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"Forfeiture by Wrongdoing" after Crawford v. Washington: Maryland's Approach Best Preserves the Right to Confrontation

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"FORFEITURE BY WRONGDOING" AFTER *CRAWFORD V. WASHINGTON*: MARYLAND'S APPROACH BEST PRESERVES THE RIGHT TO CONFRONTATION

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Only a few Supreme Court decisions have so profoundly impacted the criminal justice system that they changed the day-to-day conduct and/or strategy of prosecutors, police, defense counsel, and judges. The Warren Court provided most of these select few cases, such as *Mapp v. Ohio*,[1] *Gideon v. Wainwright*,[2] and *Miranda v. Arizona*.[3]

More recently, in 2004 *Crawford v. Washington*[4] sent shockwaves through police departments and courthouses. Greatly expanding the right to confrontation, *Crawford* requires live testimony, subject to cross-examination, and generally rejects the use of "testimonial hearsay."[5]

Crawford significantly decreased prosecutorial use of hearsay statements of unavailable witnesses.[6] As a result, prosecutors argue, with increasing frequency, that the defendant procured witness unavailability through intimidation, coercion, and/or violence, and as such, forfeited the right to *Crawford* confrontation.[7]

This article focuses on how courts resolve prosecutorial allegations of "forfeiture by wrongdoing"[8] and the extent to which *Crawford* itself may dictate the procedure for forfeiture/waiver determinations. Maryland is the only jurisdiction that takes a defense-oriented, pro-confrontation position on all three major components of a "wrongdoing" determination, requiring: (1) a hearing, (2) strict rules of evidence, and (3) clear and convincing evidence of wrongdoing.[9]

The Maryland approach best ensures *Crawford* confrontation when determining whether the defendant has forfeited or waived

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1. 367 U.S. 643 (1961).
2. 372 U.S. 335 (1963).
3. 384 U.S. 436 (1966).
4. 541 U.S. 36 (2004).
5. *Id.* at 53.
6. *See infra* Parts II–VII.
7. *See, e.g.*, U.S. v. Mastrangelo, 693 F.2d 269, 272–73; Paul W. Grimm & Jerome E. Diese, Jr., *Hearsay, Confrontation, and Forfeiture by Wrongdoing:* Crawford v. Washington, *a Reassessment of the Confrontation Clause*, 35 U. BALT. L.F. 5 *passim* (2004).
8. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-901(b) (LexisNexis 2006).
9. *See id.*; *see also* Tracey L. Perrick, Crawford v. Washington: *Redefining Sixth Amendment Jurisprudence; The Impact Across the United States and in Maryland*, 35 U. BALT. L. REV. 133, 162–65 (2005); *cf.* Gonzalez v. State, 155 S.W.3d 603, 611 (Tex. App. 2004) (holding that the rule of forfeiture applies "whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable").

confrontation by wrongdoing. The Supreme Court has yet to rule. Because the Court is unlikely to go as far as Maryland has gone, this article proposes a compromise to balance the defendant's right to confrontation with the prosecution's right to prove wrongdoing.[10]

I. THE PROBLEM THAT BEGS FOR A NATIONAL, UNIFORM, CONSTITUTIONAL SOLUTION

After *Ohio v. Roberts*[11] in 1980, many defendants were convicted on out-of-court hearsay statements that were not subject to cross-examination, and denied the opportunity to confront the statement's maker.[12] As a result of *Roberts*, the Sixth Amendment right to confrontation essentially gave way to the exceptions to the rule against hearsay in a given jurisdiction.[13]

Under *Roberts*, hearsay statements were admissible, even when not subject to cross-examination, so long as the hearsay statement was reliable.[14] A hearsay statement was deemed reliable, and thus admissible, if the statement came within one of the firmly rooted exceptions to the rule against hearsay.[15] If the hearsay statement came within an exception to the rule against hearsay, but not a firmly rooted exception, the statement was not automatically reliable.[16] However, it was reliable if there were indicia of reliability in the way in which the statement was made, as determined by the trial court.[17] Suffice to say, if a hearsay statement was admissible under the rules of evidence, it almost always satisfied the Sixth Amendment right to confrontation.[18]

A quarter century later, *Crawford v. Washington*[19] expressly overruled *Roberts*.[20] The *Crawford* Court held that the Sixth Amendment right to confrontation guarantees a defendant the right to cross-examine a witness if, without the witness present, the statement would be testimonial hearsay.[21] Although the Court did not decide

10. *See infra* Part VIII.
11. 448 U.S. 56 (1980).
12. Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 581–84 (2003).
13. *See id.* at 619.
14. *See Roberts*, 448 U.S. at 66.
15. *Id.*
16. *Id.*
17. *See id.*
18. White, *supra* note 12, at 619.
19. 541 U.S. 36 (2004).
20. *See id.* at 67–69.
21. *See id.* at 68–69.

the full scope of what hearsay is testimonial,[22] it appeared that a statement was testimonial if made to a government official in anticipation of, or for the purpose of, criminal investigation and trial.[23] Thus, even under a "narrow standard," most statements made to law enforcement officers would be testimonial.[24]

Under *Crawford*, testimonial hearsay of unavailable witnesses is only admissible if the hearsay statement was subject to cross-examination when made.[25] Because virtually no testimonial hearsay given to law enforcement officers is subject to cross-examination, if the witness is unavailable, the testimonial hearsay is inadmissible.[26]

The *Crawford* Court, by dicta, recognized the then 126-year-old doctrine called "forfeiture by wrongdoing."[27] This doctrine stands for the proposition that a defendant should not profit from his or her wrongdoing.[28] Thus, a defendant should not be allowed to procure the unavailability of a witness—through intimidation, murder, or anywhere in between—and then successfully preclude the testimonial hearsay of that witness because the witness is unavailable and not present to testify.

When *Roberts* controlled, testimonial hearsay was much more readily admissible, and prosecutors rarely had to rely on the doctrine of forfeiture by wrongdoing.[29] However, with the Confrontation Clause so dramatically changed after *Crawford* in favor of defendants, the forfeiture by wrongdoing doctrine has been revitalized. Indeed, whenever a witness is unavailable, if there appears to be any causal connection between that unavailability and the defendant's conduct, the prosecutor may seek to admit the testimonial hearsay by arguing that the defendant forfeited his or her right to confrontation under *Crawford*.[30]

The Supreme Court had not—and still has not—held whether there are minimal constitutional standards for determining the applicability of the doctrine of forfeiture by wrongdoing. In a given case, the most dispositive ruling along the way to resolving guilt or innocence is likely to be the ruling on the admissibility of testimonial hearsay,

22. *Id.* at 68.
23. *See id.* at 52.
24. *Id.*
25. *Id.* at 68–69.
26. *See id.*
27. *Id.* at 62.
28. *See* Davis v. Washington, 126 S. Ct. 2266, 2280 (2006).
29. *See Crawford*, 541 U.S. at 62.
30. *See, e.g.*, *Davis*, 126 S. Ct. at 2280; U.S. v. Rivera, 412 F.3d 562, 566–67 (4th Cir. 2005); U.S. v. Gray, 405 F.3d 227, 240–42 (4th Cir. 2005).

particularly testimonial hearsay of the victim, when the defendant claims a violation of the right to confrontation, and the prosecution claims that the defendant forfeited the *Crawford* right to confrontation by his or her wrongdoing.

Thus, the question becomes what, if any, constitutional requirements exist for the manner in which the determination of constitutional wrongdoing/waiver is made? Must there be a hearing, or is a proffer from the prosecutor sufficient?

If there is a hearing, does it apply the informal rules of evidence typically used during pre-trial motion hearings, or must strict rules of evidence be used? On first blush, because this is a pre-trial hearing out of the presence of the jury, it may seem logical to use informal rules of evidence. If so, hearsay would be admissible.[31] That is the problem. Can a hearing to determine whether the right to confrontation can tolerate hearsay be resolved using nothing more than that very hearsay?

Regardless of the nature of the hearing to resolve the prosecution's claim of forfeiture by wrongdoing, how certain must the court be that the defendant committed wrongdoing? Because a finding of wrongdoing may well be dispositive of the ultimate issue of guilt or innocence, what risk of error in that fact-finding can due process tolerate? Can it tolerate only a risk of error of about 30% under clear and convincing evidence, or can it tolerate the higher 49% risk of error assigned to preponderance of the evidence?

II. INTRODUCTION

The Confrontation Clause of the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the [w]itnesses against him."[32] This right ensures that the defendant may cross-examine witnesses against him to: (1) evoke favorable testimony and (2) refute unfavorable testimony through impeachment.[33] This "bedrock procedural guarantee"[34] was made applicable to the states in 1965 through the Due Process Clause of the Fourteenth Amendment.[35]

In the landmark decision of *Crawford v. Washington*, the Supreme Court expanded the scope of Confrontation Clause protections by holding that out-of-court testimonial hearsay statements may not be

31. *See* Knight v. State, 7 Md. 313, 321, 255 A.2d 441, 446 (1969).
32. U.S. CONST. amend. VI.
33. *See* Davis v. Alaska, 415 U.S. 308, 315–16 (1974).
34. *Crawford*, 541 U.S. at 42.
35. Pointer v. Texas, 380 U.S. 400, 401 (1965).

introduced against a defendant unless (1) the declarant of the out-of-court testimonial hearsay statement is unavailable, and (2) the defendant had the opportunity to cross-examine the declarant at the time the out-of-court statement was made.[36]

Crawford is considered to be noteworthy for a number of reasons. First, *Crawford* overruled *Roberts*,[37] which permitted prosecutorial use of out-of-court statements if they possessed "adequate indicia of reliability."[38] *Crawford*, rejecting the "adequate indicia of reliability" test, held that the "reliability exception" was unpredictable and subjective.[39] According to *Crawford*, the "unpardonable vice" of *Roberts* was its admission of "core testimonial statements that the Confrontation Clause plainly meant to exclude."[40]

Second, *Crawford* explained that an open-ended balancing test violates the Confrontation Clause because it allowed a jury to hear evidence that had been untested by the adversarial process, based solely on a judge's determination of its reliability.[41] Under the Confrontation Clause, reliability must be achieved by testing the evidence in the "crucible of cross-examination."[42]

Third, *Crawford* now vigorously protects a defendant's right to confrontation by greatly increasing the situations that require live testimony.[43] *Crawford* was decided by a Court that was conservative on criminal justice issues, and the prosecution prevailed in most cases.[44] When the defense prevailed, it was almost never by a unanimous opinion, particularly one in which seven justices expressly overruled a strong pro-prosecution precedent.[45]

Fourth, *Crawford*, as well as other cases,[46] demonstrates both Justice Scalia's position on the Confrontation Clause and his

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36. *Crawford*, 541 U.S. at 68.
37. *Id.* at 37.
38. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
39. *Crawford*, 541 U.S. at 62–63.
40. *Id.* at 63.
41. *Id.* at 61.
42. *Id.*
43. *See id.* at 43–44 (examining the common law roots of the "live testimony" requirement.
44. *See id.* at 57–66 (discussing previously decided cases).
45. In *Crawford*, all nine justices ruled in favor of the defendant. *Id.* at 37. However, Chief Justice Rehnquist authored a concurring opinion, joined by Justice O'Connor, rejecting the majority's decision to overrule *Roberts*, but agreeing with the result. *Id.* at 69 (Rehnquist, C.J., concurring).
46. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 860–70 (1990) (Scalia, J., dissenting); U.S. v. Owens, 484 U.S. 554 (1988).

influence on the Court. Indeed, *Crawford* arose from Justice Scalia's scathing dissent in *Maryland v. Craig*.[47] In a 5-to-4 decision, the *Craig* Court upheld a Maryland statute in the face of a Confrontation Clause challenge.[48] The statute denied the defendant, in a child sexual abuse case, face-to-face confrontation as the witness was permitted to testify from another room.[49] Justice Scalia, dissenting, espoused the virtues of vigorous cross-examination as the preeminent tool in administering justice fairly.[50] Fourteen years later, in *Crawford*, Justice Scalia persuaded the Court that the Confrontation Clause should not merely be a "rubberstamp" of federal and state rules of evidence.[51]

Post-*Crawford*, the question has become how courts balance a defendant's confrontation rights against allegations of forfeiture by wrongdoing, and the extent to which the scope of *Crawford* itself dictates procedures for forfeiture/waiver determinations. Maryland is the only jurisdiction that takes a defense-oriented, pro-confrontation position on all three major components of a wrongdoing determination, requiring: (1) a hearing, (2) strict rules of evidence, and (3) clear and convincing evidence of wrongdoing.[52]

The Maryland approach best ensures *Crawford* confrontation when determining whether the defendant has forfeited or waived confrontation by wrongdoing. However, because the Court is unlikely to go as far as Maryland has gone, this article proposes a compromise to balance the defense right to confrontation with the prosecution right to prove wrongdoing.[53]

III. TESTIMONIAL HEARSAY

The holding in *Crawford* prohibits the admission of out-of-court statements in the absence of the declarant's live testimony, if the

47. *Compare Craig*, 497 U.S. at 860–70 (Scalia, J., dissenting) *with Crawford*, 541 U.S. at 66.

48. *Craig*, 497 U.S. at 856.

49. *See id.* at 836.

50. *Id.* at 860–70 (Scalia, J., dissenting).

51. *Crawford*, 541 U.S. at 60–62.

52. MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2006); *see also* Stephen Shapiro & Steve Grossman, *Maryland's New 'Witness Intimidation' Hearsay Exception: Is It a Toothless Tiger?*, THE DAILY RECORD, May 13, 2005, at 2B (commenting from a prosecution-oriented perspective on the Maryland legislation that, *inter alia*, requires: proof by clear and convincing evidence that the defendant's wrongdoing caused the absence of testimony, a hearing before a judge, and strict application of the Maryland Rules of Evidence).

