

STATE OF INDIANA)	IN THE MARION SUPERIOR COURT
)SS:	CRIMINAL DIVISION, ROOM 20
COUNTY OF MARION)	
)	
STATE OF INDIANA)	
)	
V.)	
)	
ANDREW MCHUGH)	CAUSE NO. 49G20-1205-FA-031027

STATES REQUEST TO USE OUT OF COURT STATEMENTS

Comes now the State of Indiana by its Deputy Prosecuting Attorney Joseph Bosstick and files this Motion to allow out of court statements made to the police by the alleged victim Tabitha Walker:

1. The Defendant is charged in the above captioned case with twelve counts, including: Intimidation, a class C felony; Pointing a Firearm, a class D felony; Criminal Recklessness, a class D felony; two counts of Battery, a class A misdemeanor; and two counts of Domestic Battery, a class A misdemeanor. Defendant is also charged with several narcotics-related counts.
2. The charges are based in part on information provided to police by Tabitha Walker, the Defendant's girlfriend.
3. Ms. Walker first came into contact with police after officers responded to a report of a domestic disturbance at 3541 North Orchard Avenue, where Ms. Walker lived with the Defendant. Ms. Walker told police that she had been attempting to move out of the home when she got into a physical altercation with the Defendant. Ms. Walker alleged that the Defendant punched her in the face and then pointed a handgun at her and fired it into the air.
4. The Defendant was ordered by the court on May 15, 2012, to have no contact

with Ms. Walker.

5. The State has located 246 phone calls made to telephone number (317) 640-7618 since May 16, 2012.

- a. Based on recordings of these phone conversations, the State believes these calls were made by Defendant to Ms. Walker.

- b. The State has only recently located these calls because they were made using several different inmate telephone personal identification numbers. The State believes Defendant was attempting to conceal his continued contact with Ms. Walker.

6. During these phone conversations, the Defendant repeatedly told Ms. Walker that the State would be unable to continue its case if she did not cooperate. Ms.

Walker has assented to the Defendant's requests. In a call recorded August 17, 2012, at 8:48 p.m., Ms Walker told the Defendant that "I didn't show up, and I'm not showing up to court, I'm doing that s*** for your a**. I'm putting my m****f**** a** in jeopardy and still I'm doing it for you."

7. Ms. Walker failed to appear at depositions on July 6, 2012, or August 16, 2012, as expected.

8. The State contends that if Ms. Walker does not come to trial it will be due to the procurement of the Defendant.

9. On the day of the incident Ms. Walker made taped statements to Detective Michael Kermon with the IMPD Domestic Violence Unit and Detective Sergeant James Fiscus of the IMPD Metro North District Narcotics Unit regarding her observations of the Defendant's possession and sale of cocaine. Ms. Walker also

provided the detectives with a written statement which was included in the request for a search warrant.

10. The Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). This right to confront witnesses is not unlimited, however. The forfeiture by wrongdoing rule extinguishes the defendant’s right to confront a witness where the defendant has rendered that witness unavailable. *Davis v. Washington*, 547 U.S. 813, 833 (2006) (“[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.”).
11. Indiana has adopted the U.S. Supreme Court’s acceptance of the forfeiture by wrongdoing exception. In *Boyd v. State*, the Indiana Appellate Court wrote, “We see no reason why a defendant, who by his or her own wrongdoing renders a witness unavailable to testify, would not forfeit the Sixth Amendment right to confront that witness at trial. To hold otherwise would permit a defendant to benefit from his or her wrongful act.” 866 N.E.2d 855, 857 (Ind. Ct. App. 2007). The General Assembly followed in 2008 by amending the Indiana Rules of Evidence to include Rule 804(b)(5). The new rule creates an exception to the general rule prohibiting hearsay for “statement[s] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying.”

12. A witness does not need to be deceased or missing to be considered “unavailable” for purposes of the forfeiture by wrongdoing exception. Under Indiana law, a witness is unavailable even where she appears in court but refuses to answer questions in spite of a court order. *Fowler v. State*, 829 N.E.2d 459, 468-69 (Ind. Ct. App. 2005). It is the witness’s willingness to cooperate with the proceedings, and not her physical location, that determines whether she is unavailable.
13. The State must make a good faith effort to make a witness available at trial. *Garner v. State*, 777 N.E.2d 721, 724 (Ind. 2002). Whether the State has made a good faith effort is judged on a reasonableness standard. *Tiller v. State*, 896 N.E.2d 537, 543 (Ind. Ct. App. 2008).
14. The State has made reasonable efforts to locate Ms. Walker and is continuing to do so. The State sent several certified mailings to suspected addresses with no response. The State has recently located a new suspected address and has sent an additional certified mailing notifying Ms. Walker of her duty to appear at trial. These ongoing efforts reflect a serious effort to procure Ms. Walker’s appearance in court.
15. The Defendant has repeatedly attempted to coerce Ms. Walker into refusing to testify in violation of a no contact order issued by the Court. Ms. Walker confirmed in a phone call to the Defendant that she would not participate as a witness for the Defendant’s benefit. The Defendant clearly engaged in wrongdoing in the hopes of preventing Ms. Walker’s testimony, and has therefore forfeited his right to object to the introduction of Ms. Walker’s prior statements to police.

WHEREFORE, the State of Indiana respectfully requests that this motion be granted and that any and all appropriate orders be issued by the Court.

Joseph Bosstick
Deputy Prosecuting Attorney

VERIFICATION

I swear or affirm, under penalties for perjury, that the foregoing representations are true.

Joseph Bosstick
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Service of the foregoing of the foregoing has been made to the defendant or attorney for defendant, Matthew Abels, by placing a copy of same in the Court 20 Public Defender's mailbox on the date of filing.

Joseph Bosstick
Deputy Prosecuting Attorney

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ORDER

The Court having read and carefully considered same, now finds that said Motion should be and is hereby

Granted _____.

Denied _____

Set for Hearing on _____

So ordered this _____ day of _____, 2012.

Judge
Marion Superior Court
Criminal Division, Room G20

Distribution:
Joseph Bosstick, MCPO
Matthew Abels