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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: PETITION TO ADD NEW RULE 804(b)(5) ARIZONA RULES OF EVIDENCE	R- MARICOPA COUNTY ATTORNEY'S PETITION TO ADD NEW RULE 804(b)(5) ARIZONA RULES OF EVIDENCE

The Maricopa County Attorney petitions pursuant to Rule 28 of the Arizona Rules of the Supreme Court to add a new rule of evidence to the list of hearsay exceptions in Rule 804(b), Arizona Rules of Evidence. The proposed new rule, sometimes called

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"forfeiture by wrongdoing," would become Rule 804(b)(5) and the current Rule 804(b)(5) would be redesignated as Rule 804(b)(6).

Respectfully submitted this 12th day of January, 2009.

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I. SUMMARY OF PROPOSED CHANGES

The Maricopa County Attorney's Office (MCAO) proposes a modification of Rule 804(b) of the Arizona Rules of Evidence that would add a new hearsay exception for out-of-court statements by a declarant when the defendant has deliberately acted to make the declarant witness unavailable for trial. The federal courts and several other states have adopted such an exception, and MCAO believes that such an exception is appropriate because a defendant should not be allowed to profit from his own misconduct by deliberately acting to make a witness unavailable. This is especially true in domestic violence and gang-related cases where victims and witnesses are particularly susceptible to intimidation. Such misconduct undermines the truth-seeking purpose of the criminal justice system and should not be rewarded.

II. CURRENT FEDERAL RULE OF EVIDENCE 404(B)(6) PROVIDES A "FORFEITURE BY WRONGDOING" HEARSAY EXCEPTION WHEN A DECLARANT WITNESS IS UNAVAILABLE FOR TRIAL BECAUSE THE DEFENDANT HAS DELIBERATELY ACTED TO MAKE THE WITNESS UNAVAILABLE

Out-of-court statements by declarants who do not appear to testify are usually inadmissible. However, the common law provided an exception from the usual hearsay and Confrontation Clause rules in cases in which the defendant had wrongfully procured the witness's absence from trial. In 1878, the United States Supreme Court discussed the equitable basis for the "forfeiture by wrongdoing" exception to the hearsay rule:

> 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 v. United States, 98 U.S. 145, 158 (1878).

Rule 804(b), Federal Rules of Evidence, deals with exceptions to the hearsay rule in situations in which the declarant is unavailable to testify in court. In 1997, the Federal Rule was amended to add subsection (b)(6), incorporating the common law doctrine of "forfeiture by wrongdoing." That subsection reads:

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

> **(6) Forfeiture by wrongdoing.** 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.

The Comments to the amendment adding this subsection to the Federal Rules of Evidence stated in part as follows:

> **Subdivision (b)(6).** Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir.1982), *cert. denied*, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.

Noting that every federal circuit that had resolved the question had recognized the principle of forfeiture by misconduct, the Comment stated that most of those courts had applied a "preponderance of the evidence" standard for determining whether forfeiture had occurred, although some had applied a higher "clear and convincing evidence" standard. The Comment concluded, "The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage."

The United States Supreme Court has said:

> [W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.

Davis v. Washington, 547 U.S. 813, 833 (2006) [emphasis in original].

"Forfeiture under Rule 804(b)(6) applies not only in the original cases for which the declarant was an actual or potential witness, but also in any prosecution pertaining to the wrongful procurement of the witness's unavailability." *United States v. Johnson*, 495 F.3d 951, 970 (8th Cir. 2007), *citing United States v. Emery*, 186 F.3d 921 (8th Cir.1999).

Arizona Rule of Evidence 804(b) generally tracks the Federal Rule in setting out exceptions to the hearsay rule when the declarant is unavailable, but does not now include any provision dealing with "forfeiture by wrongdoing." This Petition seeks to amend the Arizona Rule by adding a new subsection (b)(5), using the same language as the Federal Rule's subsection (b)(6).

III. CONFRONTATION CLAUSE ANALYSIS

In determining the admissibility of out-of-court statements by unavailable declarants, courts must consider two factors: first, the defendant's Sixth Amendment right to confront and cross-examine the witnesses against him, and second, the Rules of Evidence concerning hearsay statements.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court rejected the long-standing rule of *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), that the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability,'" a test met when the evidence either fell within a "firmly rooted hearsay exception" or bore

"particularized guarantees of trustworthiness." The *Crawford* Court held that the Confrontation Clause required exclusion of "testimonial" statements made prior to trial by declarants who were unavailable to testify at trial.1 The Court defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." The Court explained, "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. The Confrontation Clause applied to "testimonial" statements, which, at a minimum, included such things as "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. The *Crawford* Court did not attempt to set forth a complete definition of "testimonial."

In *State v. Boggs*, 218 Ariz. 325, 337, ¶ 56, 185 P.3d 111, 123 (2008), this Court observed that the United States Supreme Court clarified "testimonial" in *Davis v. Washington*, 547 U.S. 813, 822 (2006):

> 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.

1The declarant/witness in *Crawford* was Crawford's wife, the victim. She was unavailable to testify at trial because of the Washington marital fact privilege, not because of any wrongdoing by Crawford.

