VIRGINIA:

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

COMMONWEALTH

V. **NO:** _____

MOTION IN LIMINE

COMES NOW the Deputy Commonwealth's Attorney, Nancy Oglesby, special prosecutor, in the aforesaid case and brings this Motion in Limine, stating in support thereof as follows:

MOTION TO PRECLUDE JURY NULLIFICATION ARGUMENT

1. The defendant is charged with Aggravated Malicious Wounding.

2. It is believed that the defendant through counsel will attempt to argue that the jury should acquit the defendant because the victim did not participate in the prosecution and/or the prosecutor has wasted the government's resources and abused her prosecutorial discretion by proceeding without the victim's cooperation. It is also believed that that defendant will attempt to argue nullification based on the fact that the defendant and victim have reconciled and plan to marry.

3. It is believed that these arguments constitute jury nullification, which is improper in this state pursuant to *Lily v. Commonwealth*, 50 Va. App. 173 (2007).

4. Encouraging the jury to exercise powers beyond their appropriate role of factfinder is legally impermissible.

5. It is believed that the following types of language and arguments should be excluded:

    a. Making an argument that the jury can find the defendant not guilty in spite of proof beyond a reasonable doubt that the defendant is guilty.

    b. Any mention of "sending a message" or "a sign" to society.

c. Any argument that seeks to persuade the jury to abandon its role as a trier of fact and adopt the role of legislator or executive.

WHEREFORE, the Commonwealth moves this Court to preclude the defendant from introducing jury nullification arguments.

Respectfully submitted,

Nancy Oglesby
Deputy Commonwealth Attorney

CERTIFICATE OF SERVICE

I, Nancy Oglesby, Deputy Commonwealth's Attorney, do hereby certify that a true copy of the foregoing motion was sent by First Class Mail on this _____ day of _____2010, to [redacted].

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	**CASE NO: FE-2010-XXX**
	)	
JOHN DOE	)	

MOTION TO ALLOW HEARSAY STATEMENTS OF VICTIM DUE TO DEFENDANT'S FORFEITURE OF HIS CONFRONTATION RIGHTS BY HIS OWN WRONGDOING

COMES NOW, the Commonwealth of Virginia and by her Assistant Commonwealth's Attorney, and hereby gives notice that on **Friday, November 19, 2010 at 10:00 A.M.,** or as soon thereafter as this Court may allow, she will move this Honorable Court to admit the hearsay statements of the victim, and in support of its motion states as follows:

1. That the defendant is charged with Malicious Wounding (18.2-51).

2. That the victim in this case, Jane Smith, was the fiancée of the defendant on the date of the alleged offense, July 18, 2010, and resided with him at an apartment located in Lorton, Virginia, in Fairfax County. Immediately following the incident on July 18th Ms. Smith was taken to Potomac Hospital to be treated for her injuries. On July 19, 2010 Ms. Smith was released from the hospital and, at the defendant's request, went to stay with the defendant's mother, Ms. Doe. Ms. Smith stayed with Ms. Doe until August 2, 2010. The Commonwealth was unable to contact or locate Ms. Smith once she left Potomac Hospital. The Commonwealth attempted to find her by the following means and methods: (1) visiting the apartment where Ms. Smith and the defendant resided; (2) calling Ms. Smith on her cell phone; and (3) calling Ms. Doe on July 30, 2010 to inquire about Ms. Smith's whereabouts. On August 2, 2010, Ms. Smith left the United States on an international flight from Dulles International Airport to Heathrow

International Airport in England. The Commonwealth discovered this information after August 2nd.

3. In this case, Ms. Smith made statements on July 18, 2010 at Potomac Hospital to the doctor and to the Fairfax County police officers who were conducting their initial investigation at that time. Ms. Smith told the doctor how her nose was broken. Ms. Smith also told the police officers what had occurred between her and the defendant and how she sustained her injuries after Officer Gagliardo informed her that the defendant had been arrested and that there was an emergency protective order in place prohibiting the defendant from contacting her.

