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PREA
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CENTER



BJA
Bureau of Justice Assistance
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ÆQUITAS
THE PROSECUTORS' RESOURCE
ON VIOLENCE AGAINST WOMEN

NCCD

National Council on
Crime & Delinquency

Investigating and Prosecuting the Intimidation of Victims of Sexual Abuse in Confinement

Viktorija Kristiansson • AEQUITAS

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National PREA Resource Center

The National PREA Resource Center (PRC) was established through a cooperative agreement between the Bureau of Justice Assistance and the National Council on Crime & Delinquency (NCCD). The mission of the PRC is to assist adult prisons and jails, juvenile facilities, lockups, community corrections, and tribal facilities in their efforts to eliminate sexual abuse by increasing their capacity for prevention, detection, monitoring, responses to incidents, and services to victims and their families

AEquitas: The Prosecutors' Resource on Violence Against Women

AEquitas' mission is to improve the quality of justice in sexual violence, intimate partner violence, stalking, and human trafficking cases by developing, evaluating, and refining prosecution practices that increase victim safety and offender accountability

Presenter

**Viktoria Kristiansson, Attorney Advisor,
AEquitas**



Context of Intimidation

- Sexual abuse in confinement
 - Victim literally cannot escape
- Pre- and post-incident intimidation
 - Experienced intimidator
 - Environmental intimidation
- Retaliation after a report of sexual abuse in confinement
 - Offender and other inmates/staff

Why?

Why are we dedicating a webinar to intimidation?

- Devastating effects of intimidation on victim and facility safety
- Intimidation allows abusers to run amuck and take control
- Cannot investigate or prosecute cases without understanding how to identify, document, and handle the effects of intimidating conduct

Learning Objectives

At the conclusion of this webinar, participants will be better able to:

- Effectively communicate with victims and witnesses so they are able to recognize and report intimidation
- Analyze whether and how to incorporate intimidation into the underlying case or charge as an independent case
- Identify statements that are subject to the Sixth Amendment's Confrontation Clause
- Identify conduct that may form the basis of a forfeiture by wrongdoing claim

State v. Godoiy

Albert Molvan entered the Montgomery State Prison after a conviction for dealing marijuana. Although he had spent some time in a juvenile detention facility for narcotics possession and truancy, this was his first adult conviction. He was 23.

State v. Godoiy

Montgomery was the largest facility in the state, and housed more than 2,300 males with sentences of longer than one year. With few exceptions, all inmates were housed together in general population.

State v. Godoiy

When Albert entered Montgomery, he tried to lay low, get a job, and find a small group of quiet allies. Albert was a smoker, and, as was the case with all inmates seeking tobacco, he had to engage in the inmate bartering system in order to get cigarettes. For the first couple of months, Albert was able to obtain cigarettes and repay the trade within the agreed-upon time frame. But soon enough, Albert found himself in debt to inmate Mak Burrell, a friend of inmate Simon Godoiy.

State v. Godoiy

Simon Godoiy was well known in Montgomery. He had been there for 6 years and had 11 years remaining on multiple violent felonies. Godoiy was also the de facto leader of a small group of about 8-12 inmates, including Burrell. Albert asked Burrell to extend his debt repayment one more week. Burrell responded that Albert could get his ass kicked (meaning they would physically fight) or Albert would get his ass f-cked (meaning he would get raped) – it was Albert's choice. Albert, fearing Burrell and his friends would beat him to death, said nothing and walked back to his cell block.

State v. Godoiy

Later that day, Simon Godoiy came to Albert's cell. Godoiy told Albert's cellmate to leave unless he wanted to get his too. Gogoiy told Albert that he was going to get f-cked, that it could be as painful as Albert wanted it to be. Godoiy told Albert to rub Vaseline in his anus and lean over the lower bunk bed. When Albert didn't move, Godoiy handed him the jar and stated he wasn't going to say it again. That day, Godoiy raped Albert twice.

State v. Godoiy

From that point forward, Godoiy raped Albert almost every day, and sometimes more than once a day. Sometimes Godoiy would bring Albert cigarettes and tell Albert that he was, "my boy." Albert suffered pain in his anal cavity and persistent bleeding. After two months, he went to the prison doctor for treatment. He disclosed the rape to the doctor, and after the exam was concluded, the doctor brought in the facility's PREA Coordinator and reported the sexual abuse.