In *State v. King*, 212 Ariz. 372, 378, ¶ 28, 132 P.3d 311, 317 (App. 2006), the Court of Appeals held that statements made in 9-1-1 calls must be analyzed on a case-by-case basis to determine if they were testimonial or not; such calls that were primarily "loud cries for help" were nontestimonial, *id.* at ¶ 29; and calls "made for the primary purpose of identifying a suspect or reporting evidence of an alleged crime that has already occurred will usually be testimonial." *Id.* at ¶ 30. In *King*, the victim's responses to a police officer responding to a 9-1-1 call were testimonial because "a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime." *Id.* at 376, ¶ 20, 132 P.3d at 315, *quoting United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004).

It is important to note that the United States Supreme Court specifically stated in *Crawford* that *nontestimonial* hearsay did not implicate the Confrontation Clause, stating, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

In *Giles v. California*, __ U.S. __, 128 S.Ct. 2678 (2008), the Supreme Court held that there was no "forfeiture by wrongdoing" exemption to the Confrontation Clause rule announced in *Crawford*, *supra*, unless the defendant had deliberately acted with the intent and result that the declarant witness be unavailable to testify at trial. Giles shot and killed his ex-girlfriend but claimed that he acted in self-defense. The prosecution sought to

introduce statements the victim had made to a police officer responding to a domestic violence call three weeks earlier. The prosecution did not dispute that these statements were "testimonial" under *Crawford*, but argued that under California law, such statements could be admitted, despite the Confrontation Clause, if a judge found, as the judge did in Giles's case, "that the defendant committed a wrongful act that rendered the witness unavailable to testify at trial." 128 S.Ct. at 2682.

The *Giles* Court noted that there was a common law exception to the Confrontation Clause requirement for "forfeiture by wrongdoing," which "permitted the introduction of statements of a witness who was detained or kept away by the means or procurement of the defendant." *Id.* at 2683 [internal quotation marks omitted]. However, the Court reasoned, this exception was limited to situations in which the defendant committed wrongdoing that was *specifically intended to prevent the declarant from testifying at trial* – that is, deliberate tampering with the witness – rather than situations in which the defendant may have killed the victim for another purpose. *Id.* at 2687. The Court remanded the case to the California courts to determine the defendant's intent in killing the victim.

The *Giles* Court stressed that its holding applied only to *testimonial* statements, saying, "Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing."

Id. at 2692-93. The Court went on to say that acts of domestic violence "are often intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions." *Id.* at 2693. In such circumstances, evidence of past abuse "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." *Id.*

III. HEARSAY ANALYSIS

As noted above, the Federal Rules of Evidence have codified a hearsay exception based on "forfeiture by wrongdoing." Indiana has also adopted a "forfeiture by wrongdoing" exception to the hearsay rule for nontestimonial statements, which is similar to the amendment this Petition seeks. In *Roberts v. Indiana*, 894 N.E.2d 1018 (Ind. App. 2008), Roberts killed his girlfriend. The State sought to admit statements the victim had made to co-workers and friends that Roberts had threatened to kill her. The trial court allowed the State to present those statements, and Roberts was convicted of murder. On appeal, Roberts argued that admitting the statements violated his Sixth Amendment right to confront the witnesses against him and also was inadmissible hearsay under the Indiana Evidence Rules. *Id.* at 1023.

The Indiana Court first found that the victim's statements to her co-workers and friends were not testimonial, so there was no Sixth Amendment Confrontation Clause

right and *Giles*, *supra*, was not implicated. *Id.* The Court then stated that it would "accept the Supreme Court's invitation [in *Giles*] to take a slightly broader view of the doctrine of forfeiture by wrongdoing as advocated by Justice Breyer in his dissent in *Giles* as it applies to non-testimonial statements under Indiana law." *Id.* at 1024. The Indiana Court then held that "a party, who has rendered a witness unavailable for cross-examination through a criminal act, including homicide, may not object to the introduction of hearsay statements by the witness as being inadmissible under the Indiana Rules of Evidence." *Id.* at 1025. "Roberts forfeited his right to confront [the victim] about the statements when he killed her. The trial court did not abuse its discretion in admitting these statements." *Id.* at 1026.

Only two Arizona cases have addressed the "forfeiture by wrongdoing" issue in this criminal context. *State v. Valencia*, 186 Ariz. 493, 924 P.2d 497 (App. 1996), preceded both *Crawford* and *Giles*. Valencia shot S.B. in February 1993 but failed to kill him. While S.B. was hospitalized, he identified Valencia as the person who shot him and identified his picture from a photographic lineup. In July 1993, Valencia went to S.B.'s house and shot him and his stepfather. The stepfather died immediately, but S.B. was rushed to the hospital, where he told a detective that Valencia had shot him again and again identified him from a photographic lineup. Three weeks later, S.B. died from his wounds. Valencia was convicted of aggravated assault for the February shooting of S.B.

and of two counts of murder for the July shootings. On appeal, Valencia argued that the trial court erred by admitting S.B.'s out-of-court statements identifying Valencia.