4. The Commonwealth has reason to believe that Ms. Smith will fail to appear at trial.

5. Such failure to appear will make Ms. Smith unavailable to testify.

6. That between July 19, 2010 and August 2, 2010, the defendant made phone calls to Ms. Smith repeatedly, some calls in direct violation of a court order prohibiting contact, and told her that he will not go to jail if she does not appear in court. The defendant encouraged Ms. Smith to leave the country and promised to bring her back once the case was over. The defendant also subjected Ms. Smith to verbal abuse, cursing at her and demanding that she "show him some love."

7. The Confrontation Clause of the Sixth Amendment bars admission of unconfronted testimonial statements of a witness who does not appear at trial unless the defendant has forfeited his right to confrontation by causing the witness' absence through his own wrongdoing. *See Giles v. California,* 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008), *Davis v. Washington,* 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), *Reynolds v. United States,* 98 U.S. 145, 25 L. Ed. 244 (1879).

8. The defendant's conduct, including his knowledge, complicity and planning, amounts to forfeiture by wrongdoing.

9. To apply the forfeiture by wrongdoing doctrine there must be evidence presented, either direct or through a reasonable inference from the facts and circumstances of the case, to determine whether there was intent on the part of the defendant to "isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution." *See Crawford v. Commonwealth,* 55 Va. App. 457 (2009).

10. When a defendant seeks to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require the court to acquiesce. *See Davis,* at 244.

11. The rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds. *Id.*

12. The United States Supreme Court in *Giles* recognizes the doctrine of forfeiture by wrongdoing and goes on to indicate that in the context of domestic violence cases the "earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry." *See Giles,* at 2693.

13. Courts from around the country have allowed unconfronted testimonial statements of a victim into evidence where the defendant's wrongdoing caused the defendant to forfeit his right of confrontation. *See, U.S. v. Houlihan,* 92 F.3D 1271 (1st Circuit 1996); *U.S. v. Aguiar*, 975 F.2d 25 (2nd Circuit 1992); *U.S. v. Gray,* 405 F.3d 227 (4th Circuit 2005); *U.S. v. Thevis,,* 665 F.2d 616 (5th Circuit 1982); *Steele v. Taylor,* 684 F.2d 1193 (6th Circuit 1982); *U.S v. Thompson,* 286 F.3d 950 (7th Circuit 2002); *U.S. v. Carlson,* 547 F.2d 1346 (8th Circuit 1976); *U.S. v. Balano,* 618 F.2d 624 (10th Circuit 1979); *U.S v. Zlatogur,* 271 F.3d 1025 (11th Circuit 2001); and *U.S. v. White,* 116 F.3d 903 (D.D.C. 1997).

14. Any significant interference with the declarant's appearance as a witness, including the exercise of persuasion and control amounts to wrongdoing that forfeits the defendant's right to confront the victim. *See Steele,* at 1201.

15. In the instant case, the defendant has forfeited his right to confrontation should Ms. Smith not appear in court. The defendant's repeated phone calls to Ms. Smith, his verbal abuse, and his statements that there would be no court case if Ms. Smith left the country and that if she could not stand the pressure from the police she would need to hide, constitute intimidation, coercion and improper influence of Ms. Smith in an effort to dissuade and prevent her from testifying in court against him. This results in forfeiture by wrongdoing.

WHEREFORE, the Commonwealth asks that the Court find that defendant's actions caused the defendant to forfeit his right of confrontation and the Commonwealth further requests the Court grant this motion *in limine* and allow the Commonwealth to introduce the hearsay statements of the victim, Ms. Jane Smith, should Ms. Smith fail to appear at trial on November 30, 2010.

Respectfully submitted,

_____
JESSICA L. GREIS EDWARDSON
Assistant Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was faxed to (xxx) xxx-xxx and was provided, at the Office of the Commonwealth's Attorney, to _____, counsel for Defendant, this _____ day of November, 2010.

