

# MURPHY'S LAW BLOG

## DEAD WIVES TALKING

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Drew Peterson's attorneys filed a much-anticipated motion last week in the criminal case involving Peterson's alleged murder of his ex-wife Kathleen Savio. They asked the court to render a new Illinois law unconstitutional because it allows certain statements, presumably made by Savio as well as Peterson's missing (though presumed dead) "current" wife, Stacey, to be admitted against him at trial.

It's unclear exactly what statements Peterson's lawyers are complaining about because they nowhere describe what the women said that's so devastating to the defense. The motion simply lodges a broad-sweeping complaint that the new law is unconstitutional because it allows the prosecution to use "hearsay", which is legal lingo for - things said by people who aren't available to testify at trial.

Peterson's lawyers make two basic arguments. 1. It violates the "ex post facto" rule which forbids the retroactive application of a new law if it enhances the prosecution's ability to prove a crime. 2. It violates Peterson's rights to confrontation and cross-examination because it allows witness statements to be used against him even though the witnesses are unavailable to physically attend the trial so that his attorneys can challenge their credibility under oath.

Peterson certainly has the right to raise these issues, but it takes a lot of chutzpah to whine about a witness' unavailability when the REASON they're unavailable is Peterson's inability to keep a wife around long enough that she might have a chance to testify against him!

Put another way - the prosecution is planning to use statements made by Kathleen Savio and Stacey Peterson precisely because Drew Peterson himself has made it, um, tough for the women to attend the trial.

The prosecution's strategy isn't unconstitutional. It's based on the "forfeiture by wrongdoing" rule; a longstanding legal doctrine that says a defendant "forfeits" his rights if the reason he can't cross-examine a dead witness is that he CAUSED their unavailability, in part to make sure the witness WON'T be around to testify. Hardly a constitutional insult, defendants forfeit their rights all the time when they engage in wrongdoing. For example, a criminal trial can continue in the defendant's absence if he fails to show up even though he has a fundamental Due Process right to be present.

And contrary to Peterson's crankiness about how it's all terribly unfair because the

"forfeiture by wrongdoing" rule is brand new and is thus ex post facto, the doctrine has been around for over 300 years. The only thing "new" is that the Illinois legislature codified the rule after the United States Supreme Court, in the recent Crawford and Giles decisions, reminded prosecutors of its existence. The act of codifying an old rule is not the same as "creating" a new one.

If anyone deserves criticism, it's Peterson's defense attorneys - who had a duty to understand the law, including old doctrines, and to advise their client about the impact of the "forfeiture by wrongdoing" rule on the potential for a successful prosecution. If they'd done so after Savio died, maybe Peterson wouldn't have caused the disappearance of his next wife, which led police to rethink whether they got it right the first time when they ruled Savio's death an accident.

Peterson's lawyers acknowledge in their motion that the Illinois legislature was indeed only codifying a settled rule of law, established in American courts from virtually the beginning of our nation's legal system. Their real beef is that the Illinois law seems to be more broad - and thus more generous to the prosecution - than the common law. Their claim is that the old rule forbids use of the "forfeiture by wrongdoing" doctrine unless the ONLY reason a witness is dead is that the defendant killed them in order to prevent their testimony. The Illinois rule provides that preventing testimony need only be ONE motivating factor - not the exclusive reason a witness isn't around anymore.

It's not an illegitimate argument - but it is ultimately a losing one, as such a narrow use of the rule would have ensured its demise long ago. Witnesses are rarely killed or rendered "unavailable" ONLY to keep them quiet - and the point of the forfeiture rule is not to require the splitting of such hairs but to ensure that criminals are not rewarded for behavior that inhibits access to justice.

Peterson's attorneys also complain that the forfeiture rule shouldn't apply in Savio's case because the prosecution claims Savio was killed not to keep her from testifying in her own murder trial, but to keep her out of court in her divorce case against Peterson. The defense has it exactly backward. The fact that Savio was killed because of the divorce trial is exactly the type of case where the rule applies best - where the witness is killed because of some OTHER litigation - not the murder case itself. Indeed, it would be odd to create a rule of law that allows hearsay statements of a murder victim to be admitted at the murder trial on the theory they were killed to prevent them from testifying - because there isn't even a death yet, much less a judicial proceeding. Which is not to say murder victims' hearsay statements don't get admitted at trial. They do - all the time - primarily to show the victim's "state of mind". The point is that if the reason Savio was killed is related to her possible testimony in a DIFFERENT trial, the use of her statements regarding her fear of Peterson and knowledge of his actions makes their admissibility in her murder trial especially logical and fair under the "forfeiture by wrongdoing" rule.

Finally, the defense complains that allowing hearsay evidence to be used when it is rooted in a claim of the defendant's "wrongdoing" offends Peterson's presumption of innocence. If this silly argument carried the day, it would also be unconstitutional to

allow into evidence, if it exists (as has been reported), the fact that Peterson told his buddies he wanted Savio dead, that Peterson has a history of beating and abusing women, and that he tried to hire someone to kill his wife. Surely this unproved "wrongful" behavior makes a dent in the presumption of innocence at trial - and - um - isn't that the point?

The constitutional arguments are interesting - but in this case, won't amount to much. The real public benefit of the defense motion is the stark way it reminds us that women in violent homes must speak up more about domestic violence.

Women too often feel ashamed of their husband or partner, so they suffer in silence and don't tell others what's going on behind closed doors.

Thanks to Drew Peterson, women everywhere will now better understand the importance of putting their fears in writing, making audiotapes and videotapes of their concerns and finding a way to make sure their recorded statements are kept in a safe place to ensure their use as evidence, in the event they become "unavailable". It is particularly important that women include in their recorded statements not only that they fear being killed, but also that they have been threatened with death "for the purpose of preventing them from testifying against their abuser in court".

Telling others might not save every endangered woman's life, but if more women worked together to teach each other about the benefits of the "forfeiture by wrongdoing" rule, violent men might think twice before deciding to kill. With victims systematically arming themselves with the power of the "forfeiture by wrongdoing" rule, a few women might still end up dead - but not a single one will be silenced.