

## FORFEITURE BY WRONGDOING

### CHEAT SHEET

1. Is the witness unavailable?
  - a. Commonwealth must prove unavailability, *Burton v. Oldfield*, 195 Va. 544 (1954), by a preponderance of the evidence, *Davis v. Washington*, 547 U.S. 813, 833.
  - b. Types of Unavailability (Friend, Section 15-10):
    - i. Dead
    - ii. Too ill to testify
    - iii. Insane
    - iv. Absent from the state and cannot be deposed
    - v. Can't be found after diligent inquiry
    - vi. Can't be compelled to testify (including due to invocation of privilege)
    - vii. Can't remember (either real or feigned)
    - viii. Witness blatantly lying (no case law to directly support this)
2. Did the Defendant intentionally cause the witness's unavailability?
  - a. Standard is preponderance of the evidence, *Davis v. Washington*, 547 U.S. 813, 833.
  - b. "Hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." *Davis v. Washington*, 547 U.S. 813, 833.
  - c. In domestic violence cases, the court may and should take special note of any history of the defendant (*Giles v. California*, 554 U.S. 353, 377 (2008)):
    - i. Repeatedly abusing the victim (especially if it culminates in murder);
    - ii. Intimidating the witness in the past to not testify or report abuse to the police;
    - iii. Taking efforts to isolate the victim (from police or any source of help).
3. If the court finds that: 1) the witness is unavailable; 2) the unavailability was caused by the defendant, and; 3) the actions undertaken by the defendant were done with the intent to cause the unavailability:
  - a. Forfeiture by wrongdoing applies, *Giles* at 367 and *Crawford v. Commonwealth*, 55 Va. App. 457, 472 (2009);
  - b. All hearsay statements of the unavailable witness are admissible for the truth of the matters they assert. *Giles* at 365 and *Crawford v. Commonwealth* at 472.