_____
JESSICA L. GREIS EDWARDSON
Assistant Commonwealth's Attorney

V I R G I N I A:
IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	**CASE NO: FE-2010-XXX**
	)	
JOHN DOE	)	

COMMONWEALTH'S MEMORANDUM OF POINTS AND AUTHORITIES ON ALLOWING HEARSAY STATEMENTS OF THE ABSENT WITNESS AT TRIAL BASED ON THE FORFEITURE BY WRONGDOING DOCTRINE

COMES NOW, the Commonwealth of Virginia and by her Assistant Commonwealth's Attorney, and moves this Honorable Court to admit the hearsay statements of the absent witness in this matter.

FACTS

The defendant is charged with Malicious Wounding under Virginia Code Section 18.2-51. The victim, Ms. Jane Smith, was the fiancée of the defendant on the date of the alleged offense, July 18, 2010, and resided with him at an apartment located in Lorton, Virginia, in Fairfax County. Immediately following the incident on July 18th Ms. Smith was taken to Potomac Hospital to be treated for her injuries.

On July 19, 2010 Ms. Smith was released from the hospital and, at the defendant's request, went to stay with the defendant's mother, Ms. Doe. Ms. Smith stayed with Ms. Doe until August 2, 2010. The Commonwealth was unable to contact or locate Ms. Smith once she left Potomac Hospital. The Commonwealth attempted to find her by the following means and methods: (1) visiting the apartment where Ms. Smith and the defendant resided; (2) calling Ms. Smith on her cell phone multiple times; and (3) calling Ms. Doe on July 30, 2010 to inquire about Ms. Smith's whereabouts. On August

2, 2010, Ms. Smith left the United States on an international flight from Dulles International Airport to Heathrow International Airport in England. The Commonwealth learned of Ms. Smith's departure from the country after August 2nd.

Ms. Smith made statements on July 18, 2010 at Potomac Hospital to the Fairfax County police officers conducting the initial investigation. Ms. Smith told the police officers what had occurred between her and the defendant and that she sustained her injuries when the defendant punched her in the face. Ms. Smith made these statements to Officer Gagliardo after she had been informed that the defendant had been arrested, was already in police custody, and that there was an emergency protective order in place prohibiting the defendant from contacting her.

Between July 19, 2010 and August 2, 2010, the defendant, while in jail, made phone calls to Ms. Smith repeatedly while she resided with his mother, sometimes more than once a day. All of these phone calls were recorded, per the rules and regulations of the Fairfax County Adult Detention Center, and each time the defendant placed a phone call he was advised, by a pre-recorded message, that the call was being recorded and monitored. Some of the telephone calls made by the defendant to Ms. Smith were in direct violation of the emergency protective order, which prohibited the defendant from having any contact with her. On multiple occasions the defendant told Ms. Smith that he would not go to jail if she did not appear in court. The defendant also repeatedly encouraged Ms. Smith to leave the country and promised to bring her back once the case was over. Around the time of the defendant's bond hearing, the defendant directed Ms. Smith during a telephone conversation to send a letter to the judge to help him post bond, and told Ms. Smith what she needed to specifically write in the letter to help him get

released. Near the end of July, the defendant ordered Ms. Smith to send a letter to the judge before she left the country, and dictated what she should write in this second letter, which included statements that she did not want to prosecute the case, she would not show up in court, she would be leaving the Commonwealth of Virginia, and that the incident was not as serious as it was made out to be.

On November 19, 2010, this Court held an evidentiary pre-trial hearing to determine if the defendant intended to keep Ms. Smith away from court, and if, by his acts of wrongdoing in keeping Ms. Smith away, he forfeited his right to confrontation under the Sixth Amendment, thereby allowing Ms. Smith's prior statements to the police officers to be admitted at trial.