**Did the prison doctor do the
right thing when he reported to
the PREA Coordinator?**

Please indicate **"YES"** or **"NO"** using the
Feedback option on your left

First Responder

The PREA Coordinator asked Albert what happened, and Albert provided a general account of his victimization. The PREA Coordinator called the shift supervisor and told him to execute staff first responder duties:

- Separate the alleged victim and abuser
- Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence
- If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim and alleged abuser not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating

28 CFR § 115.64, Staff first responder duties,
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 102

What should the prison do, as an initial response, with Godoiy?

- a. Tell Godoiy he's been accused of rape and therefore is being moved to another pod within the prison
- b. Tell Godoiy he's been accused of rape and therefore is being moved to solitary confinement
- c. Transfer Godoiy to another prison with no explanation at all
- d. Interrogate Godoiy in the prison administrative offices and transfer him to solitary confinement

Please indicate **which letter** using the Feedback option on your left

Assume Simon Godoiy is a staff member. What could the facility do upon receiving a report of sexual abuse perpetrated by a staff member?

- a. Immediately suspend Godoiy
- b. Suspend Godoiy pending the outcome of an investigation
- c. Re-assign Godoiy to desk duty only
- d. Transfer Godoiy to another prison

Please indicate **which letter** using the Feedback option on your left

Ensure Victim Safety and Health

Sexual Assault Response Team:

- Health care
- Advocacy
- Law enforcement

Victim safety:

- Short- and long-term security and privacy
- Minimize emotional and physical trauma; begin healing process
- Safety from abuser, other inmates, other staff

28 CFR § 115.21(d) Evidence protocol and forensic medical examinations; 28 CFR § 115.21(c), Evidence protocol and forensic medical examinations; 28 CFR § 115.82(a) Access to emergency medical and mental health services; 28 CFR § 115.83, Ongoing medical and mental health care for sexual abuse victims and abusers; 28 CFR § 115.53 Inmate access to outside confidential support services, <http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>

INTIMIDATION

Impact

- Injury
- Fear
- Compliance
- Failure to report
- Recruitment of other victims

Preventing Intimidation

PREA Standards

- § 115.13 Supervision and monitoring
- § 115.41 Screen for risk of victimization and abusiveness
- § 115.43 Protective custody
- § 115.51 Inmate reporting
- § 115.54 Third-party reporting
- § 115.61 Staff and agency reporting duties
- § 115.66 Preservation of ability to protect inmates from contact with abuser

Sanctions Related to Intimidation

- § 115.67 Protecting staff and inmates from retaliation
- § 115.76 Disciplinary sanctions for staff
- § 115.78 Disciplinary sanctions for inmates

Responding to Intimidation

- Recognize issue
- Support victim
- Train police to investigate
- Educate victims to preserve evidence of intimidation
- Punish intimidation
- Fight corruption
- ***Prosecute these cases!***

Safety Plan

- Judicial order
- Staff protection
- Safety plan
- Sanctions against abuser and intimidators
- Safe housing within or in another facility
- Additional witness relocation, if relevant

Preliminary Hearing

Simon Godoiy is charged with multiple counts of rape and related charges. Three weeks later, Albert testifies and is briefly cross-examined by the defense attorney at the preliminary hearing. The case is held for court.

Prior to Trial

Albert writes the prosecutor a letter stating he does not want the case to move forward and he does not want to testify at trial. He asks to be left alone.

Can the prosecutor try the case without Albert?

