAW;)
MULTIJURISDICTIONAL PRACTICE OF LAW)
AND LPORPC 1.12A-SAFEGUARDING)
PROPERTY; NEW SET OF RULES FOR)
ENFORCEMENT OF LAWYER CONDUCT (ELC))
AND RPC 5.8-MISCONDUCT INVOLVING)
DISBARRED, SUSPENDED, RESIGNED, AND)
INACTIVE LAWYERS; AMENDMENT TO GR)
12.1-WASHINGTON STATE BAR ASSOCIATION;)
PURPOSES)

ORDER

NO. 25700-A- 1010

CLERK

BY RONALD R. CARPENTER

2012 DEC -6 P 4:28

STATE OF WASHINGTON

SUPREME COURT

FILED

The Washington State Bar Association having recommended the adoption of the proposed amendments to ER 804-Hearsay Exceptions; Declarant Unavailable, ER-901-Requirement of Authentication or Identification and CR 34-Producing Documents, Electronically Stored Information, and Things or Entry Upon Land for Inspection and Other Purposes; APR Title, APR 1-9, Appendix APR 12, Regulation 14, APR 13, APR 15, APR 15 Procedural Rules 6, 9, 13, APR 17, APR 18, APR 20, APR 20.1, APR 20.2, APR 20.3, APR

651/146

Page 2

ER 804-Hearsay Exceptions: Declarant Unavailable, ER 901-Requirement of Authentication or Identification and CR 34-Producing Documents, Electronically Stored Information, and Things or Entry Upon Land for Inspection and Other Purposes; APR's RPC 5.5-Unauthorized Practice of Law; Multijurisdictional Practice of Law and LPORPC 1.12A-Safeguarding Property; New Set of Rules for Enforcement of Lawyer Conduct (ELC) and RPC 5.8-Misconduct Involving Disbarred, Suspended, Resigned, and Inactive Lawyers; Amendment to GR 12.1-Washington State Bar Association: Purposes

20.4, APR 20.5, APR 21, APR 22, APR 23, APR 24, APR 24.1, APR 24.2, APR 24.3, APR 24.4, APR 24.5, APR 25, APR 25.1, APR 25.2, APR 25.3, APR 25.4, APR 25.5 and APR 25.6.

RPC 5.5-Unauthorized Practice of Law; Multijurisdictional Practice of Law and LPORPC 1.12A-Safeguarding Property; New Set of Rules for Enforcement of Lawyer Conduct (ELC) and RPC 5.8-Misconduct Involving Disbarred, Suspended, Resigned, and Inactive Lawyers; Amendment to GR 12.1-Washington State Bar Association: Purposes, and the Court having approved the proposed amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the proposed amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2013;

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2013. Comments may be sent to the following

Page 3

ER 804-Hearsay Exceptions: Declarant Unavailable, ER 901-Requirement of Authentication or Identification and CR 34-Producing Documents, Electronically Stored Information, and Things or Entry Upon Land for Inspection and Other Purposes; APR's RPC 5.5-Unauthorized Practice of Law; Multijurisdictional Practice of Law and LPORPC 1.12A-Safeguarding Property; New Set of Rules for Enforcement of Lawyer Conduct (ELC) and RPC 5.8-Misconduct Involving Disbarred, Suspended, Resigned, and Inactive Lawyers; Amendment to GR 12.1-Washington State Bar Association: Purposes

addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or

Denise.Foster@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 6th day of December, 2012.

For the Court

Madsen, C. J.
CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendment SUPERIOR COURT EVIDENCE RULES ER 804 – Hearsay Exceptions: Declarant Unavailable

(Codifying hearsay exception when witness is unavailable due to a party's wrongdoing)

Submitted by the Board of Governors of the Washington State Bar Association

Purpose: In the federal courts, a defendant who causes the nonappearance of a witness at trial (either by killing or intimidating the witness) waives both the hearsay rule and the Sixth Amendment right to confrontation with respect to that witness. As a result, a federal prosecutor is then able to call other witnesses to recount out-of-court statements by the witness who did not appear. Washington State jurisprudence holds that a criminal defendant waives the Sixth Amendment right to confrontation by killing a prosecution witness, but Washington has not adopted the language of the Federal Rules of Evidence to clarify that a defendant *also* waives the hearsay rule. See State v. Mason, 160 Wn.2d 910 (2007); Giles v. California, 128 S. Ct. 2678 (2008). As a result, in Washington, there is an anomalous situation where a defendant is barred from asserting the right to confrontation, and yet may object to the same statements on the basis of the hearsay rule. Codification of the rule on forfeiture by wrongdoing in Washington State would allow the membership the benefit of federal jurisprudence.

Federal Evidence Rule 804(b)(6) creates a hearsay exception for statements 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. Effective December 2011, the federal rule will be revised to state as follows: "[a] statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result."

Different jurisdictions have adopted different formulations of the federal rule. The suggested rule would adopt a formulation of the hearsay exception adopted in the State of New Jersey: "A statement offered against a party that has engaged directly or indirectly in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Suggested ER 804(b)(6) is an adaptation of the federal hearsay rule that clarifies the circumstances giving rise to a waiver. The suggested rule does not incorporate the language of "acquiescence" in that the proponent may not rely on assertions that a party "acquiesced" in conduct that procured the unavailability of a witness. Furthermore, the suggested rule is a hearsay rule and is not designed to alter

SUGGESTED AMENDMENT
SUPERIOR COURT RULES OF EVIDENCE (ER)
RULE 804 -- HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

1 (a) Definition of unavailability. [Unchanged]

2 (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant
3 is unavailable as a witness:

4 [1 - 5 unchanged]

5 (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged directly or
6 indirectly in wrongdoing that was intended to, and did, procure the unavailability of the declarant
7 as a witness.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the petitioner, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Amicus Curiae Washington Association of Prosecuting Attorneys, in STATE V. TIMOTHY DOBBS, Cause No. 87472-7, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

12/17/12
Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to James Smith, the attorney for the respondent, at Cowlitz County Prosecutor's Office, Hall of Justice, 312 SW First Ave., Kelso, WA 98626, containing a copy of the Brief of Amicus Curiae Washington Association of Prosecuting Attorneys, in STATE V. TIMOTHY DOBBS, Cause No. 87472-7, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

12/17/12
Date

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, December 17, 2012 11:02 AM
To: 'Vitalich, Andrea'
Cc: Smith.James@co.cowlitz.wa.us; 'Eric Broman'; Sloane, John
Subject: RE: State v. Timothy Dobbs, No. 87472-7

Rec'd 12/17/2012

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Vitalich, Andrea [<mailto:Andrea.Vitalich@kingcounty.gov>]
Sent: Monday, December 17, 2012 10:55 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Smith.James@co.cowlitz.wa.us; 'Eric Broman'; Sloane, John
Subject: State v. Timothy Dobbs, No. 87472-7

Dear Supreme Court Clerk,

Please find attached for filing by email the "Motion for Leave to File Amicus Curiae Brief" and "Brief of Amicus Curiae Washington Association of Prosecuting Attorneys," with accompanying certificates of service, for State v. Timothy Dobbs, No. 87472-7.

Thank you,

Andrea Vitalich, WSBA #25535

King County Prosecutor's Office, Appellate Unit
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
(206) 296-9655