The Court listened to over thirty recorded jail calls from the defendant to Ms. Smith, and held that based on the totality of that evidence the defendant specifically intended to procure the absence of Ms. Smith from the jurisdiction of the Commonwealth and court. The Court found the defendant forfeited his Sixth Amendment right to confrontation under the forfeiture by wrongdoing doctrine in accordance with the holding in *Giles v. California.*

The Court asked counsel to brief the issue of hearsay to determine if the defendant's forfeiture of his Sixth Amendment right to confrontation also constituted a waiver of hearsay objections to Ms. Smith's prior statements to the police, or if a Virginia hearsay exception must be found in order to allow those statements to be admitted at trial.

ARGUMENT

The defendant's waiver of his right to confrontation based upon his intentional acts to secure the absence of the victim constitutes a forfeiture of any hearsay objections to prior statements of the absent victim being admitted at trial. The Supreme Court of the United States has recognized this doctrine, as well as the Commonwealth of Virginia, the Federal Circuit Courts and other state courts.

A. The Supreme Court of the United States determined that the forfeiture by wrongdoing doctrine permits prior statements of an absent witness to be admitted at trial over hearsay objections.

The common law doctrine of forfeiture by wrongdoing permits the introduction of out of court statements of a witness who has been kept away from the jurisdiction of the court by the defendant's actions. *See Giles v. California,* 128 S. Ct. 2678, 2683 (2008). This is a well settled common law exception to the defendant's right to confrontation under the Sixth Amendment and was first addressed in *Reynolds v. United States*. In that case, the Supreme Court held the admission of the wife's prior testimony at trial did not violate the defendant's right to confrontation because the defendant had wrongfully procured his wife's absence to prevent her testifying in court by keeping her away so that she could not be subpoenaed to court. *See Reynolds v. United States,* 98 U.S. 145, 148-150 and 158 (1879).

The forfeiture by wrongdoing doctrine is applicable only when the defendant engaged in conduct designed to prevent that witness from testifying. *See Giles* at 2683. This doctrine, also called the wrongful procurement rule, is a common law doctrine based on the legal principle that a defendant should not be permitted to benefit from his own wrong, such as conduct that is designed to prevent a witness from testifying. *See Giles* at

2687. The Supreme Court's historical analysis of the forfeiture by wrongdoing doctrine found that "a leading treatise's justification of the use of statements from coroner's inquests when a witness was detained and kept back from appearing by the means and procurement of the defendant was that the defendant shall never be admitted to shelter himself by such evil practices on the witness, that being to give him advantage of his own wrong. *Id.* at 2689 (quoting *G. Gilbert,* Law of Evidence 140 (1756). Furthermore, "if the defendant could keep out unconfronted prior testimony of a wrongfully detained witness he would profit from such evil practices." *Id.* at 2689. The Court went on to state that "[t]he common law forfeiture by wrongdoing rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill witnesses against them – in other words, it is grounded in the ability of the courts to protect the integrity of their proceedings." *Id.* at 2691.

The fact that the forfeiture by wrongdoing doctrine was created to thwart a defendant's ability to intimidate, bribe or even kill a witness who may testify against them is of great significance in cases of domestic violence. According to the *Giles* court "[a]cts of domestic violence are intended to dissuade a victim from resorting to outside help, and include conduct [by the defendant] designed to prevent testimony to police officers or cooperation in criminal prosecutions." *See Giles* at 2693.

Here, this Court previously determined at a pre-trial evidentiary hearing on November 19, 2010 that the defendant had procured the absence of the victim, Ms. Smith, through threats and intimidation and that he lost his right to confrontation because of his wrongful acts. This Court listened to over thirty recorded jail calls from the defendant to Ms. Smith, and held that based on this evidence the defendant did in fact

intend to keep Ms. Smith out of the jurisdiction of the Commonwealth and away from court so that she could not testify against him. The facts of the Commonwealth's case must be distinguished from the facts of *Giles*. In *Giles* the prosecution did not argue or provide evidence that the defendant intended to procure the victim's absence from court; rather, the prosection sought to introduce the unavailable witness' statements through a recognized California hearsay exception for out of court statements. *See Giles* at 2681. In the present case, the Commonwealth is seeking to admit Ms. Smith's statements solely under the forfeiture by wrongdoing doctrine as held by the Supreme Court in *Giles*.