Please indicate "YES" or "NO" using the Feedback option on your left

Crawford v. Washington and its Progeny

Part I

Crawford v. Washington
Davis v. Washington/Hammon v. Indiana
Bryant v. Michigan

Crawford v. Washington

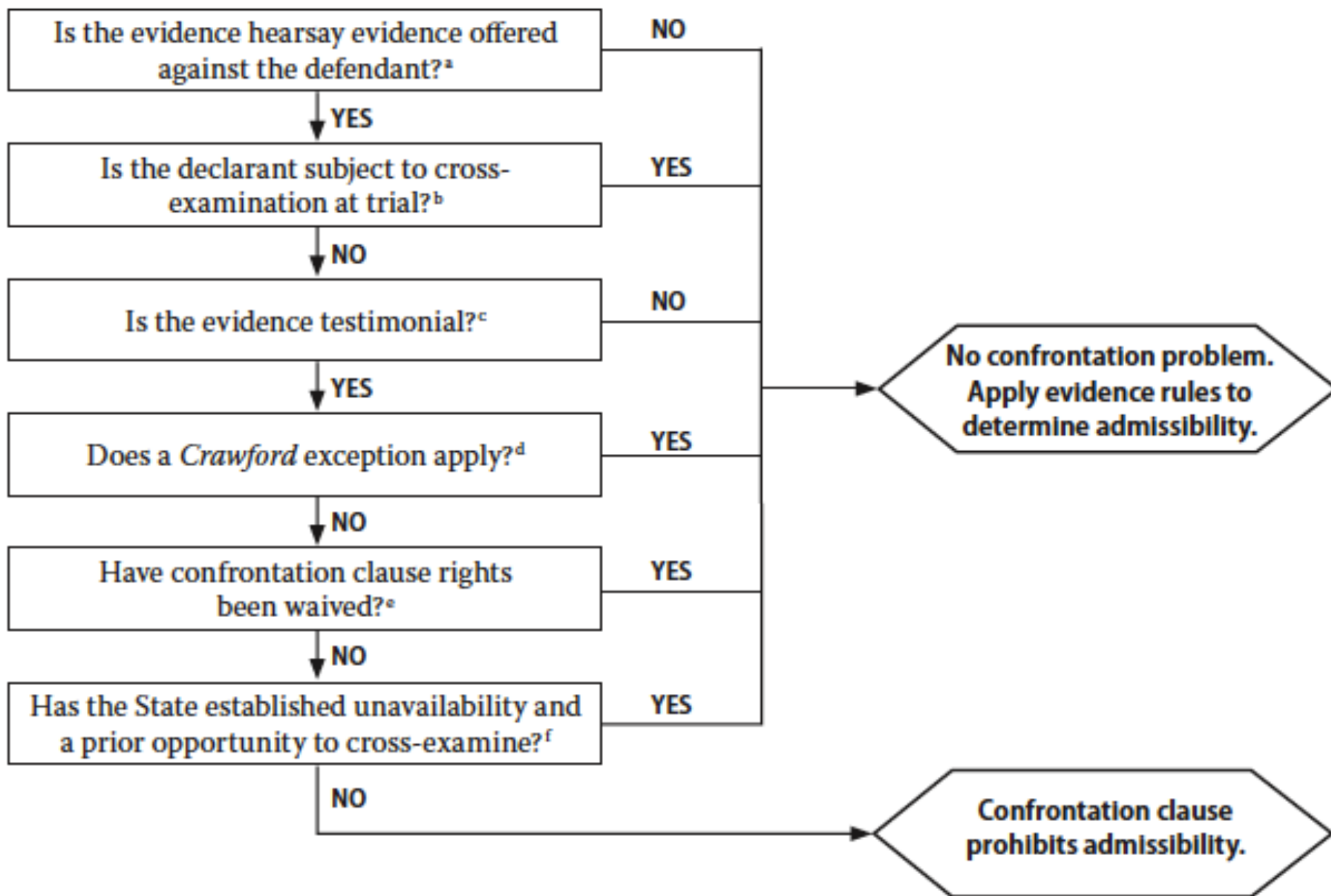
541 U.S. 36 (2004)

Sixth Amendment, U.S. Constitution Confrontation Clause:

- In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him

Crawford v. Washington:

- Where *testimonial* statements are at issue, only confrontation satisfies



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Crawford v. Washington

“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”

541 U.S. at 68

Davis & Hammon

547 U.S. 813 (2006)

- Police interrogation is TESTIMONIAL if circumstances objectively indicate:
 - No ongoing emergency
 - Primary purpose of interrogation to establish or prove past events potentially relevant to later criminal trial

Davis & Hammon

Police interrogation is NONTESTIMONIAL if circumstances objectively indicate:

- Ongoing emergency
- Primary purpose of interrogation is to address emergency

Michigan v. Bryant

131 S.Ct. 1143 (2011)

- Police responded to a radio dispatch of a man shot
- Police found victim with gunshot to abdomen in great pain/difficulty speaking
- Police asked
 - What happened?
 - Who shot him?
 - Where shooting occurred?
- Victim identified shooter and circumstances of shooting
- Victim died at hospital within hours

Michigan v. Bryant

- (1) Reaffirmed the “primary purpose” test from *Davis*
- (2) Directed the use of an objective evaluation of the case circumstances to determine the primary purpose of the statement
- (3) Explained that the objective evidence of the primary purpose of the interrogation comes from the statements and actions of both the declarant and the interrogators
- (4) Clarified that the existence of an ongoing emergency is among the most important factors to consider, but not the only factor