The Court of Appeals affirmed Valencia's convictions, stating, "If a defendant silences a witness by violence or murder, the defendant cannot then assert his Confrontation Clause rights in order to prevent the admission of prior testimony from that witness. ... In such circumstances, a defendant is deemed to have waived both his Confrontation Clause *and* his hearsay objections to the admission of the witness's statements." *Id.* at 498, 924 P.2d at 402 [emphasis in original, citations omitted]. The Court said that before admitting testimony under this principle, the trial court must hold a hearing at which the prosecution bears the burden of showing by a preponderance of the evidence that the defendant was responsible for the witness's absence. *Id.* The Court concluded that the trial court did not err in admitting S.B.'s statements.

After *Crawford* but before *Giles*, this Court referred to the "forfeiture by wrongdoing" issue in *State v. Prasertphong*, 210 Ariz. 496, 114 P.3d 826 (2005). Prasertphong and Huerstel robbed a Pizza Hut and murdered three employees. Each man gave a statement to police. "Both statements contained portions that inculpated each defendant and other portions that exculpated the other." *Id.* at 497, ¶ 4, 114 P.3d at 829. A grand jury indicted both men in the same indictment, but the cases were severed for trial. Because he was a co-defendant, Huerstel was unavailable to testify at Prasertphong's trial. At Prasertphong's trial, he sought to introduce part of Huerstel's statement in which

Huerstel said he shot all three victims. The State argued that presenting only those portions of Huerstel's statement would mislead the jury and that, under Evidence Rule 106, the jury should also receive the portions of Huerstel's statement inculpating Prasertphong. The trial court agreed and presented Huerstel's entire statement to the jury. Prasertphong was convicted of three counts of armed robbery and three counts of first degree murder.

On appeal, Prasertphong argued that admitting Huerstel's entire statement violated his rights under the Confrontation Clause. This Court disagreed, holding that by choosing to introduce part of Huerstel's out-of-court statement, he waived his rights to object to admission of the remainder of the statement under the Confrontation Clause. *Id.* at 499-500, ¶ 16, 114 P.3d at 831-32. This Court reasoned that Rule 106 was similar to the rule of forfeiture by wrongdoing, citing and quoting from *Crawford*, *supra* at 62:

> We conclude that Rule 106, the rule of completeness, is similar to the rule of forfeiture in that it does not purport to be an alternative means of determining reliability. Rather, the rule of completeness, like the rule of forfeiture, "extinguishes confrontation claims essentially on equitable grounds." Rule 106 does not permit admission of the remaining portion of a statement because the remaining portion is reliable but rather because it would be unfair to mislead the jury by admitting the redacted version, particularly when a defendant chooses to introduce the portion of the statement or writing that the trial court has found to be incomplete and thus misleading to the jury.

Prasertphong, 210 Ariz. 496, 502, ¶ 24, 114 P.3d 828, 502 (2005). This Court has thus recognized the equitable soundness of prohibiting a defendant who deliberately makes a declarant/witness unavailable to testify at trial from profiting from his own wrongdoing

by allowing the defendant to exclude the unavailable declarant/witness's out-of-court statements.

III. CONCLUSION

The common law has long recognized the equitable foundation of the "forfeiture by wrongdoing" doctrine. As the D.C. Circuit stated in *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997):

> It is hard to imagine a form of misconduct more extreme than the murder of a potential witness. Simple equity supports a forfeiture principle, as does a common sense attention to the need for fit incentives. The defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him. And where a defendant has silenced a witness through the use of threats, violence or murder, admission of the victim's prior statements at least partially offsets the perpetrator's rewards for his misconduct. We have no hesitation in finding, in league with all circuits to have considered the matter, that a defendant who wrongfully procures the absence of a witness or potential witness may not assert confrontation rights as to that witness.

In *Giles*, the Court explained: "The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them – in other words, it is grounded in 'the ability of courts to protect the integrity of their proceedings.'" *Giles v. California*, 128 S.Ct. 2678, 2691 (2008), *quoting Davis*, *supra*. When a defendant has "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," "[t]he absence of a forfeiture rule covering this sort of conduct would create an intolerable

incentive for defendants to bribe, intimidate, or even kill witnesses against them." *Giles*, *id.* at 2686.

Therefore, MCAO respectfully requests that this Court submit the proposed rule change for comment and adopt the proposed change as set forth in the attached Exhibit A.

Respectfully submitted this 12th of January, 2009.

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Copies of the forgoing mailed
this 12th day of January, 2009 to:

Clerk of the Court
Arizona Supreme Court

Paul Ahler, Executive Director
Diane Gunnels-Rowley
Arizona Prosecuting Attorneys' Advisory Council
3001 West Indian School Rd., Suite 307
Phoenix, Az. 85017

EXHIBIT A

Proposed text of Amended Evidence Rule 804(b):

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

(1) *Former testimony (criminal action or proceeding).* Former testimony in criminal actions or proceedings as provided in Rule 19.3(c), Rules of Criminal Procedure.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Forfeiture by Wrongdoing. ***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.**

~~(5)~~ (6) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.