Furthermore, the *Giles* court specifically remanded the matter back to the California courts *for the sole purpose of considering evidence of the defendant's intent* because the trial court failed to consider the defendant's intent with respect to the admission of the witness' statements "because they found that irrelevant to the application of the forfeiture doctrine" and "[t]his view of the law was error." *Id.* at 2693 (emphasis added). The reason the *Giles* case was remanded back to the state court was to determine if in fact the forfeiture doctrine applied because the issue of the defendant's intent was never properly considered, which is a requirement in order to prove forfeiture by wrongdoing. Again, the reason for the remand in *Giles* must be distinguished from the present case wherein the Commonwealth, at the pre-trial evidentiary hearing on November 19, 2010, did in fact argue, and this Court determined, that the defendant's intent, as established through evidence of the defendant's plethora of jail calls to Ms. Smith, was to prevent her from cooperating with the Commonwealth and appearing in court to testify. This Court found, based on the evidence and argument from counsel at the pre-trial hearing, that the defendant's intentional acts of wrongdoing constituted a

forfeiture of the defendant's right to confrontation under the Sixth Amendment. Although *Giles* provides the guiding legal principle applicable to the case at bar, i.e., the forfeiture by wrongdoing doctrine, the specific finding in *Giles* that the forfeiture by wrongdoing was erroneous is not applicable to the case at bar.

The forfeiture by wrongdoing doctrine, as explained in *Giles*, allows Ms. Smith's prior statements to the police officers to be admitted at trial over any hearsay objection raised by the defendant because he committed wrongdoing and forfeited his right to confrontation. The *Giles* court found that "no case or treatise . . . suggested that a defendant who committed wrongdoing forfeited his right to confrontation 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 unconfronted." *See Giles* at 2686. Under this analysis, the Supreme Court clearly stated that once a defendant committed forfeiture by wrongdoing he also forfeited his right to object to hearsay statements from the absent witness.[1] Nowhere does *Giles* hold that the

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[1] Courts from around the country have allowed unconfronted statements of a victim into evidence where the defendant's wrongdoing caused the defendant to forfeit his right of confrontation. *See U.S. v. Houlihan,* 92 F.3D 1271, 1279 (1st Circuit 1996) (a defendant who wrongfully procured a witness's absence for the purpose of denying the government that witness's testimony waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements); *U.S. v. Aguiar*, 975 F.2d 45, 47 (2nd Circuit 1992) (affirming the district court holding that defendant procured the witness's unavailability and waived his confrontation rights and hearsay objections); *U.S. v. Gray,* 405 F.3d 227, 242 (4th Circuit 2005) (out-of-court statements ordinarily may not be admitted to prove the truth of the matter asserted, however the doctrine of forfeiture by wrongdoing allows the admission of such statements when the defendant's own misconduct made the witness unavailable); *U.S. v. Thevis,,* 665 F.2d 616, 630 (5th Circuit 1982) (a defendant whose actions are designed to procure a witness' unavailability are a waiver of confrontation rights); *Steele v. Taylor,* 684 F.2d 1193, 1202 (6th Circuit 1982) (no case was found in which a court declined, upon a finding of wrongful conduct, to admit prior statements of the absent witness that would have been admissible had the witness taken the stand); *U.S v. Thompson,* 286 F.3d 950, 961 (7th Circuit 2002) (defendant waives his right to object on hearsay when he intentionally procured the unavailability of the witness; *U.S. v. Carlson,* 547 F.2d 1346, 1359 (8th Circuit 1976) (hearsay testimony was admitted because the defendant had intimidated the witness into not testifying); *U.S. v. Balano,* 618 F.2d 624, 628 (10th

unconfronted testimony, or prior statements of the absent witness, can only be allowed in under a recognized hearsay exception once it has been found that the defendant violated his right to confrontation under the Sixth Amendment.