53. *See infra* Part VIII.

statement constitutes testimonial hearsay.[54] Although the Court was unwilling to explore the outer limit of what is testimonial, the Court noted that "testimonial," in the hearsay context, must be understood in its colloquial sense and not in a legal sense.[55] Testimonial hearsay includes depositions, affidavits, grand jury testimony, preliminary hearing testimony, and prior trial testimony.[56]

The real significance of *Crawford* is that testimonial hearsay includes statements made to government officials under circumstances that would cause an objective person to reasonably believe that the statement would be available for use at a later trial.[57] This includes, as in *Crawford*, a police interrogation or interview during a criminal investigation.[58]

Although *Crawford* did not have the issue before it, the Court indicated that its holding would not apply to out-of-court non-testimonial hearsay statements, such as business records and statements made in furtherance of a conspiracy.[59] Moreover, *Crawford* does not apply to dying declarations, whether they are testimonial or non-testimonial.[60]

In 2006, in *Davis v. Washington*,[61] in two consolidated cases, the Supreme Court provided some clarity as to what hearsay is testimonial hearsay post-*Crawford*.[62] In *Davis*, the Court held that a statement is not testimonial, and thus not subject to *Crawford*, when made during police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police to meet an ongoing emergency.[63] However, a statement is testimonial, and thus subject to *Crawford*, when the primary purpose is to establish or prove past events potentially relevant to criminal prosecution.[64]

In *Davis*, a female victim called 911 and told the operator she had just been assaulted by the defendant, her former boyfriend.[65] When the police arrived shortly thereafter, the victim was still visibly

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54. *Crawford*, 541 U.S. at 53–54.
55. *Id.* at 53.
56. *See id.* at 51–52.
57. *Id.* at 52.
58. *Compare id. with* Davis v. Washington, 126 S. Ct. 2266, 2273–74 (2006).
59. *Crawford*, 541 U.S. at 56.
60. *Id.* at 56 n.6.
61. 126 S. Ct. 2266.
62. *See* Timothy O'Toole & Catharine Easterly, Davis v. Washington*: Confrontation Wins the Day*, THE CHAMPION, Mar. 2007, at 20–21.
63. *Davis*, 126 S. Ct. at 2273–74.
64. *Id.*
65. *Id.* at 2271.

shaken and had fresh bruises and injuries on her body.[66] She was frantically trying to collect her belongings and gather her children out of fear for their safety.[67] The victim's statements were not made at a police station, as in *Crawford*, but rather were made during a 911 call for emergency assistance.[68]

The victim was speaking of events that were happening in an ongoing emergency, and her statement was elicited to help the police address a present emergency rather than investigate events in the past.[69] The panic in the victim's voice and the nature of her responses to the 911 operator showed that the primary purpose of her statements was to enable police to assist her in the ongoing emergency.[70] Therefore, the Court held that her 911 statements were not testimonial within the meaning of *Crawford*.[71]

In *Davis*, regarding the second of the consolidated cases, *Hammon v. Indiana*, the Court held that the challenged out-of-court hearsay statement was testimonial and thus subject to *Crawford*.[72] Officers went to the defendant's home in response to a report of a domestic disturbance.[73] The wife was waiting on the porch, appeared frightened, told the officers nothing was wrong, and let the officers into the residence.[74] One officer kept the defendant in one part of the residence while another officer interviewed the wife.[75]

Eventually, the wife signed an affidavit, indicating that she had been battered by her husband.[76] At trial, the wife, although subpoenaed, did not appear to testify.[77] The Supreme Court held that, unlike in *Davis*, the victim's statements here were made at a time when she was not apparently in immediate danger.[78] Instead, she was conveying information about the past rather than seeking

66. *Id.*
67. *See id.*
68. *Compare* Crawford v. Washington, 541 U.S. 36, 38–40 (2004) *with Davis*, 126 S. Ct. at 2271–72.
69. *Davis*, 126 S. Ct. at 2276–77.
70. *Id.*
71. *Id.*
72. *See id.* at 2278.
73. *Id.* at 2272 (citing Hammon v. State, 829 N.E.2d 444, 446 (2005)).
74. *Id.* (citing *Hammon*, 829 N.E.2d at 446–47; Joint Appendix at 16, *Davis*, 126 S.Ct. 2266 (No. 05-5705), 2005 WL 3617526).
75. *Id.* (citing *Hammon*, 829 N.E.2d at 447; Joint Appendix, *supra* note 74, at 17, 32).
76. *Id.*
77. *Id.*
78. *Id.*

immediate aid.[79] Thus, these statements were testimonial under *Crawford*.[80]

Post-*Crawford*, Maryland has limited the scope of testimonial hearsay. In *State v. Snowden*,[81] the Court of Appeals of Maryland had its first occasion to apply *Crawford*. The issue addressed was whether section 11-304 of the Maryland Criminal Procedure Article (known as the "tender years" statute), which permitted out-of-court hearsay statements of child declarants through the testimony of a social worker to whom the statements were made, violated the right to confrontation under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights.[82]

This statute allowed health professionals or social workers to testify on behalf of children they interviewed if the trial court interviewed the child in a closed proceeding and determined that the child's statement contained, "specific guarantees of trustworthiness."[83] Under the statute, this method of allowing substitute testimony for the child victim applied whether the child victim was available or unavailable to testify.[84]

In *Snowden*, a licensed social worker employed by a county child protective services agency conducted interviews with each of three alleged child sexual abuse victims (ages eight to ten).[85] Pursuant to the tender years statute, the social worker in *Snowden* testified to what the children told her, but none of the children testified.[86] The defendant was convicted of child abuse and third-degree sexual offense.[87]

While the *Snowden* case was on appeal, *Crawford* was decided by the Supreme Court.[88] Applying *Crawford*, a unanimous Court of Appeals of Maryland affirmed the Court of Special Appeals of Maryland and held that the statements of the child victims were testimonial.[89] An individual, assuming the perspectives of the children, could anticipate that statements they made to a sexual abuse investigator could be used to prosecute the defendant.[90] In fact, in

79. *Id.* at 2279.
80. *Id.*
81. 385 Md. 64, 867 A.2d 314 (2005).
82. *Id.* at 68, 867 A.2d at 316.
83. *Id.* at 73, 867 A.2d at 319.
84. *Id.* at 78, 867 A.2d at 322.
85. *Id.* at 68–70, 867 A.2d at 316–17.
86. *Id.* at 73, 867 A.2d at 319.
87. *Id.* at 73–74, 867 A.2d at 319.
88. *Id.*
89. *Id.* at 74, 867 A.2d at 319.
90. *Id.* at 84, 867 A.2d at 325.

this case the children were actually aware that this was the purpose of the interviews.[91] The social worker's interviews with the children were conducted as part of the police investigation.[92]

The State argued that the court should find the statements of the children to be non-testimonial per se.[93] The court stated that it was "unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants."[94] The court continued:

> This concern for the testimonial capacity of young children overlooks the fundamental principles underlying the Confrontation Clause. Even though there are sound public policy reasons for limiting a child victim's exposure to a potentially traumatizing courtroom experience, we nonetheless must be faithful to the Constitution's deep concern for the fundamental rights of the accused. Although the Supreme Court has recognized that the interest of protecting victims may triumph over some rights protected by the Confrontation Clause, it also has concluded that such interests may never outweigh the explicit guarantees of the Clause, including the "right to *meet face to face* all those who appear and give evidence *at trial*."[95]

Ultimately, the court did not invalidate Maryland's tender years statute, but restricted its use to situations in which a child's statements to a health or social worker were non-testimonial.[96]

In *Griner v. State*,[97] the Court of Special Appeals of Maryland addressed testimonial hearsay. In *Griner*, a child victim made statements about physical abuse to a nurse during medical treatment at a hospital.[98] Before the nurse and others testified at trial, and with the jury not present, the prosecution proffered the child's statements, arguing that they were admissible as an exception to the rule against hearsay for statements made during medical treatment or diagnosis.[99]

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91. *Id.* at 84–85, 867 A.2d at 326.
92. *Id.* at 84, 867 A.2d at 325.
93. *Id.* at 89, 867 A.2d at 328.
94. *Id.* at 89, 867 A.2d at 328–29.
95. *Id.* at 90, 867 A.2d at 329 (citations omitted).
96. *Id.* at 92, 867 A.2d at 330.
97. 168 Md. App. 714, 899 A.2d 189 (2006).
98. *Id.* at 726–27, 899 A.2d at 196.
99. *Id.* at 736, 899 A.2d at 202.

The defendant argued the statements violated her rights under *Crawford* because they were testimonial.[100] The trial court admitted the statements, ruling, in part, that they were not testimonial.[101] The Court of Special Appeals of Maryland held that, because the statements were not admitted under the tender years statute,[102] and because the defendant's only appellate argument was based on the tender years statute, admission of the statements was not preserved.[103] However, the court explained that the defendant would not have prevailed in any event, because the trial court properly concluded that the child's statements to the nurse were made in conjunction with medical diagnosis and treatment and not for the purpose of gathering testimony for trial.[104]

Moreover, under Maryland Rule 5-803(b)(4), statements taken and given for purposes of medical diagnosis or treatment are not excluded by the rule against hearsay.[105] This contemplates statements that describe how the patient incurred the injury.[106] In this case, there was enough evidence to show the child understood such information had to be given to the nurse for medical reasons.[107]

In another child abuse case, *Lawson v. State*,[108] a seven-year old girl accused the defendant of sexually molesting her.[109] A social worker employed by the county Department of Social Services interviewed the girl.[110] The girl, the girl's mother, and the social worker all testified at trial.[111] The Court of Appeals of Maryland distinguished *Snowden* and held that the challenged testimony of the social worker at trial was admissible under Maryland's tender years statute.[112] When a declarant testifies at trial, there is no violation of the Confrontation Clause.[113] Here, the social worker did not testify in place of the child.[114]

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100. *Id.* at 737, 899 A.2d at 202.
101. *Id.*
102. MD. CODE ANN., CRIM. PROC. § 11-304 (LexisNexis 2006).
103. *Griner*, 168 Md. App. at 736–40, 899 A.2d at 201–04.
104. *Id.* at 742–43, 899 A.2d at 205–06.
105. *Id.* at 744–45, 899 A.2d at 207–08.
106. *Id.*
107. *Id.* at 746–47, 899 A.2d at 207–08.
108. 389 Md. 570, 886 A.2d 876 (2005).
109. *Id.* at 577, 886 A.2d at 880.
110. *Id.*
111. *Id.* at 577–79, 886 A.2d at 879–81.
112. *Id.* at 586–89, 886 A.2d at 885–87.
113. *Id.* at 588–89, 886 A.2d at 886–87 (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)).
114. *Id.* at 589, 886 A.2d at 887.

In a different testimonial hearsay argument, in *Rollins v. State*,[115] the Court of Appeals of Maryland addressed the admissibility of autopsy reports.[116] On appeal from a murder conviction, the defendant argued that his confrontation rights were violated when the trial court denied his pretrial motion to exclude the testimony of a medical examiner, arguing that the medical examiner's "opinion was based on hearsay statements contained in the autopsy report from witnesses who may or may not testify at trial," and that *Crawford* applied to autopsy reports.[117]

In a case of first impression, the court held that autopsy reports are not per se testimonial,[118] but (1) autopsy reports that fall under the business or public records exception are still subject to *Crawford* scrutiny;[119] (2) factual, routine, descriptive, and non-analytical findings in autopsy reports are non-testimonial and may be admitted without the testimony/availability of the medical examiner; and (3) conclusions drawn from objective findings are testimonial and must be redacted if the medical examiner is unavailable.[120]

In this case, the trial court redacted all testimonial statements from the autopsy report prepared by the medical examiner prior to admission into evidence, including the conclusion that the victim's death was a homicide caused by smothering.[121] The remaining non-testimonial hearsay statements were admissible under the business or public records exception to the rule against hearsay.[122]

In *Costley v. State*,[123] the defendant argued that the trial court violated *Crawford* by admitting an autopsy report and a physician's testimony about the contents of the report.[124] The Court of Special Appeals of Maryland held there was no error in admitting the report.[125] At the defendant's trial, the doctor testified only as to the physical findings in the autopsy report, and the defendant was able to cross-examine the doctor.[126]

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115. 392 Md. 455, 897 A.2d 821 (2006).
116. *Id.* at 459, 897 A.2d at 823.
117. *Id.* at 459–60, 897 A.2d at 823.
118. *Id.* at 486, 897 A.2d at 839.
119. *Id.* at 497, 897 A.2d at 845.
120. *Id.*
121. *Id.* at 489–90, 897 A.2d at 841.
122. *Id.* at 496–97, 897 A.2d at 845.
123. 175 Md. App. 90, 926 A.2d 769 (2007).
124. *Id.* at 115, 926 A.2d at 783.
125. *Id.* at 126, 926 A.2d at 790.
126. *Id.*

Following the Supreme Court decision in *Davis*, the Court of Special Appeals of Maryland decided *Head v. State*.[127] In that case, officers responded immediately to the scene of the crime and followed a trail of blood to the kitchen where they found the victim begging for help.[128] The smell of gunpowder was strong in the air when officers asked the victim, "Who shot you?"[129] The victim answered, "Bobby," referring to the defendant.[130] On appeal, the defendant argued that the trial court violated his Sixth Amendment confrontation rights in allowing the officer to testify to the victim's declaration that "Bobby" killed him under the "dying declaration" and "excited utterance" exceptions to the rule against hearsay.[131] The court applied *Davis*, decided six weeks after oral argument in this case,[132] and held that the statement "Bobby" was non-testimonial.[133] The circumstances objectively indicated that the primary purpose of the officer's question was not to establish or prove past events.[134] Rather, the officers needed to know, for safety reasons, whether the person who shot the victim was still in the house.[135] Therefore, it was not a violation of the defendant's right to confrontation to allow the officer to testify as to the victim's identification of the defendant.[136]