Analyzing Statements

Testimonial and Nontestimonial Statements

Testimonial	Nontestimonial
<ul style="list-style-type: none"> • <i>Ex parte</i> in-court testimony⁵⁷ • Testimony at a preliminary hearing⁵⁸ • Testimony before a grand jury⁵⁹ • Prior testimony at a former trial⁶⁰ • Statements taken by police officers in the course of interrogations⁶¹ • Affidavits (including scientific reports and certificates)⁶² • Depositions⁶³ • Confessions of co-defendants⁶⁴ • Custodial examinations⁶⁵ • Pretrial statements that declarants would reasonably expect to be used prosecutorially or would be available for use at a later trial⁶⁶ • Extrajudicial statements contained in formalized testimonial materials⁶⁷ • Certification of non-existence of official records⁶⁸ 	<ul style="list-style-type: none"> • Informal statements made with no reasonable expectations the statement will be used in trial⁶⁹ • Recording of 911 calls or records of police questioning which took place while an emergency was in progress and with the primary purpose of meeting the emergency situation⁷⁰ • Statements made and documents generally prepared without the reasonable contemplation of their use at a criminal trial (many business records fall within this category)⁷¹ • A tape recording of a conversation between an informant and a non-testifying accomplice.⁷²

Albert testified at the preliminary hearing and was cross-examined by the defense attorney. If he was unavailable at trial, would his preliminary hearing testimony be admissible?

Please indicate **"YES"** or **"NO"** using the Feedback option on your left

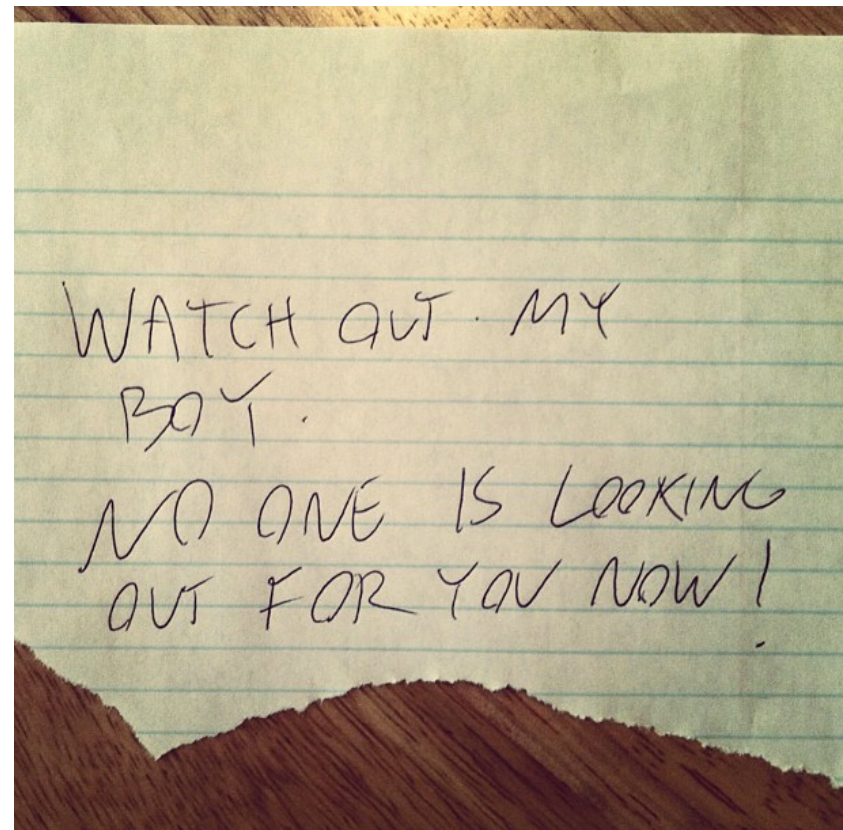
Remember

- If the statement is nontestimonial, Crawford does NOT apply, BUT
- State hearsay rules DO apply, and the statement must fall within an exception

Non-participating Victims and Establishing Forfeiture by Wrongdoing

Intimidation and Retaliation

After the preliminary hearing, Albert returned to the prison, and the staff member who conducted his pat down told Albert that he had caused a lot of trouble for everyone in the prison, and that Albert was "going to get his." When Albert returned to his cell, there was a note on his pillow:



Part II

Establishing Forfeiture by Wrongdoing

Rules of Evidence

- FRE 804: Exceptions to rule against hearsay when declarant is unavailable as a witness
 - Provides examples of when witness considered unavailable
 - (b)(6): If declarant unavailable, a statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – declarant's unavailability and did so intending that result

Reynolds v. United States

“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”

98 U.S. 145, 158 (1878)

Reynolds v. United States

“The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts ... **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”