In the present case, the Commonwealth asserts that based on the holding in *Giles* and this Court's prior ruling on November 19, 2010 with respect to the defendant's forfeiture of his right to confrontation under the Sixth Amendment, the prior statements made by Ms. Smith to the police should be admitted at trial, over any hearsay objections, under the forfeiture by wrongdoing doctrine.

B. Virginia courts have determined that the forfeiture by wrongdoing doctrine permits prior statements of an absent witness to be admitted at trial over hearsay objections.

Virginia has specifically addressed the issue of hearsay and the forfeiture by wrongdoing doctrine in the case of *Crawford v. Commonwealth.* The Court of Appeals held that the trial court did not make the necessary factual findings "required as a prerequisite for the application of the forfeiture by wrongdoing doctrine." *See Crawford v. Commonwealth,* 55 Va. App. 457, 471 (2009). The court in *Crawford* looked to *Giles* when it determined that to apply the forfeiture by wrongdoing doctrine there must be evidence presented, either direct or through a reasonable inference from the facts and circumstances of the case, to determine whether there was intent on the part of the defendant to "isolate the victim and to stop her from reporting abuse to the authorities or

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Circuit 1979) (the common law principle states that a defendant should not benefit by his own wrong and such wrongful behavior can be a waiver of the right of confrontation); *U.S v. Zlatogur,* 271 F.3d 1025, 1028-1029 (11th Circuit 2001) (a preponderance of the evidence standard is required to prove the defendant's intent with respect to the unavailability of the witness); and *U.S. v. White,* 116 F.3d 903, 912 (D.D.C. 1997) (if the defendant's actions make it necessary for the government to use out-of-court declarations as proof then the defendant has forfeited both his right to object on hearsay rules and the right to confrontation).

cooperating with a criminal prosecution." *See Crawford* at 474. As in *Giles*, the *Crawford* court found that the prosecution presented no direct or circumstantial evidence to determine the defendant's intent with respect to preventing the victim from testifying against him or seeking protection from abuse through the courts, and that the trial court had incorrectly applied the forfeiture by wrongdoing doctrine as defined in *Giles*. *Id.*

Again, the *Crawford* case must be distinguished from the present case, because this Court has in fact determined the defendant's intent and found that forfeiture by wrongdoing does in fact apply. It is important to note that the *Crawford* holding completely accepted the forfeiture by wrongdoing doctrine as held in *Giles*, stating that: (1) it is a common-law doctrine which permits the statements of a witness at trial when that witness was detained or kept away by means of the defendant; (2) the doctrine only applies when the defendant engaged in conduct designed to prevent the witness from testifying; and (3) that unconfronted testimony of the witness would be admitted once there was a showing that the defendant intended to prevent the witness from testifying. *Id.* at 472. Nowhere does *Crawford* hold that the unconfronted testimony, or prior statements of the absent witness, can only be allowed in under a recognized hearsay exception once it has been found that the defendant violated his right to confrontation under the Sixth Amendment. Rather, the Court of Appeals in *Crawford* specifically cites to the trial court's holding which originally classified forfeiture by wrongdoing doctrine as a hearsay exception: "[t]o apply the forfeiture by wrongdoing doctrine, this [c]ourt must find by a preponderance of the evidence . . . that [Crawford] is responsible for [Sarah's] unavailability as a witness and therefore forfeited his right to assert the Confrontation Clause to suppress the statements . . ." *See Crawford* at 471. Clearly the

Court of Appeals has found that once forfeiture by wrongdoing has been established then the unconfronted statements of the absent witness are admissible.

In the present case, this Court already found that the defendant forfeited his right to confrontation under the Sixth Amendment, thus under the forfeiture by wrongdoing doctrine the prior statements made by Ms. Smith to the police should be admitted at trial, over any hearsay objections. There is no additional hearsay exception required under the law to admit Ms. Smith's statements.