In another "911 case," *Marquardt v. State*,[137] the defendant, who was looking for his girlfriend, broke into the wrong house, and then broke into a house that belonged to her friend.[138] The defendant assaulted the friend with a baseball bat because he believed the friend was holding something in his hand, and he dragged the girlfriend from the house into his car and assaulted her.[139] The defendant argued that the court erroneously admitted three pieces of evidence, including the 911 call from the victim.[140] The Court of Special Appeals of Maryland held that, under *Crawford*, the 911 call was

127. 171 Md. App. 642, 912 A.2d 1 (2006).
128. *Id.* at 646–47, 912 A.2d at 3–4.
129. *Id.* at 644, 912 A.2d at 2.
130. *Id.*
131. *Id.* at 647–48, 912 A.2d at 4.
132. *Id.* at 645, 912 A.2d at 2.
133. *Id.* at 660, 912 A.2d at 12.
134. *Id.* at 659–60, 912 A.2d at 11–12.
135. *Id.* at 660, 912 A.2d at 11.
136. *Id.* at 660–61, 912 A.2d at 12.
137. 164 Md. App. 95, 882 A.2d 900 (2005).
138. *Id.* at 110–12, 882 A.2d at 909–10.
139. *Id.* at 112, 882 A.2d at 910.
140. *Id.* at 119, 882 A.2d at 914.

non-testimonial[141] because the victim called 911 for help while she was being assaulted; therefore, the tape of the call could later be used at trial.[142]

In summary, testimonial hearsay is subject to the restrictions of *Crawford*, making the admissibility of such statements unlikely. Non-testimonial hearsay is not controlled by *Crawford*; instead, it is controlled by *Roberts* and much more likely to be admissible.

IV. WITNESS UNAVAILABILITY

A prerequisite to the admission of an out-of-court testimonial statement, in lieu of live testimony, is that the declarant be unavailable.[143] A declarant is not unavailable if that unavailability resulted from prosecutorial negligence or a lack of good faith in attempting to obtain the declarant's presence for trial.[144]

A declarant is unavailable as a witness if the witness is: (1) deceased,[145] (2) emigrated to another country,[146] (3) unable to be located despite a good faith effort,[147] (4) has no memory,[148] or (5) incompetent.[149] Moreover, if live testimony by a child witness will cause serious emotional distress, making the child unable to communicate reasonably, the declarant is unavailable.[150]

Furthermore, if a declarant has a privilege, such as the Fifth Amendment privilege against compelled self-incrimination or a marital privilege, the declarant is unavailable.[151] In Maryland, if a person has a serious physical disability that prevents the person from testifying, the declarant is unavailable.[152]

Prosecutors argue that *Crawford* makes prosecution of child abuse and domestic violence cases much more difficult because, in those

141. *Id.* at 122, 882 A.2d at 916.
142. *Id.*
143. Crawford v. Washington, 541 U.S. 36, 68 (2004).
144. Barber v. Page, 390 U.S. 719, 724–25 (1968); Motes v. United States, 178 U.S. 458, 474 (1900).
145. MD. R. 5-804(a)(4); *e.g.*, Mattox v. United States, 156 U.S. 237 (1895).
146. *See* Mancusi v. Stubbs, 408 U.S. 204, 212–13 (1972).
147. MD. R. 5-804(a)(5); *e.g.*, Ohio v. Roberts, 448 U.S. 56 (1980).
148. MD. R. 5-804(a)(3); *e.g.*, California v. Green, 399 U.S. 149, 168 n.17 (1970).
149. *See* Idaho v. Wright, 497 U.S. 805, 816 (1990).
150. Maryland v. Craig, 497 U.S. 836, 860 (1990).
151. *See* FED. R. EVID. 804(a)(1); MD. R. 5-804(a)(1).
152. *See* MD. R. 5-804(a)(4).

cases, the victim witness is more likely to become unavailable than in other types of prosecutions.[153]

In child abuse cases, the victim may be "unavailable" to testify for a number of reasons, including "a child's age and maturity level, his or her general fear of a courtroom environment, or simply a parent or guardian specifically urging the child not to testify at trial for fear that the child will become emotionally upset."[154] In domestic violence cases, prosecutors argue that *Crawford* "creates perverse incentives for domestic violence batterer-defendants to absent their victims from court and then seek dismissal of their charges by raising the Confrontation Clause."[155]

In both child abuse cases and domestic violence cases, prosecutors have a greater need to use out-of-court statements, but after *Crawford*, there are stringent requirements for admission that often cannot be met.[156]

V. WITNESS INTIMIDATION & FORFEITURE BY WRONGDOING

Despite the concern that *Crawford* has limited "the prosecution's arsenal for combating witness intimidation,"[157] Supreme Court cases pre-*Crawford* and post-*Crawford* approved the prosecution's ability to seek a determination that the defendant, by wrongdoing, "forfeited" his or her confrontation rights under *Crawford*.[158]

Through the doctrine of forfeiture by wrongdoing, the prosecution may admit out-of-court statements, despite the unavailability of the witness, if the defendant's wrongful conduct procured the witness's unavailability through intimidation, coercion, and/or violence.[159] This doctrine provides a way for courts to ensure a defendant's protection under the Confrontation Clause, while enjoining him from

153. *See* Matthew M. Staab, Student Work, *Child's Play: Avoiding the Pitfalls of* Crawford v. Washington *in Child Abuse Prosecution*, 108 W. VA. L. REV. 501, 502–03 (2005).

154. *Id.* at 535.

155. Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 472 (2006).

156. *See, e.g.*, Perrick, *supra* note 9, at 144, 148–49.

157. Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(d)(1)(A) to Protect Domestic Violence Victims in a Post-*Crawford *World*, 27 PACE L. REV. 199, 240 (2007).

158. *See* Davis v. Washington, 126 S. Ct. 2266, 2280 (2006); Crawford v. Washington, 541 U.S. 36, 62 (2004).

159. *See* King-Ries, *supra* note 157, at 229.

complaining about being denied his right of confrontation when the defendant himself caused that unavailability.[160]

Although the forfeiture doctrine existed at common law and was codified by federal rule in 1997, this doctrine has evolved into a critical part of the analysis of the defendant's Sixth Amendment rights as delineated by *Crawford*.[161]

*A. Pre-*Crawford

Under the common law doctrine of forfeiture by wrongdoing, if the defendant's misconduct was the cause of a witness being unavailable, the defendant could not object to the admission of that witness's statement on the grounds of denial of the right to cross-examine the witness.[162] In *Reynolds v. United States*,[163] the Supreme Court held that the Constitution does not provide a defendant with the means to perform an end-run around this common law doctrine:

> 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. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the

160. *See* Grimm & Deise, *supra* note 7, at 32–33.

161. *See Davis*, 126 S. Ct. at 2280 ("The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings."); *see also* Myrna Raeder, *Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 361 (2005) ("*Crawford* virtually invited prosecutors to raise claims of forfeiture when facing Confrontation Clause challenges," and consequently, it "is likely that forfeiture will be a factor in a number of domestic violence cases."); Deborah Tuerkheimer, Crawford*'s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 34 (2006) (arguing that *Crawford* "instantly creates the prospect of a newly robust forfeiture doctrine as well as provid[es] an impetus for its re-envisioning.") (footnote omitted).

162. *See* Kelly Rutan, Comment, *Procuring the Right to an Unfair Trial: Federal Rule of Evidence 804(B)(6) and the Due Process Implications of the Rule's Failure to Require Standards of Reliability for Admissible Evidence*, 56 AM. U. L. REV. 177, 183–84 (2006).

163. 98 U.S. 145 (1878).

> 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.[164]

In the 126 years from *Reynolds* to *Crawford*, *Reynolds* has been cited only five times by the Supreme Court, and with no elaboration of the constitutional dimensions of the doctrine of forfeiture by wrongdoing.[165]

In the 1970s, federal courts began to apply the forfeiture by wrongdoing principle to admit hearsay testimony of witnesses who were intimidated or prevented from testifying in narcotics and organized crime cases, using the "residual exception" to the rule against hearsay under Federal Rule of Evidence 807.[166]

In the first such case, *United States v. Carlson*,[167] the Eighth Circuit held that the defendant, who intimidated a witness into refusing to testify against him, pursued a course of conduct that was "itself inimical to the administration of justice."[168] Concluding that to "permit the defendant to profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the [C]onfrontation [C]lause," *Carlson* held that the defendant waived his rights under the Confrontation Clause.[169]

Carlson and other cases permitted the introduction of hearsay statements of witnesses whose unavailability was procured by the defendant. The courts usually admitted such statements on the theory

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164. *Id.* at 158–59.

165. *See* James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1208–09 (2006); *see also* Motes v. United States, 178 U.S. 458, 473–74 (1900) ("In the present case there was not the slightest ground in the evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement, or with the assent of either of the accused."); White v. Illinois, 502 U.S. 346, 365 n.2 (1992); Diaz v. United States, 223 U.S. 442, 452 (1912); West v. Louisiana, 194 U.S. 258, 265 (1904); Mattox v. United States, 156 U.S. 237, 242 (1895). Frankly, pre-*Crawford*:

> > *Reynolds* was not an important precedent. The novel issue was not that the defendant deliberately kept his wife from appearing and thereby waived the right to confront her. The opinion made clear that this principle was already firmly established [in the common law]. Rather, the important point was that prior trial testimony, subject to cross-examination, could be admitted.
>
> Flanagan, *supra*, at 1208 (footnote omitted).

166. *See* Flanagan, *supra* note 165, at 1209.

167. 547 F.2d 1346 (8th Cir. 1976).

168. *Id.* at 1357–59.

169. *Id.* at 1359.

that the statements possessed the requisite guarantees of trustworthiness under the residual exception to the rule against hearsay.[170]

This changed in 1979 when the Tenth Circuit, in *United States v. Balano*,[171] held that because the defendant procured the unavailability of the witness, the defendant also waived his confrontation rights.[172] Unlike *Carlson*, *Balano* found that there was no reason to consider whether the testimony was admissible under the rule against hearsay, concluding that "[a] valid waiver of the constitutional right is a valid waiver of an objection under the rules of evidence."[173] The application of the waiver by misconduct doctrine, under both constitutional and non-constitutional analyses became a common approach in the federal circuits.[174]

In 1982, the Second Circuit decided *United States v. Mastrangelo*,[175] which provided important precedent for later application of the forfeiture doctrine at the federal level, as well as the subsequent federal rule regarding forfeiture by wrongdoing.[176] In *Mastrangelo*, the defendant, who was charged with violating narcotics laws, was recorded via wiretap threatening the State's only eyewitness.[177] Subsequently, the witness was murdered while traveling to testify.[178] The trial court declared a mistrial, ruling by a preponderance of the evidence that the defendant was involved in the

170. *See* Flanagan, *supra* note 165, at 1210 & n.95 (citing United States v. Rouco, 765 F.2d 983, 993–96 (11th Cir. 1985); Steele v. Taylor, 684 F.2d 1193, 1199–1200 (6th Cir. 1982); United States v. West, 574 F.2d 1131, 1134–36, 1138 (4th Cir. 1978); *Carlson*, 547 F.2d at 1354–55; United States v. Mastrangelo, 533 F. Supp. 389, 391 (E.D.N.Y. 1982); *c.f.* United States v. Thevis, 84 F.R.D. 57, 63–66 (N.D. Ga. 1979), *aff'd. on other grounds*, 665 F.2d 616, 628–30 (5th Cir. 1982), *superseded on limited grounds by rule*, FED. R. EVID. 804(b)(6), *as recognized in* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001)).

171. 618 F.2d 624 (10th Cir. 1979).

172. *See id.* at 626.

173. *Id.*

174. *See* Flanagan, *supra* note 165, at 1210 & n.98 (citing United States v. Emery, 186 F.3d 921, 926–27 (8th Cir. 1999); United States v. White, 116 F.3d 903, 911–12 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d. 1271, 1279–80 (1st Cir. 1996); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Mastrangelo, 693 F.2d 269, 272–73 (2d Cir. 1982)).

175. 693 F.2d 269 (2d Cir. 1982).

176. *See* Grimm & Deise, *supra* note 7, at 25–29; Rutan, *supra* note 162, at 182, 186–87 (stating that the author of *Mastrangelo* later became the chair of the Federal Rules Advisory Committee, and was chair of the Committee in 1997 when Federal Rule of Evidence. 804(b)(6) codified the forfeiture doctrine).

177. *See Mastrangelo*, 693 F.2d at 271.

178. *Id.*

conduct that led to the murder of the witness.[179] Upon retrial, the prosecution entered the grand jury testimony of the murdered witness into the record, which later formed the basis of the defendant's appeal.[180]

On appeal, the Second Circuit remanded the case for an evidentiary hearing on whether the defendant procured the witness's unavailability, opining:

> [I]f a witness' [sic] silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his [C]onfrontation [C]lause rights in order to prevent prior grand jury testimony of that witness from being admitted against him. Any other result would mock the very system of justice the [C]onfrontation [C]lause was designed to protect.[181]

During this time, state courts also began applying the forfeiture by wrongdoing principle by focusing on the defendant's role in securing the unavailability of a witness. States generally addressed the waiver of any objection to the use of such a witness's out-of-court statement on confrontation or evidentiary grounds.[182]

For example, in *State v. Gettings*, the State's key witness was found murdered several months after he made a taped statement that implicated the defendant in an arson.[183] Relying heavily on the doctrine of forfeiture by wrongdoing in the federal courts, the Kansas Supreme Court affirmed the introduction of the taped statement into evidence because the defendant had, through murder of the witness, waived both his constitutional right to confrontation and any hearsay objections to the statement.[184]

In 1992, the Advisory Committee on the Federal Rules of Evidence began considering codification of the forfeiture by wrongdoing doctrine.[185] In 1997, Federal Rule of Evidence 804(b)(6) was

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179. *See id.*

180. *See id.* at 272.