98 U.S. 145, 158 (1878)

FBW Doctrine Untouched

Crawford v. Washington

“The Roberts test ... is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, **the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essential equitable grounds**; it does not purport to be an alternative means of determining reliability”

541 U.S. 36, 62 (2004)

FBW Doctrine

Davis v. Washington

“We reiterate what we said in Crawford: that ‘the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.’ ... That is, **one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation**”

547 U.S. 813, 833 (2009)

Giles v. California

554 U.S. 353 (2008)

- Domestic violence-related homicide: Defendant shot ex-girlfriend
- Claimed self-defense
 - Prior bad acts (assaults, vandalism)
 - Threats to defendant and new girlfriend
 - Victim charged at him; defendant afraid she had something in her hand
 - Closed eyes, fired several shots
 - Did not intend to kill

Giles v. California

- 3 Weeks prior → Domestic violence
 - Victim crying
 - Made statements about being assaulted, strangled, threatened with knife
- Statements allowed under FBW based upon intentional act of killing
- Defendant convicted of 1st Degree Murder

Intent/Purpose

Giles v. California

- Case remanded:
 - Not enough evidence that victim was made unavailable due to intentional acts of defendant
 - Defendant had to have specific intent to make victim unavailable as a witness when committing the wrongdoing

**Can the prosecutor use the
letter as evidence in a
forfeiture by wrongdoing
hearing?**

Please indicate **"YES"** or **"NO"** using the
Feedback option on your left

Can the prosecutor use the statement of the staff member who conducted the pat down as evidence in a forfeiture by wrongdoing hearing?

Please indicate "YES" or "NO" using the Feedback option on your left

Proving FBW

- Burden of proof in most jurisdictions:
PREPONDERANCE OF THE EVIDENCE
- Applies to potential witnesses – a formal proceeding need not be underway
- Can use unavailable witness' hearsay statements themselves

What Comprises Wrongdoing?

Significant influence, including 'influence and control'

Steele v. Taylor, 654 F.2d 1193 (6th Cir. 1982)

Knowledge, complicity, planning, or in any other way

People v. Pappalardo, 152 Misc.2d 364 (N.Y. 1991)

Evidence of past relationship relevant, but may not be enough by itself

United States v. Montague, 42 F.3d 1099 (10th Cir. 2005)

**What other evidence can
investigators and
prosecutors look for to
introduce at a FBW hearing?**

Please **Private Chat** your response to
Charlie

Promising Practices

Coordinated Response

Provide training and resources for all criminal justice responders so that they:

- Recognize intimidation as a crime
- Preserve intimidation evidence
- Report the intimidation
- Educate victims to do the same

Obtaining and Maintaining Evidence

- Physical evidence
- 911 tapes
- Crime scene photographs, videos, or diagrams
- Documentation or photos of injuries
- Medical records (both victim's and defendant's)
- Social media/online evidence

Obtaining and Maintaining Evidence

- Witnesses (e.g., inmates/staff, relatives, neighbors, children)
- Written/recorded statements
- Confessions/admissions
- Witness statements
- Victim's statements

Specialized Units

- Vertical prosecution
- Concentrated trial experience
- Collaboration with allied criminal justice professionals
- Focused training

Preliminary Hearing

- Foster a “full & fair opportunity” for cross-examination
- Fight defense attempts to waive
- Pass discovery before hearing
- Allow short adjournments (1-2 hours)
- Refrain from objections

Can you introduce the evidence of intimidation in your case-in-chief?

Please indicate "YES" or "NO" using the Feedback option on your left

Recommended Practices

- Be proactive to try to encourage victim cooperation
- Working with a coordinated, MDT response will increase victim cooperation
- Provide victim with resources and services that make him feel safe and secure
- Communicate about, prevent, and respond to intimidation
- Oppose delays and continuances

Resources

Witness Intimidation: Meeting the Challenge,
<http://www.aequitasresource.org/Witness-Intimidation-Meeting-the-Challenge.pdf>

The Prosecutors' Resource: Crawford and Its Progeny,
[http://www.aequitasresource.org/
The_Prosecutors_Resource_Crawford.pdf](http://www.aequitasresource.org/The_Prosecutors_Resource_Crawford.pdf)

The Prosecutors' Resource: Forfeiture by Wrongdoing,
[http://www.aequitasresource.org/
The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf](http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf)

"Turned Out: Sexual Assault Behind Bars" (Limestone Correctional, Alabama),
<http://www.youtube.com/watch?v=gtdtJTJdnfM>

For additional information on safety planning, contact the National Sexual Violence Resource Center,
<http://www.nsvrc.org>



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