The case of *Commonwealth of Virginia v. Mustafa Salaam* also addressed the forfeiture of confrontation right by the defendant and the admissibility of hearsay statements of an unavailable declarant. While this is a Circuit Court ruling and is persuasive authority only, the significance of the court's finding cannot be overlooked. In that case, the defendant was charged with the murder of Mr. Coward and Mr. Coward made a dying declaration identifying the defendant as his killer. *See Commonwealth of Virginia v. Mustafa Salaam,* 65 Va. Cir. 405 (2004). The court found that the statement of Mr. Coward was properly admissible on multiple grounds pursuant to traditional hearsay rules and under the forfeiture by wrongdoing doctrine. "[I]f a witnesses' silence is procured by the defendant himself, whether by chicanery . . . by threats . . . or by actual violence or murder . . . the defendant cannot then assert his confrontation clause rights in order to prevent . . . [statements] of that witness from being admitted against him. Any other result would mock the very system of justice the confrontation clause was designed to protect." *Id. at* 413 (quoting *U.S. v. Mastrangelo,* 693. F.2d 269, 272 (2d Cir. 1982)). Furthermore, "[a] waiver of the right to confrontation based upon the procurement of the absence of the witness also constitutes a forfeiture of any hearsay objections to prior

statements of the absent witness." *Id.* (quoting *Kansas v. Meeks,* 277 Kan. 609, 615 (2004)). The court ultimately held that Mr. Coward was unavailable to testify because the defendant killed him and that Mr. Coward's statement was properly admissible because the defendant had forfeited his right of confrontation. *Id.* at 414.

Applying this ruling to the case at bar, there does not have to be a hearsay exception in order for Ms. Smith's statements to the police to be admissible at trial. According to *Salaam,* the defendant cannot object to Ms. Smith's statements on the basis of hearsay because he has forfeited his right to confrontation by his intentional acts of wrongdoing that led to her absence from the jurisdiction of the Commonwealth and this court.

Forfeiture by wrongdoing has been accepted by other jurisdictions outside of the Commonwealth. At least fourteen states and the District of Columbia have adopted a version of the forfeiture by wrongdoing doctrine, and several other states have recognized the legitimacy of the doctrine even if they have not applied the doctrine in any case. *See Commonwealth v. Edwards* 444 Mass. 526, 534 (2005).[2] The court in Edwards went on state that "[w]hile States vary with respect to the scope of the doctrine, we are aware of no jurisdiction that, after considering the doctrine, has rejected it." *Id.*

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[2] *See State v. Valencia,* 186 Ariz. 493 (Ct. App. 1996); *People v. Moore,* No. 01CA 1760, 117 P.3d 1, 2004 Colo. App. LEXIS 1354 (Colo. Ct. App. 2004); *State v. Henry,* 76 Conn. App. 514 (2003); *Devonshire v. United States,* 691 A.2d 165 (D.C.); *Vines v. United States,* 520 U.S. 1247 (1997); *State v. Hallum,* 606 N.W.2d 351 (Iowa 2000); *State v. Meeks,* 277 Kan. 609 (2004); *State v. Fields,* 679 N.W.2d 341 (Minn. 2004); *State v. Sheppard,* 197 N.J. Super. 411 (1984); *State v. Alvarez-Lopez,* 2004 NMSC 30, 136 N.M. 309 (N.M. 2004); *People v. Geraci,* 85 N.Y.2d 359 (1995); *State v. Boyes,* Nos. 2003-CA-0050, 2003-CA-0051, 2004 Ohio 3528 (Ohio Ct. App. 2004); *Commonwealth v. Paddy,* 569 Pa. 47 (2002); *State v. Hinson,* 2002 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. 2002); *Gonzalez v. State,* 155 S.W.3d 603 (Tex. Crim. App. 2004); *Commonwealth v. Salaam,* 65 Vir. Cir. 405 (2004).