181. *Id.* at 272–73 (citations omitted).

182. *See* Flanagan, *supra* note 165, at 1210 & n.99 (citing Steele v. Taylor, 684 F.2d 1193, 1199–1200 (6th Cir. 1982); Devonshire v. United States, 691 A.2d 165, 166 (D.C. 1997); State v. Gettings, 769 P.2d 25 (Kan. 1989); State v. Sheppard, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984); Holtzman v. Hellenbrand, 460 N.Y.S.2d 591, 597 (N.Y. App. Div. 1983)) (citations omitted).

183. *See* 769 P.2d at 28–29.

184. *See id.*

185. *See* Flanagan, *supra* note 165, at 1212.

promulgated.[186] Under this rule, a hearsay statement is not excluded from evidence because the declarant is unavailable if the statement is "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."[187]

Unlike some other exceptions to the rule against hearsay, which are predicated on the notion of reliability of statements, FED. R. EVID. 804(b)(6) represents "a prophylactic rule [designed] to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'"[188] In other words, Federal Rule of Evidence 804(b)(6) is intended to make clear to defendants that there is "nothing to be gained from compounding his crimes by killing or threatening the witness, since the witness' [sic] statements will be admitted in any event."[189]

Several states and U.S. territories have enacted equivalents of Federal Rule of Evidence.804(b)(6),[190] including Delaware,[191] Guam,[192] Hawaii,[193] Kentucky,[194] Michigan,[195] North Dakota,[196] Ohio,[197] Pennsylvania,[198] Tennessee,[199] and Vermont.[200] New Mexico judicially applied the federal approach codified in Federal Rule of Evidence 804(b)(6), even though it had not been formally adopted by New Mexico's legislature.[201]

Other states have enacted statutes that do not mirror the federal rules but nonetheless codify forfeiture by wrongdoing as an exception

186. *See* Rutan, *supra* note 162, at 182, 185–86; Grimm & Deise, *supra* note 7, at 24.
187. FED. R. EVID. 804(b)(6).
188. FED. R. EVID. 804(b)(6) advisory committee's note (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).
189. Jay M. Zitter, Annotation, *Construction and Application of Fed. Rules Evid. Rule 804(b)(6), 28 U.S.C.A., Hearsay Exception Based on Unavailable Witness' Wrongfully Procured Absence*, 193 A.L.R. FED. 703, 710 (2007).
190. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 807 (2005).
191. DEL. R. EVID. 804(b)(6).
192. 6 GUAM CODE ANN. tit. 6 § 804 (2006).
193. HAW. R. EVID. 804(b)(7).
194. KY. R. EVID. 804(b)(5).
195. MICH. R. EVID. 804(b)(6).
196. N.D. R. EVID. 804(b)(6).
197. OHIO R. EVID. R. 804(b)(6).
198. PA. R. EVID. 804(b)(6).
199. TENN. R. EVID. 804(b)(6).
200. VT. R. EVID. 804(b)(6).
201. *See* State v. Alvarez-Lopez, 98 P.3d 699, 704 (N.M. 2004).

to the rule against hearsay.[202] Many jurisdictions continue to judicially adopt the general concept of forfeiture by wrongdoing as an equitable doctrine, extinguishing a defendant's objection to the admission of hearsay evidence on Confrontation Clause grounds.[203]

Additionally, every federal circuit that has considered the doctrine of forfeiture by wrongdoing has accepted it.[204] Similarly, some state courts have elected to adopt the forfeiture by wrongdoing doctrine as well.[205]

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202. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/115-10.2a (West 2007). Illinois enacted a statute in 2003 that provides for the admissibility of prior hearsay statements in domestic violence prosecutions if: (1) the prior statement is not covered by another hearsay exception but possesses equivalent circumstantial guarantees of trustworthiness, (2) the witness is a crime victim who is unavailable to testify because of intimidation by the defendant, (3) the statement is offered as evidence of a material fact, (4) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (5) the interests of justice are served by admission of the statement. *Id.*

203. *See, e.g.*, Commonwealth v. Edwards, 830 N.E.2d 158, 168 (Mass. 2005).

204. *See, e.g.*, United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002) (applying FED. R. EVID. 804(b)(6)); United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir. 2001) ("[T]his Court, as well as a majority of our sister circuits, have also applied the waiver-by-misconduct rule in cases where the defendant has wrongfully procured the witnesses' silence through threats, actual violence or murder."); United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000) (applying FED. R. EVID. 804(b)(6)); United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996) ("[A] defendant who wrongfully procures a witness's absence for the purpose of denying the government that witnes's testimony waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements."); Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982) ("The law prefers live testimony over hearsay, a preference designed to protect everyone, particularly the defendant. A defendant cannot prefer the law's preference and profit from it, as the Supreme Court said in Reynolds [sic], while repudiating that preference by creating the condition that prevents it."); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982) ("[A] defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying also waives his right to confrontation under the Zerbst standard," because "[t]he law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him."), *superseded on limited grounds by rule*, FED. R. EVID. 804(b)(6), *as recognized in* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) ("[U]nder the common law principle that one should not profit by his own wrong, coercion can constitute voluntary waiver of the right of confrontation."); United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976) ("Nor should the law permit an accused to subvert a criminal prosecution by causing witnesses not to testify at trial who have, at the pretrial stage, disclosed information which is inculpatory as to the accused. To permit the defendant to profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the [C]onfrontation [C]lause.").

205. *See, e.g.*, State v. Valencia, 924 P.2d 497, 502 (Ariz. Ct. App. 1996); People v. Moore, 117 P.3d 1, 5 (Colo. Ct. App. 2004); Devonshire v. United States, 691 A.2d

The doctrine of forfeiture by wrongdoing requires proof that: (1) the declarant is unavailable, (2) the declarant was expected to be a witness, (3) the defendant acted with the intent to prevent the declarant from testifying, and (4) there is a nexus between the defendant's acts and the unavailability of the declarant.[206] The wrongful conduct that forfeited or waived a defendant's Confrontation Clause rights in these cases included use of force, threats, persuasion, control, wrongful non-disclosure of information, collusion, and "direction to a witness to exercise the [F]ifth [A]mendment privilege."[207]

Some courts have held that the forfeiture of wrongdoing doctrine applies to the defendant even when the alleged wrongdoing in procuring witness unavailability is the same conduct for which the defendant is on trial.[208] In *Commonwealth v. Edwards*,[209] Massachusetts held that the nexus between a defendant's actions and the witness's unavailability was shown when "(1) a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion, persuasion, or pressure; (2) a defendant physically prevents a witness from testifying; or (3) a defendant actively facilitates the carrying out of the witness's independent intent not to testify."[210]

165, 168–69 (D.C. 1997); State v. Hallum, 606 N.W.2d 351, 358 (Iowa 2000); Wildermuth v. State, 310 Md. 496, 514, 530 A.2d 275, 284 n.10 (1987) (acknowledging the concept of forfeiture or waiver of the right to confrontation, citing *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), but not squarely addressing the issue); State v. Fields, 679 N.W.2d 341, 347 (Minn. 2004); State v. Sheppard, 484 A.2d 1330, 1345–48 (N.J. Super. Ct. Law Div. 1984); State v. Alvarez-Lopez, 98 P.3d 699, 703–05 (N.M. 2004); People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995); Commonwealth v. Paddy, 800 A.2d 294, 310 (Pa. 2002); State v. Boyes, Nos. 2003-CA-0050 to 0051, 2004 WL 1486333, at *8 (Ohio Ct. App. June 21, 2004).

206. *See* James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 479–87 (2003); King-Ries, *supra* note 155, at 454–55.

207. *Steele*, 684 F.2d at 1201 (holding that witness's prior statement to law enforcement could be admitted at trial even though the witness later refused to testify because the witness was under the control of defendants and defense counsel, who procured her unavailability by counseling her to assert her Fifth Amendment privilege against self-incrimination); *see also* United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985); *Carlson*, 547 F.2d at 1360.

208. *See, e.g.*, United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005); *Moore*, 117 P.3d at 5; State v. Meeks, 88 P.3d 789, 794–95 (Kan. 2004); Gonzalez v. State, 155 S.W.3d 603, 610–11 (Tex. Ct. App. 2004).

209. 830 N.E.2d 158 (Mass. 2005).

210. *Id.* at 171.

In each of these cases, the courts explained that, although the Sixth Amendment protects a defendant's right to confront witnesses, "courts will not suffer a party to profit by his [or her] own wrongdoing," and testimonial statements made by witnesses who are unavailable because of a defendant's misconduct may be admitted into evidence.[211]

When addressing constitutional challenges to the forfeiture by wrongdoing doctrine, some courts utilize the word "waiver" rather than "forfeiture."[212] In *Johnson v. Zerbst*,[213] the Supreme Court recognized that an accused can waive a fundamental constitutional right, provided the waiver is made knowingly and intelligently.[214] By contrast, forfeiture of a right involves the loss of a right or privilege "because of a crime, breach of obligation, or neglect of duty."[215]

One scholar has argued that it is most appropriate to analyze the doctrine as an implicit waiver of constitutional rights because the conceptualization of constitutional rights as a "benefit" to a criminal defendant that the defendant then "forfeits" by committing a crime obscures the true nature of individual constitutional rights.[216] Others argue that, analytically, the concept of forfeiture more accurately describes the penalty a defendant suffers for his or her misconduct because a defendant, by murdering a witness, cannot reasonably be said to have made a "voluntary and intelligent" choice to waive a constitutional right.[217] The Advisory Committee to Federal Rule of Evidence 804(b)(6) used the word forfeiture rather than waiver: (1) in part because forfeiture conveys the idea that the loss of this right is a penalty for misconduct, and (2) in part because the knowing and

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211. United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996); *see also Edwards*, 830 N.E.2d at 168–70 (holding that collusion with a witness to prevent the witness from testifying is sufficient to trigger the issue of forfeiture by wrongdoing).

212. *See* Enrico B. Valdez & Shelley A. Nieto Dahlberg, *Tales from the Crypt: An Examination of Forfeiture by Misconduct and Its Applicability to the Texas Legal System*, 31 ST. MARY'S L.J. 99, 104, 105 & n.25, 106 & nn.26–27 (1999) (citing United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982), *superseded on limited grounds by rule*, FED. R. EVID. 804(b)(6), *as recognized in* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001); United States v. Stephens, 609 F.2d 230, 232 (5th Cir. 1980); *Carlson*, 547 F.2d at 1358)) (citations omitted); *see also* David J. Tess, Note, *Losing the Right to Confront: Defining Waiver to Better Address a Defendant's Actions and Their Effects on a Witness*, 27 U. MICH. J.L. REFORM 877, 882 (1994).

213. 304 U.S. 458 (1938).

214. *Id.* at 464–65.

215. BLACK'S LAW DICTIONARY 677 (8th ed. 2004).

216. Flanagan, *supra* note 165, at 1240–41.

217. *See* Grimm & Deise, *supra* note 7, at 23–24.

intelligent requirement of a waiver of constitutional rights might require notification to the defendant that witness intimidation would result in loss of Confrontation Clause objections to the use of such witness statements at trial.[218]

Both arguments have merit, and this article does not seek to resolve the debate on whether to characterize this concept as forfeiture or waiver of confrontation rights. Rather, because of its predominant usage, the article will use the term forfeiture by wrongdoing.

B. Post-Crawford

Crawford, in dicta, made reference to the concept of forfeiture by wrongdoing without explicitly ruling on its constitutionality, noting that the *Roberts* test was an impermissible substitution for the constitutionally-approved method of testing the reliability of a statement (cross-examination):

> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it 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 essentially equitable grounds; it does not purport to be an alternative means of determining reliability.[219]

Crawford thus indicated that the concept of forfeiture of confrontation rights through misconduct (as articulated in *Reynolds* and applied in various federal and state cases) survived because it did not act as a substitute method for determining the reliability of a statement. Post-*Crawford*, numerous federal circuit and district court cases,[220] and state appellate court cases,[221] have addressed the

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218. Valdez & Dahlberg, *supra* note 212, at 104–06, 128–29; *see* Alycia Sykora, Comment, *Forfeiture by Misconduct: Proposed Federal Rule of Evidence 804(b)(6)*, 75 OR. L. REV. 855, 860–61 (1996).

219. Crawford v. Washington, 541 U.S. 36, 62 (2004).

220. *See, e.g.*, United States v. Montague, 421 F.3d 1099, 1101–02 (10th Cir. 2005) (Sutton, J. dissenting); United States v. Arnold, 410 F.3d 895, 912–19 (6th Cir. 2005); United States v. Gray, 405 F.3d 227, 240–43 (4th Cir. 2005); United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005); United States v. Rodriguez-Marrero, 390 F.3d 1, 17–18 (1st Cir. 2004); United States v. Battle, 473 F. Supp. 2d 1185, 1195 (S.D. Fla. 2006); United States v. Johnson, 403 F. Supp. 2d 721, 813–14

concept of forfeiture by wrongdoing, many of which referred to *Crawford* in their analysis.[222]

In 2006, the Supreme Court addressed the issue of testimonial hearsay in both *Davis* and *Hammon* in the context of domestic violence cases.[223] The Supreme Court also addressed the doctrine of forfeiture by wrongdoing, which it recognized as a means of preventing a defendant from exploiting *Crawford* through his or her own misconduct:

> Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. But when 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. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. 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

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(N.D. Iowa 2005), *aff'd in part, remanded in part*, No. 06-1001, 2007 U.S. App. LEXIS 18059 at *43–47 (8th Cir. July 30, 2007); United States v. Lentz, 384 F. Supp. 2d 934, 942–45 (E.D. Va. 2005); United States v. Mayhew, 380 F. Supp. 2d 961, 966–70 (S.D. Ohio 2005); United States v. Honken, 381 F. Supp. 2d 936, 996 (N.D. Ohio 2005).

221. *See, e.g.*, People v. Pantoja, 18 Cal. Rptr. 3d 492, 499 (Ct. App. 2004); People v. Moore, 117 P.3d 1, 5 (Colo. Ct. App. 2004); People v. Purcell, 846 N.E.2d 203, 217 (Ill. App. Ct. 2006); Commonwealth v. Edwards, 830 N.E.2d 158, 165–70 (Mass. 2005); People v. Jones, 714 N.W.2d 362, 366–67 (Mich. Ct. App. 2006); People v. Bauder, 712 N.W.2d 506, 512–15 (Mich. Ct. App. 2005); State v. Romero, 133 P.3d 842, 849–50 (N.M. Ct. App. 2006), *aff'd*, 156 P.3d 694 (N.M. 2007); State v. Hand, 840 N.E.2d 151, 171–72 (Ohio 2006); Gonzalez v. State, 155 S.W.3d 603, 609–10 (Tex. Ct. App. 2004), *aff'd*, 195 S.W.3d 114 (Tex. Crim. App. 2006); Virgin Islands v. George, 47 V.I. 46, 59–61 (2004).

222. *See, e.g.*, *Montague*, 421 F.3d at 1101–02; *Johnson*, 403 F. Supp. 2d at 814; State v. Meeks, 88 P.3d 789, 794 (Kan. 2004); State v. Henderson, 129 P.3d 646, 650–52 (Kan. Ct. App. 2006); *Edwards*, 830 N.E.2d at 166–67; State v. Fields, 679 N.W.2d 341, 347 (Minn. 2004); State v. Hale, 691 N.W.2d 637, 651–52 (Wis. 2005).

223. *See* Davis v. Washington, 126 S. Ct. 2266 (2006).

> absence of a witness by wrongdoing forfeits the constitutional right to confrontation.[224]

As recognized by the Court, in the world of testimonial hearsay, post-*Crawford*, the doctrine of forfeiture by wrongdoing has assumed greater importance in evidentiary battles over admissibility of hearsay statements by unavailable, out-of-court declarants. Prior to *Crawford*, when the *Roberts* test controlled, a prosecutor needed only to persuade the trial court of the reliability of a statement as a condition of its admission.[225] After *Crawford*, prosecutors must rely much more heavily on the forfeiture doctrine and must demonstrate that the defendant procured the unavailability of the witness.[226]

VI. PROCEDURES FOR DETERMINING WHETHER THE DEFENDANT HAS FORFEITED *CRAWFORD* CONFRONTATION BY WRONGDOING

The Supreme Court acknowledged the doctrine of forfeiture by wrongdoing in *Crawford* and referred to the doctrine, with approval, in *Davis*, the first application of *Crawford*. The Court stated:

> We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard. State courts tend to follow the same practice. Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.[227]

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224. *Id.* at 2279–80 (citations omitted).

225. *See* Crawford v. Washington, 541 U.S. 36, 61–62 (2004).

226. *See supra* notes 220–22 and accompanying text.

227. *Davis*, 126 S. Ct. at 2280 (citations omitted). The Supreme Court indicated that, absent a specific finding of forfeiture by wrongdoing by the Indiana Supreme Court, the out-of-court testimonial hearsay statement in *Hammon* was excluded on Confrontation Clause grounds, but noted that the "Indiana courts may [if they are

In *Davis*, the Court expressly declined to rule on the type of evidentiary hearing and the burden of persuasion required to demonstrate that a defendant forfeits the right to object to testimonial, hearsay statements on Confrontation Clause grounds.[228]

Thus, an open question remains as to what, if any, constitutional requirements exist for the determination of whether the defendant has forfeited his or her constitutional rights through wrongdoing. Must there be a hearing or is a proffer from the prosecutor sufficient? If there is a hearing, does the hearing apply the informal rules of evidence typically used during pre-trial motion hearings or must strict rules of evidence be used?

Regardless of the nature of the hearing, because a finding of wrongdoing means the defendant loses all *Crawford* confrontation rights, how certain must the court be that the defendant committed wrongdoing? Stated alternatively, what risk of error in that fact finding can due process tolerate and does due process require clear and convincing evidence or merely preponderance of the evidence?

The Supreme Court has not yet resolved these issues. Nonetheless, the Court's dicta lean in the direction of: (1) a hearing, (2) a lower burden of persuasion, i.e., preponderance of the evidence and not clear and convincing evidence, and (3) relaxed rules of evidence, i.e., hearsay to determine the admissibility of hearsay.[229]

The Court acknowledged that, under the federal rule and in the majority of state courts, the prosecution need only prove by a preponderance of the evidence that the defendant procured the unavailability of the witness.[230] The Court also appeared to endorse the notion that, when an independent evidentiary hearing is required to make such a determination, the court may employ relaxed rules of evidence and use hearsay.[231]

Ultimately, the Court will have to decide whether the Sixth Amendment right to confrontation, as understood in *Crawford*: (1) requires an independent evidentiary hearing, (2) requires strict rules of evidence, and/or (3) requires a burden of persuasion greater than the 51-to-49 preponderance of the evidence.

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asked] determine on remand whether a claim of forfeiture by wrongdoing . . . is properly raised . . . and, if so, whether it is meritorious." *Id.* at 2270.

228. *Id.* at 2280.

229. *See id.*

230. *See id.*

231. *See id.*

A. Evidentiary Hearing Requirement

Historically, there has been no consistent federal approach to whether an independent evidentiary hearing was required for a trial court to find that a defendant waived or forfeited Confrontation Clause objections to hearsay statements of unavailable witnesses.[232]

The Tenth Circuit, in 1979, in *Balano*,[233] and the Second Circuit, in 1982, in *Mastrangelo*,[234] both required an evidentiary hearing outside the presence of the jury as a predicate to determine whether the defendant procured the absence of the witness. However, the First,[235] Fifth,[236] Sixth,[237] and Eighth Circuits[238] did not expressly require such a hearing.

Federal Rule of Evidence 804(b)(6) did not answer the question of whether an independent evidentiary hearing is required. Presumably, a forfeiture by wrongdoing hearing would be a preliminary hearing and thus governed by Federal Rule of Evidence 104(a), which requires only an evidentiary hearing outside the presence of the jury.[239] "Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests."[240] Thus, the federal rules do not mandate an independent, evidentiary hearing to determine whether the defendant procured the witness' unavailability and thereby forfeited his or her confrontation rights through wrongdoing.

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232. *See infra* notes 233–38 and accompanying text.

233. United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979).

234. United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

235. United States v. Houlihan, 92 F.3d 1271, 1281 n.5 (1st Cir. 1996) (holding that the trial court did not abuse its discretion by failing to conduct an independent evidentiary hearing thirty-seven days after the trial commenced).

236. In *United States v. Thevis*, 665 F.2d 616, 627 n.7 (5th Cir. 1982), the Fifth Circuit discussed admission of such testimony under the residual hearsay exception codified in Federal Rule of Evidence 804(b)(5), which only requires sufficient notice to the opposing party of intent to use the hearsay statement in advance of trial or hearing.

237. *See* Steele v. Taylor, 684 F.2d 1193, 1199, 1203–04 (6th Cir. 1982) (holding that a trial court may use hearsay evidence at trial, under the forfeiture doctrine, "based on [the judge's] observation of the witness, the evidence introduced in the case, and the course of events leading to the impasse").

238. In *United States v. Carlson*, 547 F.2d 1346, 1355 (8th Cir. 1976), the Eighth Circuit discussed admission of such evidence under Federal Rule of Evidence 804(b)(5), requiring "that notice be given to the adverse party prior to the trial or hearing to inform him [or her] that the hearsay statement will be used at trial," and did not expressly rule on whether an evidentiary hearing is required. *Id.* at 1353, 1355.

239. FED. R. EVID. 104(a).

240. FED. R. EVID. 104(c).

Moreover, federal cases decided subsequent to the 1997 adoption of Federal Rule of Evidence 804(b)(6) are not uniform. In *United States v. Scott*,[241] the Seventh Circuit adopted the preponderance of the evidence standard for such evidentiary hearings without holding whether an evidentiary hearing is required (in *Scott*, the trial court conducted such a hearing).[242] Conversely, in *United States v. Zlatogur*, the Eleventh Circuit adopted the preponderance of the evidence standard for such evidentiary hearings also without holding whether an evidentiary hearing is required (in *Zlatogur*, it was unclear whether the trial court conducted an evidentiary hearing).[243]

Some federal circuits have expressly held that there is no requirement for a separate evidentiary hearing if the requisite findings that the defendant intentionally procured witness unavailability can be made based on the evidence at trial, e.g., the defendant is on trial for murdering the witness.[244] In *United States v. Emery*,[245] the Eighth Circuit held that a trial court need not conduct an independent evidentiary hearing and may admit testimonial hearsay of an unavailable witness "contingent upon proof of the underlying murder by a preponderance of the evidence."[246] The court noted that this procedure is used when determining whether to admit hearsay statements of a co-conspirator.[247] There is "similarity of the questions involved and . . . the repetition necessarily inherent with a preliminary hearing would amount to a significant waste of judicial resources."[248]

The Fourth Circuit adopted this position in *United States v. Johnson*.[249] In *Johnson*, the defendant was charged with, and convicted of, murdering the unavailable witness.[250] The Fourth Circuit determined that sufficient evidence was adduced at trial to show that the defendant caused the witness's unavailability, thereby making a separate evidentiary hearing unnecessary.[251]

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241. 284 F.3d 758 (7th Cir. 2002).
242. *Id.* at 762.
243. 271 F.3d 1025, 1028–29 (11th Cir. 2001).
244. *See, e.g.*, United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (holding that, instead of holding a preliminary hearing, courts may admit "the evidence at trial in the presence of the jury contingent upon proof of the underlying murder by a preponderance of the evidence").
245. *Id.* at 921.
246. *Id.* at 926.
247. *Id.*
248. *Id.*
249. 219 F.3d 349 (4th Cir. 2000).
250. *Id.* at 352.
251. *Id.* at 357.

Other federal jurisdictions hold that an evidentiary hearing is required, and that it must take place outside the presence of the jury, following the Second Circuit's lead in *Mastrangelo*[252] and *Dhinsa*.[253] The *Dhinsa* Court also held that the failure to conduct an evidentiary hearing violates the Confrontation Clause, but that such violation is subject to the harmless error doctrine.[254] In *Balano*, the Tenth Circuit held that an evidentiary hearing in the absence of the jury would provide the most appropriate means to facilitate a balance between the need to determine whether a defendant coerced a witness and the desire to avoid "emasculat[ing] the Confrontation Clause merely to facilitate government prosecutions."[255] Though overruled on other grounds, the Tenth Circuit reaffirmed *Balano*'s hearing requirement in *United States v. Cherry*.[256] *Cherry* confirmed it had become established in the Tenth Circuit that an evidentiary hearing, out of the jury's presence, was required to determine whether a defendant procured the unavailability of a witness.[257]

Among state courts, some require an evidentiary hearing outside the presence of the jury to determine if forfeiture has occurred.[258] In New York, if the prosecution demonstrates a "distinct possibility" that the defendant's wrongdoing procured witness unavailability, an evidentiary hearing is required, during which the prosecution must prove its claim by clear and convincing evidence.[259]

In *Commonwealth v. Edwards*,[260] Massachusetts held that an evidentiary hearing outside the presence of the jury is required.[261] In *State v. Valencia*,[262] Arizona likewise required an evidentiary hearing.[263] In *State v. Henry*,[264] Connecticut held that an evidentiary

252. United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); *see* Valdez & Dahlberg, *supra* note 212, at 124.
253. United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001).
254. *Id.* at 656.
255. United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979), *overruled on other grounds by* Richardson v. United States, 468 U.S. 317, 325–26 (1984).
256. 217 F.3d 811, 815 (10th Cir. 2000) (quoting *Balano*, 618 F.2d at 629).
257. *Id.*
258. *See, e.g.*, State v. Hallum, 606 N.W.2d 351, 355–56 (Iowa 2000).
259. People v. Johnson, 250 A.D.2d 922, 924 (N.Y. App. Div. 1998); Holtzman v. Hellenbrand, 92 A.D.2d 405, 415 (N.Y. App. Div. 1983).
260. 830 N.E.2d 158 (Mass. 2005).
261. *Id.* at 174.
262. 924 P.2d 497 (Ariz. Ct. App. 1996).
263. *Id.* at 502 (citing United States v. Thai, 29 F.3d 785, 814 (2d Cir. 1994), *cert. denied*, 513 U.S. 977, 993 (1994); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir.1992); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).
264. 820 A.2d 1076 (Conn. App. Ct. 2003), *cert. denied*, 826 A.2d 178 (Conn. 2003).

hearing in the absence of the jury is required to determine, by clear and convincing evidence, whether the defendant procured the unavailability of the witness.[265]

An Illinois statute permits out-of-court hearsay statements in domestic violence cases, but makes no provision for an independent evidentiary hearing.[266] The statute provides:

> A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of the statement, including the name and address of the declarant.[267]

B. Rules of Evidence During an Evidentiary Hearing

For federal courts applying Federal Rule of Evidence 104(a), a court conducting a hearing on preliminary questions is not bound by the rules of evidence, except with respect to testimonial privilege. In *United States v. Mastrangelo*, the Second Circuit held that, although an independent evidentiary hearing on forfeiture is required, the hearing is governed by Federal Rule of Evidence 104(a), which provides that evidentiary exclusionary rules (other than privilege) are inapplicable.[268] Accordingly, the hearsay statement of the absent witness, for example, may be considered by the trial court.[269]

The case law is frequently silent on whether relaxed or strict rules of evidence are applicable in evidentiary hearings on forfeiture by wrongdoing. The trend, however, appears to allow relaxed rules of evidence, such that hearsay is admissible.[270]

In *Commonwealth v. Edwards*,[271] in which Massachusetts judicially adopted the forfeiture by wrongdoing doctrine, the court referred to *Mastrangelo* and expressly held that relaxed rules of evidence are appropriate, analogizing the forfeiture by wrongdoing hearing to hearings on motions to suppress.[272] The court explained

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265. *Id.* at 1088.
266. *See* 725 ILL. COMP. STAT. 5/115-10.2 (2002).
267. *Id.* 5/115-10.2(b).
268. *Mastrangelo*, 693 F.2d at 273.
269. *Id.*; *see* United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) ("We recognize that often the only evidence of coercion will be the statement of the coerced person, as repeated by government agents.").
270. *See infra* notes 271–79 and accompanying text.
271. 830 N.E.2d 158 (Mass. 2005).
272. *Id.* at 173.

that "the hearing is not intended to be a mini-trial, and accordingly, hearsay evidence, including the unavailable witness's out-of-court statements, may be considered."[273]

Consistent with *Edwards*, a New Jersey court referred to its rules on preliminary determinations of the admissibility of evidence in *State v. Sheppard*,[274] and held that the trial court is not bound by strict rules of evidence and may use hearsay evidence (but not evidence subject to evidentiary privileges) in making that preliminary determination.[275] The court was persuaded by the Second Circuit decision in *Mastrangelo*.[276] Even New York, which requires the more stringent clear and convincing evidence standard of persuasion, allows hearsay evidence to be used in the evidentiary hearing.[277]

Other state courts, although not squarely addressing the issue, appear to permit informal rules of evidence and often cite with approval federal cases such as *Mastrangelo* and Federal Rule of Evidence 804(b)(6) as support.[278] One court, in dicta, went so far as to suggest that the court may rule on the admissibility of the witness's out-of-court statement based solely on a proffer from the prosecutor.[279]

C. *Burden of Persuasion in an Evidentiary Hearing*

Although Federal Rule of Evidence 804(b)(6) does not specifically set forth a burden of persuasion standard for forfeiture by wrongdoing hearings, the Advisory Committee indicated in its notes that the majority of federal circuits apply a preponderance of the evidence standard. "The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage."[280]

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273. *Id.* at 174.
274. 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).
275. *Id.* at 1347.
276. *Id.*
277. *See* People v. Geraci, 649 N.E.2d 817, 823 n.4 (N.Y. 1995).
278. *See, e.g.*, State v. Henry, 820 A.2d 1076, 1082–83 (Conn. App. Ct. 2003); State v. Gettings, 769 P.2d 25, 29 (Kan. 1989); State v. Alvarez-Lopez, 98 P.3d 699, 703 (N.M. 2004); *cf.* People v. Moore, 117 P.3d 1, 5 (Colo. Ct. App. 2004) (stating "there is no dispute that the victim was unavailable to testify because of her death and that her death was the result of defendant's actions," without indicating whether the trial court should have followed any procedural or evidentiary rules before coming to that determination).
279. Devonshire v. United States, 691 A.2d 165, 168–69 (D.C. 1997).
280. FED. R. EVID. 804(b)(6) advisory committee's note.

In turn, Federal Rule of Evidence 104(a) does not specifically set forth the burden of persuasion that the prosecution bears on preliminary questions of fact, but the Advisory Committee's notes cite to Supreme Court precedent placing the burden of persuasion, for preliminary questions, on the moving party by a preponderance of the evidence.[281] In forfeiture by wrongdoing hearings, the critical fact is whether the party seeking to prevent the admission of the out-of-court statement procured the unavailability of the witness.[282]

Prior to the 1997 codification of the federal forfeiture rule, the Eleventh Circuit (when it was part of the Fifth Circuit) was the only federal circuit to require proof by clear and convincing evidence.[283] Later, in *United States v. Zlatogur*,[284] the Eleventh Circuit overruled this precedent, adopting the preponderance of the evidence standard.[285] Thus, today all federal circuits and a majority of state courts that have addressed this issue have adopted the preponderance of the evidence standard.[286]

Among the states, for example, in *Commonwealth v. Edwards*,[287] Massachusetts adopted the preponderance of the evidence standard in

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281. FED. R. EVID. 104(a) advisory committee's note; Bourjaily v. United States, 483 U.S. 171, 179 (1987).

282. United States v. Mastrangelo, 693 F.2d 269, 272 (1982); *see* Valdez & Dahlberg, *supra* note 212, at 124.

283. *See* United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982), *superseded on limited grounds by rule*, FED. R. EVID. 804(b)(6), *as recognized in* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001).

284. 271 F.3d 1025.

285. *Id.* at 1028. The Fifth Circuit, in an unreported decision, in *United States v. Nelson*, No. 06-60487, 2007 U.S. App. LEXIS 17582, at *14 (5th Cir. Jul. 24, 2007), observed that "*United States v. Thevis* was overruled by FED. R. EVID. 804(b)(6), so now only proof by a preponderance is required." The court noted that preponderance of the evidence is the standard for an objection rooted in the Federal Rules of Evidence, but the standard "may well be higher" when dealing with objections based on the Confrontation Clause. *Id.* at *14 n.2.

286. *See Nelson*, 2007 U.S. App. LEXIS at *14 n.2; United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005); United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002); *Zlatogur*, 271 F.3d at 1028; United States v. Dhinsa, 243 F.3d 635, 653–54 (2nd Cir. 2001); United States v. Cherry, 217 F.3d 811, 815 (10th Cir. 2000); United States v. Emery, 186 F.3d 921, 927 (8th Cir. 1999); United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996); Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982); State v. Valencia, 924 P.2d 497, 502 (Ariz. Ct. App. 1996); Devonshire v. United States, 691 A.2d 165, 169 (D.C. 1997); State v. Hallum, 606 N.W.2d 351, 355–56 (Iowa 2000); State v. Gettings, 769 P.2d 25, 29 (Kan. 1989); Commonwealth v. Edwards, 830 N.E.2d 158, 172 (Mass. 2005); State v. Sheppard, 484 A.2d 1330, 1348 (N.J. Super. Ct. Law Div. 1984); State v. Alvarez-Lopez, 98 P.3d 699, 704 (N.M. 2004).

287. 830 N.E.2d 158.

line with the general proposition of law that all preliminary questions of fact are subject to a preponderance of the evidence standard, and in keeping with the standard of proof used to determine whether a conspiracy or joint venture existed for purposes of admitting an out-of-court statement of a co-conspirator under that particular exception to the rule against hearsay.[288]

In *United States v. Mayhew*,[289] the United States District Court for the Southern District of Ohio addressed the dilemma presented by applying a preponderance of the evidence standard when the very act upon which a court made the preliminary determination of forfeiture by wrongdoing by the defendant was the same act for which the defendant is on trial.[290] In *Mayhew*, the defendant was on trial for murdering his daughter after he shot and killed his ex-girlfriend and engaged in a high-speed chase with officers.[291] The defendant's daughter was interviewed by a police officer in the ambulance, where he recorded her statement.[292] She died in the hospital,[293] and the defendant sought to exclude the recorded statements on Confrontation Clause grounds.[294] The court stated that "[r]equiring the court to decide by a preponderance of the evidence the very question for which the defendant is on trial may seem, at first glance, troublesome."[295]

Nonetheless, the court concluded that: (1) a defendant should receive no benefit from wrongdoing,[296] (2) the jury would not learn of the preliminary determination that the defendant procured the wrongdoing,[297] (3) the jury would apply the beyond a reasonable doubt standard to determine guilt,[298] and (4) the trial court may, in other evidentiary situations, determine preliminary questions of fact, even though those facts would be part of the jury's ultimate consideration, e.g., whether a defendant was a co-conspirator for allowing statements offered to show the defendant's participation in a conspiracy.[299]

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288. *Id.* at 172–73.
289. 380 F. Supp. 2d 961 (S.D. Ohio 2005).
290. *Id.* at 967–68.
291. *Id.* at 963.
292. *Id.*
293. *Id.*
294. *Id.* at 963.
295. *Id.* at 967.
296. *Id.* at 968.
297. *See id.*
298. *Id.*
299. *Id.*

Only a few states have adopted a clear and convincing evidence standard. In *People v. Geraci*,[300] the Court of Appeals of New York characterized the preponderance of the evidence standard as "relatively undemanding," and concluded that the clear and convincing evidence standard was the "more exacting standard, which is the one most protective of the truth-seeking process."[301] The court explained:

> Because human fact finders lack the quality of omniscience, the process of determining the truth in adjudicative proceedings necessarily involves some margin of error. The size of the margin of error that the law is willing to tolerate varies in inverse proportion to the importance to the party or to society of the issue to be resolved. On one end of the spectrum are most civil disputes, where, from a societal standpoint, "a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant". On the other end are criminal determinations of guilt or innocence, "[w]here one party has at stake an interest of transcendent value". The rules governing how persuasive the proof must be "[represent] an attempt to instruct the factfinder concerning the degree of confidence our society thinks . . . should [be had] in the correctness of factual conclusions for a particular type of adjudication." Viewing the issue in light of this fundamental principle, we deem the "clear and convincing evidence" standard to be the test that best recognizes the gravity of the interest at stake and most effectively balances the need to reduce the risk of error against the practical difficulties of proving witness tampering.[302]

A determination that the defendant has procured a witness's unavailability results in the admission of hearsay statements and the forfeiture of the right to cross-examine the witness about the substance of those statements. Obviously, a defendant's loss of the valued Sixth Amendment confrontation right constitutes a substantial deprivation. Additionally, and even more significantly, society has a weighty investment in the outcome, "[b]ecause of the intimate

300. 649 N.E.2d 817 (N.Y. 1995).
301. *Id.* at 821.
302. *Id.* at 821–22.

association between the right to confrontation and the accuracy of the fact-finding process."[303]

In this regard, it is significant that, unlike most exceptions to the rule against hearsay, the exception at issue here is justified not by the inherent reliability of the evidence, but rather by the public policy of reducing the incentive to tamper with witnesses. Indeed, hearsay evidence such as the Grand Jury testimony at issue here is especially troubling because "although given under oath, [it] is not subjected to the vigorous truth testing of cross-examination."[304] "Furthermore, Grand Jury testimony is often obtained through grants of immunity, leading questions, and reduced attention to the rules of evidence—conditions which tend to impair its reliability."[305]

> These factors militate in favor of a standard of proof that is high enough to assure a great degree of accuracy in the determination of whether the defendant was, in fact, involved in procuring the witness's unavailability for live testimony. While we recognize the need for the use of this less trustworthy class of evidence when necessitated by the defendant's misconduct, we also believe that such use should be authorized only to the extent that the misconduct is clearly and convincingly shown.[306]

In 2007, in *State v. Mason*,[307] the Supreme Court of Washington, citing to *Geraci*, adopted the forfeiture by wrongdoing doctrine, and also adopted a clear and convincing standard of proof.[308] The court recognized that "[m]any critical evidentiary determinations, including those involving core constitutional rights, are made by trial judges based upon the preponderance standard,"[309] and that the preponderance of the evidence standard represented a majority approach.[310]

However, the court distinguished forfeiture by wrongdoing as "unique in that the trial judge must often rule on the ultimate

303. *Id.* (quoting United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982), *superseded on limited grounds by rule*, FED. R. EVID. 804(b)(6), *as recognized in* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001)).

304. *Id.* at 822 (quoting *Thevis*, 665 F.2d at 629).

305. *Id.* (citations omitted).

306. *Id.*

307. 162 P.3d 396 (Wash. 2007) (en banc).

308. *Id.* at 404–05.

309. *Id.* at 404.

310. *Id.*

question: did the accused kill the alleged victim?"[311] The court concluded that it agreed with the reasoning of *Geraci* and adopted the minority approach, recognizing that, although the clear and convincing standard is a more difficult standard, "the right of confrontation should not be easily deemed forfeited by an accused."[312]

Maryland appears to be the only state that has adopted, by statute, a clear and convincing standard of persuasion for hearings to determine forfeiture by wrongdoing.[313] In other states, like Connecticut, the appellate courts have yet to establish a standard of persuasion for these hearings, leaving "the question of the standard of proof required in cases such as this to another day."[314]

VII. MARYLAND'S STATUTORY PROCEDURES FOR DETERMINING FORFEITURE BY WRONGDOING

Maryland is one of the few states that have adopted the minority approach to procedural requirements regarding application of the forfeiture by wrongdoing doctrine, and Maryland is the only state to have adopted the more defense-oriented posture on all three sub-issues—an independent evidentiary hearing, strict rules of evidence, and a burden of persuasion requiring clear and convincing evidence.[315]

In order to understand the reason why Maryland took this approach, it is important to possess a contextual understanding of Maryland's approach to post-*Crawford* cases and the public debate over how to address witness intimidation in the post-*Crawford* era.[316]

Although no Maryland case squarely addresses the topic of forfeiture by wrongdoing,[317] the citizens of Maryland are familiar

311. *Id.*

312. *Id.* at 404–05.

313. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2006).

314. State v. Henry, 820 A.2d 1076, 1088 (Conn. App. Ct. 2003).

315. *See infra* notes 328–30 and accompanying text.

316. In three cases not discussed in this article, the Court of Special Appeals of Maryland either held that the *Crawford* issue was not preserved or declined to review it. *See* Adams v. State, 165 Md. App. 352, 444, 885 A.2d 833, 886 (2005); Collins v. State, 164 Md. App. 582, 598, 884 A.2d 181, 191 (2005); Logan v. State, 164 Md. App. 1, 74, 882 A.2d 330, 372 (2005).

317. In 1987, the Court of Appeals of Maryland made what appears to be the only reference to the forfeiture by wrongdoing doctrine in Maryland case law. In *Wildermuth v. State*, 310 Md. 496, 514, 530 A.2d 275, 284 n.10 (1987), the court acknowledged the concept of forfeiture or waiver of the right to confrontation but did not address the validity or applicability of the doctrine because it was not at issue in the case.

with the topic of forfeiture by wrongdoing, better known as "witness intimidation." This topic received much attention in 2004 when a group of individuals released a two-hour "Stop Snitching" DVD, which gained national coverage after a couple of months of circulation on the streets of Baltimore.[318] Later, officers responded with a "Keep Talking" DVD.[319]

In 2005, several high-profile cases of witness intimidation (including the firebombing of a witness's home that killed seven people) brought further attention to what prosecutors argue is a continual and substantial problem in getting witnesses to testify in criminal trials.[320]

During the 2005 session of the Maryland General Assembly, legislators submitted a series of proposals attempting to: (1) increase the criminal penalty for witness intimidation[321] and (2) codify exceptions to the general rule against hearsay and permitting out-of-court testimonial statements by declarants who were intimidated from testifying.[322]

During that same period, the Court of Appeals of Maryland Standing Committee on Rules of Practice and Procedure, known as the "Rules Committee,"[323] proposed a rule of court making the

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318. Ryan Davis, *DVD's Producer Calls It a Glimpse of Reality*, BALT. SUN, Dec. 29, 2004, at B1, *available at* http://www.baltimoresun.com/news/local/crime/bal-dvd1229,0,8012.story.

319. Ryan Davis, *Police Hit Streets with Their Answer to 'Snitch' DVD*, BALT. SUN, May 11, 2005, at A1, *available at* http://www.baltimoresun.com/news/local/crime/bal-te.md.dvd11may11,0,4580772.story.

320. Matthew Dolan, *Victim Describes Fire Attack: Harwood Activist Testifies in Trial of 3*, BALT. SUN, Dec. 6, 2005, at B1, *available at* http://www.baltimoresun.com/news/local/crime/bal-md.harwood06dec06,0,6681446.story; Matthew Dolan, *Dawson Family Survivors File Lawsuit Against Officials, Police*, BALT. SUN, Feb. 18, 2005, at B1, *available at* http://www.baltimoresun.com/news/local/crime/bal-dawson0218,0,5070444.story.

321. Under MD. CODE ANN., CRIM. LAW § 9-303 (LexisNexis 2002 & Supp. 2007), it is a criminal misdemeanor for a person to intentionally harm another or damage or destroy property in retaliation for victim or witness testimony or reporting of a crime, subject to imprisonment not exceeding five years, a fine not exceeding $5,000, or both. In 2005, then-Governor Robert Ehrlich submitted a proposal to the legislature to increase the penalty to twenty years, but the law ultimately was not changed. Julie Bykowicz, *Proposals Focus on Witnesses Who Are Intimidated*, BALT. SUN, Jan. 20, 2005, at B1, *available at* http://www.baltimoresun.com/news/local/crime/bal-md.witness20jan20,0,3521945.story.

322. Bykowicz, *supra* note 321, at B1.

323. In Maryland, the Court of Appeals has the power to promulgate rules governing legal practice and procedure in Maryland courts. MD. R. 16-801(a). The "Rules Committee" assists the Court of Appeals in exercising its rule-making power. MD.

forfeiture by wrongdoing doctrine an exception to the rule against hearsay, but limiting the scope of the exception only to those statements given under oath by the unavailable witness, signed by the unavailable witness, or recorded in a near-verbatim fashion by electronic means or a stenographer.[324]

Then-Governor Robert Ehrlich proposed codification of a much broader exception, closer in scope to the federal rule.[325] During hearings before Maryland's General Assembly, proponents of the proposed legislation testified from the Governor's Office, the judiciary, and the Maryland State's Attorneys' Association.[326] Opponents to the bill testified from the Maryland Public Defender's Office, the Maryland Criminal Defense Attorney Association, and academia, arguing that the proposed legislation could infringe on the constitutional right of criminal defendants to confront the witnesses against them.[327]

The Maryland General Assembly: (1) adopted forfeiture by wrongdoing as an exception to the rule against hearsay[328] and (2) codified the procedure for determining whether the forfeiture by wrongdoing hearsay exception applies.[329] The procedure enacted made Maryland the only jurisdiction, whether by statute, court rule, or case law, to adopt a "defense-oriented" approach to forfeiture by wrongdoing on all three procedural issues—requiring a hearing, strict rules of evidence, and persuasion by clear and convincing evidence.

First, although the statutory hearsay exception does not apply to all crimes, it applies to cases of felony narcotics distribution and crimes of violence.[330] The statute provides:

> During the trial of a criminal case in which the defendant is charged with a felonious violation of Title 5 of the Criminal Law Article or with the commission of a crime of violence as defined in § 14-101 of the Criminal Law Article, a statement as defined in Maryland Rule 5-801(a) is not

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R. 16-801(b). The Rules Committee is composed of judges, lawyers, and those familiar with judicial administration. *Id.*

324. Bykowicz, *supra* note 321, at B1.

325. *Id.*

326. Julie Bykowicz, *Witness-Intimidation Victims Urge the Passage of Legislation: Bills Would Increase Penalties, Change Rules on Statements in Court*, BALT. SUN, Jan. 26, 2005, at B1, *available at* http://www.baltimoresun.com/news/local/crime/bal-victims0126,0,7409092.story.

327. *Id.*

328. MD. RULE 5-804(b)(5)(B).

329. Act of May 26, 2005, ch. 446, 2005 Md. Laws 2510 (codified as amended at MD. CODE ANN. CTS. & JUD. PROC. § 10-901 (LexisNexis 2006)).

330. CTS. & JUD. PROC. § 10-901 § 10-901(a).

> excluded by the hearsay rule if the statement is offered against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement, as defined in Maryland Rule 5-804.[331]

Second, the statutory hearsay exception requires a hearing to be held outside the presence of the jury.[332] The statute provides, "before admitting a statement under this section, the court shall hold a hearing outside the presence of the jury . . . ."[333]

Third, at this hearing, strict evidentiary rules (rather than relaxed rules of evidence) are required.[334] The statute provides that, during the hearing, "[t]he Maryland Rules of Evidence are strictly applied . . . ."[335]

Fourth, the statute requires the prosecution to prove by clear and convincing evidence, rather than by a preponderance of the evidence, that the defendant procured the witness's unavailability.[336] The statute provides that a statement may be admitted if "[t]he court finds by clear and convincing evidence that the party against whom the statement is offered engaged in, directed, or conspired to commit the wrongdoing that procured the unavailability of the declarant."[337]

Fifth, the statute limits eligible out-of-court witness statements to those that are: (1) under oath, (2) in a signed writing, or (3) recorded.[338] The statute provides:

> A statement may not be admitted under this section unless: (1) [t]he statement was: (i) [g]iven under oath

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331. *Id.* In 2007, Senate Bill 779 and House Bill 1038 were introduced in the Maryland General Assembly. S. 779, 2007 Leg., 423rd Sess. (Md. 2007); H.D. 1038, 2007 Leg., 423rd Sess. (Md. 2007). These bills, if enacted, would have expanded the list of offenses to which section 10-901 applies. *See* S. 779; H.D. 1038. The additional offenses would be second-degree assault, actual or attempted third-degree sexual offense, continuing course of conduct sexual offense with a child, incest, sexual solicitation of a minor, kidnapping a minor, child abuse, narcotics solicitation or conspiracy, and solicitation or conspiracy to commit a crime of violence. S. 779; H.D. 1038. House Bill 1038 was reported "unfavorable" by the House Judiciary Committee on March 5, 2007. H.D. 423-1038, 423rd Sess. (Md. 2007), http://mlis.state.md.us/2007RS/billfile/hb1038.htm (last visited Oct. 28, 2007).

332. CTS. & JUD. PROC. § 10-901(b).

333. *Id.*

334. *Id.* § 10-901(b)(1).

335. *Id.*

336. *Id.* § 10-901(b)(2).

337. *Id.*

338. *Id.* § 10-901(c)(1).

> subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (ii) [r]educed to writing and signed by the declarant; or (iii) [r]ecorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement . . . ."[339]

Finally, the statute requires that, "[a]s soon as is practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent notifies the adverse party of: (i) [t]he intention to offer the statement; (ii) [t]he particulars of the statement; and (iii) [t]he identity of the witness through whom the statement will be offered."[340]

In response to the newly enacted section 10-901 of the Courts and Judicial Proceedings Article of the Maryland Code, the Court of Appeals of Maryland promulgated Maryland Rule 5-804(b), incorporating the statute as follows:

> A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.
>
> The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Witness unavailable because of party's wrongdoing. . . .
>
> (B) In criminal causes in which a witness is unavailable because of a party's wrongdoing, admission of the witness's statement under this exception is governed by Code, Courts Article, § 10-901.[341]

VIII. CONCLUSION & RECOMMENDATIONS

The Maryland approach to forfeiture by wrongdoing best ensures a constitutionally sound approach in deciding whether to strip a defendant of the right to confrontation.[342] First, the statute requires a

339. *Id.*
340. *Id.* § 10-901(c)(2).
341. MD. R. 5-804(b).
342. *See* Grimm & Diese, *supra* note 7, at 39.

hearing to be conducted outside the presence of the jury.[343] Second, the statute requires that the hearing be conducted under strict evidentiary rules.[344] Third, the statute requires that the prosecution prove, by clear and convincing evidence, that a defendant engaged in, directed, or conspired to commit wrongdoing that was intended to—and actually did—procure the unavailability of the declarant.[345]

Moreover, the statute limits witness out-of-court statements to those that are under oath, in a signed writing, or recorded.[346] Finally, the statute requires that, as soon as is practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent must notify the adverse party of the intention to offer the statement, the particulars of the statement, and the identity of the witness through whom the statement will be offered.[347]

Clearly, Maryland has taken what may be characterized as the most defense-oriented, pro-confrontation rights position with respect to determining whether forfeiture by wrongdoing is applicable, by requiring: (1) an independent evidentiary hearing, (2) the use of strict rules of evidence at that hearing, and (3) a burden of showing that such wrongdoing occurred by clear and convincing evidence.[348] On the opposite end of the spectrum, some jurisdictions require: (1) no independent evidentiary hearing,[349] or (2) if a hearing is conducted, the use of relaxed rules of evidence,[350] and/or (3) the burden of showing that such wrongdoing occurred by a preponderance of the

343. CTS. & JUD. PROC. § 10-901(b).
344. *Id.* § 10-901(b)(1).
345. *Id.* § 10-901(b)(2).
346. *Id.* § 10-901(c)(1).
347. *Id.* § 10-901(c)(2).
348. *Compare id.* § 10-901 *with e.g.*, CAL. EVID. CODE § 1350 (West 2006 & Supp. 2007) (requiring both clear and convincing evidence and a hearing outside the presence of the jury but making no mention of strict evidentiary rule), OHIO EVID. R. 804 (requiring advance written notice of witness testimony, but setting forth no other procedural safeguards), *and* PA. R. EVID. 804(b)(6) (requiring only that the defendant "engaged or acquiesced" in wrongdoing and silent regarding procedure of such determination).
349. *See, e.g.*, United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000); United States v. Emery, 186 F.3d 926 (8th Cir. 1999).
350. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982); Commonwealth v. Edwards, 830 N.E.2d 158, 174 (Mass. 2005); State v. Sheppard, 484 A.2d 1330, 1346 (N.J. Super. Ct. Law Div. 1984).

evidence.[351] Some jurisdictions take approaches that lie between these two ends of the spectrum.[352]

Ultimately, among the state and federal courts there are multiple approaches and no uniformity.[353] To date, the Supreme Court has not ruled on whether the Constitution imposes a minimum standard or threshold on the determination of forfeiture by wrongdoing. However, given that the determination of applicability of the forfeiture by wrongdoing doctrine may cause a defendant to lose the right to confrontation, the Supreme Court should undoubtedly step in and resolve this dilemma. Despite the merits of Maryland's approach, the Supreme Court may be unwilling to mandate it as a constitutional requirement, in part because it does represent the "minority" approach.[354] In light of this, this article makes the following recommendations.

A. Recommendation #1: The Sixth Amendment Right to Confrontation and/or the Fifth and Fourteenth Amendment Due Process Clauses Should Mandate the System Adopted by Maryland

The questions for the Supreme Court are four-fold. First, is the Constitution implicated in a forfeiture by wrongdoing determination? Is the procedure for applying forfeiture by wrongdoing doctrine controlled by: (1) the Sixth Amendment Confrontation Clause, (2) the Fifth and Fourteenth Amendment Due Process Clauses, or (3) no constitutional mandate? Second, if the Constitution is at issue, does the Constitution mandate a hearing? Third, if the Constitution is at issue, does it mandate the application of strict rules of evidence in determining whether a defendant has forfeited his or her Sixth Amendment Confrontation Clause rights? Fourth, if the Constitution is at issue, does it mandate the application of clear and convincing evidence in finding forfeiture by wrongdoing?