It is contrary to public policy, common sense and the underlying confrontation clause of the Sixth Amendment to allow a defendant to benefit from witness intimidation. *See United States v. Carlson,* 547 F.2d 1346, 1359 (8th Cir. 1976). A prior statement given by a witness made unavailable by the wrongful conduct of the defendant is admissible against the defendant had that witness testified. *See Steele v. United States,* 684 F.2d 1193, 1201 (1982). The *Steele* court went on to hold that "this rule . . . is based on a public policy protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness." *Id.*

To allow the defendant to object to Ms. Smith's prior statements on the basis of hearsay would allow him to benefit from her absence, an absence which he created through his wrongful acts for the sole purpose of not having her testimony admitted at trial.

CONCLUSION

This Court previously held on November 19, 2010 that the defendant waived his right to confrontation under the Sixth Amendment based upon his intentional acts to secure the absence of Ms. Smith from the jurisdiction of the Commonwealth and the court. The Court's decision was made pursuant to the holding of the *Giles* court, specifically the forfeiture by wrongdoing doctrine.

The United States Supreme Court cases clearly hold that under the forfeiture by wrongdoing doctrine a defendant's waiver of his right to confrontation based upon his intentional acts to secure the absence of the victim constitutes a forfeiture of any hearsay objections to prior statements of the absent victim being admitted at trial. This doctrine is

followed by the Federal District Courts, other state courts, and most importantly the courts in the Commonwealth.

Under the forfeiture by wrongdoing doctrine, Ms. Smith's prior statements to the police officers should be admitted at trial. This Court already held that her absence from the Commonwealth and court was caused by the intentional wrongful actions of the defendant, and that the defendant therefore waived his right to confrontation under the Sixth Amendment. As soon as this Court made the finding with respect to the defendant's intentional wrongful acts, the defendant waived his right to object on hearsay as to the prior statements of Ms. Smith being admitted at trial.

The argument that the Ms. Smith's prior statements to the police are only admissible under a recognized hearsay exception goes against the forfeiture by wrongdoing doctrine and directly contradicts the doctrine as espoused by the Supreme Court and the courts in Virginia. There is no authority to suggest that once the defendant is found to have forfeited his right to confrontation under the Sixth Amendment that the prior statements of the absent witness can only come in under a recognized hearsay exception. In fact, *Reynolds*, *Giles*, and *Crawford* have held the exact opposite to be true: once there has been a finding that the defendant intentionally procured the absence of the witness then all hearsay objections are waived and the prior statements are admissible. The purpose of the forfeiture by wrongdoing doctrine is to ensure that the defendant's intentional acts of wrongdoing do not benefit him by (1) keeping a witness from testifying against him and (2) keeping the statements of that witness out of court in their absence. Were the Court to hold that the defendant forfeited his right to confrontation under the Sixth Amendment, based on the forfeiture by wrongdoing doctrine, but the

prior statements of Ms. Smith are inadmissible because there is no recognized hearsay exception, then the entire purpose of this doctrine would be defeated because the defendant would in fact benefit from his intentional acts to prevent Ms. Smith from appearing in court and testifying against him.

This Court has already found that the defendant waived his right to confrontation under the Sixth Amendment pursuant to the holding in *Giles*. Therefore, under the doctrine of forfeiture by wrongdoing as set forth in *Giles*, Ms. Smith's prior statements should be admitted at trial because as a result of his waiver of his right to confront he also waived his right to object to hearsay.

For the above reasons, and those that may be presented in open court, the Commonwealth asks that the Court admit the hearsay statements of the victim, Ms. Jane Smith, under the forfeiture by wrongdoing doctrine, should Ms. Smith fail to appear at trial on January 24, 2011.

Respectfully submitted,

_____
JESSICA L. GREIS EDWARDSON
Assistant Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum was faxed to (xxx) xxx-xxxx and was provided, at the Office of the Commonwealth's Attorney, to _____, counsel for Defendant, this _____ day of January, 2011.

_____
JESSICA L. GREIS EDWARDSON
Assistant Commonwealth's Attorney