As to the first question, it is hard to imagine how the application of the forfeiture by wrongdoing standard would not implicate the Constitution in some way. As a general rule, the evidentiary proceedings of state courts do not violate the Due Process Clause

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351. *See, e.g., Edwards*, 830 N.E.2d at 172; *see also supra* note 286.

352. *See, e.g., Mastrangelo*, 693 F.2d at 274 ("Although we hold that the standard of proof should be a preponderance of the evidence, we suggest, in order to expedite any further proceedings, that the trial judge make findings under the clear and convincing standards as well.").

353. *See supra* notes 232–314 and accompanying text.

354. *See Edwards*, 830 N.E.2d at 172 (stating that the "majority of those states that have ruled on the standard of proof have similarly applied the preponderance standard").

unless they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[355] In this case, the fundamental right at stake is the Sixth Amendment right to confrontation.[356]

As to the second question, if the prosecution argues forfeiture by wrongdoing, the Constitution should mandate a hearing. Allowing this issue to be resolved by proffer, with no opportunity to test it through the adversarial process, will likely result in erroneous findings of wrongdoing. Moreover, with constitutional rights at stake, the mere proffer of a prosecutor alone—who has a vested interest in winning the case against a defendant—cannot sufficiently safeguard a defendant's rights.

As to the third question, if the Constitution is implicated, it further follows that the Constitution should require strict application of rules of evidence. In the context of a forfeiture by wrongdoing hearing, the strict application of rules of evidence is most relevant to whether or not the prosecution could use the hearsay statement of the victim or witness alleging intimidation to prove intimidation. Initially, because a forfeiture by wrongdoing hearing is a pre-trial hearing out of the presence of the jury, it may seem logical to use informal rules of evidence. However, the real question is: if ultimately it is unconstitutional to use hearsay, can hearsay be used in a hearing to determine whether hearsay can be used?

That question should be answered in the negative. Certainly, a significant question exists as to whether a defendant's Sixth Amendment right to confrontation extends, in full force, to pre-trial preliminary hearings.[357] When the failure to extend the Sixth Amendment confrontation right to a pre-trial proceeding will likely detrimentally impact a defendant's ability to effectively cross-examine witnesses at trial, the full scope of the Confrontation Clause should be available at the pre-trial hearing.[358] Moreover, some courts

355. Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

356. *See* Moon v. Luoma, 2007 U.S. Dist. LEXIS 63653, at *19 (D. Mich. Aug. 28, 2007).

357. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 52–53 (1987) (drawing distinctions between pretrial and trial proceedings in a Confrontation Clause analysis); McCray v. Illinois, 386 U.S. 300, 311–13 (1967) (holding that there is no confrontation right to learn name of confidential informant at pretrial hearing); People v. Felder, 129 P.3d 1072, 1073–74 (Colo. Ct. App. 2005) (explaining that *Crawford* did not apply to pretrial hearings and defendant had no Confrontation Clause right to cross-examine confidential informant at pretrial suppression hearing).

358. *See* Kentucky v. Stincer, 482 U.S. 730, 738 n.9, 740 (1987) (holding that the relevant inquiry in deciding whether defendant's right to confrontation is violated is "whether

have recognized that a defendant has the right, through the Confrontation Clause, to be present and confront witnesses during pre-trial deposition testimony if the deposition is intended for use at trial.[359] Similarly, the same rights should attach in a pre-trial hearing when the purpose is to determine what non-confrontable hearsay testimony may be used at trial against a defendant.

In addition, one should consider the implications of allowing a defendant to be stripped of the core constitutional right to confrontation based on hearsay testimony alone. How can a defendant successfully challenge a witness's hearsay statement that alleges intimidation when it comes down to a credibility contest between a defendant and the witness? What if a witness has fabricated the claim that a defendant intimidated the witness into failing to testify? How can a defendant be protected against the possibility of an overreaching or overzealous prosecutor who may interpret a witness's hesitation about testifying as full-fledged intimidation, and encourage a witness to allege intimidation and profit from a forfeiture proceeding in which hearsay is allowed? How can a defendant be protected against the statements of a hyperbolic witness without the possibility of cross-examination? The potential for abuse, when juxtaposed against the rights that are at stake, requires that the right to confrontation be preserved at the forfeiture by wrongdoing hearing. Confrontation rights are a "bedrock procedural guarantee"[360] that ensures the inherent reliability of the process, and the denial to a defendant of this guarantee should only be undertaken after the strictest of standards are met.

As to the fourth question regarding the burden of persuasion, the resolution of the forfeiture by wrongdoing issue may well decide the ultimate issue of guilt or innocence. If the court finds wrongdoing by a defendant, then exceedingly negative hearsay evidence will be admitted without the opportunity for cross-examination. On the other

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excluding the defendant from the hearing interferes with his opportunity for effective cross-examination"); United States v. Hodge, 19 F.3d 51, 53 (D.C. Cir. 1994) (upholding the right to cross-examine government witnesses in pre-trial suppression hearings because such hearings are critical stages of the prosecution that affect a defendant's substantial rights); State v. Rivera, 166 P.3d 488, 494 (N.M. Ct. App. 2007) (holding the "[d]efendant's right to confrontation was violated by State's presentation of double hearsay evidence on the key issue in the suppression hearing"). *See* Joshua Deahl, Note, *Expanding Forfeiture Without Sacrificing Confrontation After* Crawford, 104 MICH. L. REV. 599, 623–24 (2005) (discussing the potential need to re-envision application of confrontation rights in pre-trial hearings post-*Crawford* in order to give "the confrontation right meaning at trial").

359. *See* Christian v. Rhode, 41 F.3d 461, 465 n.3 (9th Cir. 1994).

360. Crawford v. Washington, 541 U.S. 36, 42 (2004).

hand, if there is a finding of no wrongdoing, the prosecution will have a weaker case or no case at all. What risk of error in that fact finding process can be tolerated—about 30% under clear and convincing evidence, or as high as 49% under preponderance of the evidence?[361] The Supreme Court has indicated that admissibility rulings based on applications of the exclusionary rule regarding search and seizure evidence or the voluntariness of confessions are constitutional if based on the preponderance of the evidence standard.[362] Why should a pre-trial hearing on the applicability of forfeiture by wrongdoing be treated to a different standard?

The answer is that if a defendant loses on a motion to suppress, the defendant still has the opportunity to attack the challenged evidence at trial by testing it in the crucible of cross-examination, including the officers who obtained the evidence. When a defendant loses in a forfeiture by wrongdoing hearing, the defendant loses entirely the ability to challenge what may be the most damaging evidence against the defendant by cross-examining the maker of the statement. Furthermore, as the Washington Supreme Court recognized in *Mason*, unlike other pre-trial evidentiary determinations involving constitutional rights, "forfeiture by wrongdoing is unique in that the trial judge must often rule on the ultimate question: did the accused kill the alleged victim?"[363]

B. Recommendation #2: If the Constitution Does Not Mandate the Maryland System, as Explained in this Article, Individual Jurisdictions Should Adopt the Maryland System by Statute, by Rule of Court, or by Case Law

State courts are free to interpret state constitutional provisions to provide greater (but not lesser) constitutional protections than those mandated by the Federal Constitution.[364] In addition, states are free through their legislatures to codify evidentiary procedures, and if those procedures provide greater (but not lesser) rights than the United States Constitution based on state statutes and constitutions, they are not subject to constitutional review by the Supreme Court.[365]

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361. *See* Aaron R. Petty, *Proving Forfeiture and Bootstrapping Testimony After Crawford*, 43 WILLAMETTE L. REV. 593, 602–06 (2007) (discussing decisions in support of a clear and convincing evidence standard).

362. Lego v. Twomey, 404 U.S. 477, 484, 488–89 (1972).

363. 162 P.2d 396, 404 (Wash. 2007) (en banc).

364. Arizona v. Edwards, 514 U.S. 1, 8 (1995); Michigan v. Long, 463 U.S. 1032, 1038–40 (1983).

365. *See Long*, 463 U.S. at 1039 n.4.

In the context of confrontation rights, some states have afforded greater rights under their state constitutions than under the Federal Constitution. For example, in *People v. Fitzpatrick*,[366] the Supreme Court of Illinois declined to find constitutional, despite the Supreme Court's holding in *Maryland v. Craig*, a state statute that permitted child abuse victims to testify by way of closed-circuit television, and instead expressly chose to provide greater confrontation rights under its state constitution.[367] Similarly, in *Commonwealth v. Ludwig*,[368] the Supreme Court of Pennsylvania decided that, under its state constitution, use of closed-circuit television testimony by an alleged child victim violated the confrontation clause of the Pennsylvania Constitution and expressly gave its citizens more rights than those provided under *Craig*.[369]

C. *Recommendation #3: If the Court is Otherwise Persuaded to Adopt the Maryland System, But is Hesitant to do so Because of the Practical Realities of Prosecution, the Court Should Promote a "Compromise" Approach*

The Court may be concerned that, if the Constitution requires a hearing governed by strict rules of evidence and a clear and convincing burden of persuasion standard, the prosecution would rarely, if ever, prevail on the issue of forfeiture by wrongdoing. There is a compromise that may balance both a defendant's right to confrontation and the prosecution's need to litigate forfeiture by wrongdoing.

In *Maryland v. Craig*, by a vote of 5-to-4, the Supreme Court held that, although face-to-face confrontation at trial is preferred, it is not mandated and may give way to public policy considerations if there is a "case-specific finding of necessity" for alternative procedures.[370] In *Craig*, the Court upheld placing the witness in another location, with testimony sent in by one-way closed-circuit television (such that the defendant could see the witness, but the witness could not see the defendant),[371] when evidence establishes that such a procedure "is

366. 633 N.E.2d 685 (Ill. 1994).

367. *Fitzpatrick*, 633 N.E.2d at 688–89.

368. Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991).

369. *Id.* at 281–82.

370. 497 U.S. 836, 849–50, 860 (1990).

371. Subsequent cases have applied the *Craig* test for admissibility of such evidence in cases dealing with both one-way and two-way video conference, concluding that one-way and two-way video conference trial testimony falls short of full face-to-face confrontation and can only be admissible under the Sixth Amendment after a *Craig* analysis determining both that there are public policy considerations and that such testimony is necessary under the particular facts of the case. *See* United States v.

necessary to protect the welfare" of the witness.[372] The witness testified live and was subject to cross-examination, but the defendant and the witness did not come face-to-face.[373] The Supreme Court found that Maryland's statute preserved all other elements of the right to confrontation by requiring that the witness be competent, testify under oath, and be subjected to contemporaneous cross-examination in front of the finder of fact.[374]

The holding in *Craig* may offer a "compromise" that both protects the spirit of Confrontation Clause rights in forfeiture by wrongdoing proceedings and allow prosecutors more leeway to use the testimony of a witness who alleges intimidation. In *Craig*, actual confrontation, though recognized as important, was not an absolute requirement and could yield "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[375] Under *Craig*'s analysis, if the trial court determines, on a case-by-case basis, that a child will experience trauma if confronted face-to-face by a defendant, the Confrontation Clause permits closed-circuit television to receive certain testimony.[376]

Craig has not been overturned, even after *Crawford v. Washington*. Although *Craig*'s application has been codified in most States in the context of protecting child witnesses,[377] *Craig* left open the possibility that a state may use the *Craig* procedure if it demonstrates that its use is necessary to support an important state interest.[378] In that way, *Craig* was not expressly limited to child witnesses, but its critical inquiry was the State's interest in protecting a child witness.[379] The critical inquiry in a forfeiture by wrongdoing case

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Yates, 438 F.3d 1307, 1313–14 (11th Cir. 2006) (discussing the Sixth, Eighth, Ninth, and Tenth Circuit applications of *Craig* to deal with the admissibility of two-way video testimony).

372. *Craig*, 497 U.S. at 855.

373. *Id.* at 851.

374. *Id.*

375. *Id.* at 850.

376. *Id.* at 857–58.

377. For a summary of states with legislation allowing special provisions for child testimony under *Craig*, see J. Steven Beckett & Steven D. Stennett, *The Elder Witness—The Admissibility of Closed Circuit Television Testimony After* Maryland v. Craig, 7 ELDER L.J. 313, 332 n.151 (1999).

378. *Craig*, 497 U.S. at 852.

379. *Id.*

would be the State's interest in protecting a witness alleging intimidation.[380]

Arguably, under *Craig*, if a state finds that the protection of adult rape victims, victims with disabilities, or elderly crime victims is an important public policy, a prosecutor should be able to make the case for *Craig*-approved testimony via one way-closed circuit television.[381] This may overlook the key differences between developmental abilities of adult witnesses and child witnesses that formed, in part, the basis of the *Craig* Court's determination that the State had a particular interest in protecting vulnerable child witnesses.[382] Nonetheless, the scope of *Craig*, narrowly defined, may perhaps be of use in protecting victims or witnesses in the context of a forfeiture proceeding.[383]

If states adopt, by statute, a *Craig*-like procedure for litigation of forfeiture of Confrontation Clause rights, enabling witnesses to avoid directly facing a defendant by testifying via one-way closed-circuit television, if based on case-specific findings of necessity, such a procedure may ensure a proper balance between a defendant's rights under the Confrontation Clause and the practical realities of litigating issues of forfeiture by wrongdoing.

A cautionary note should be added here. The case-specific determination would require a finding that the witness would be traumatized *specifically* by the presence of the defendant (not just the atmosphere of the courtroom),[384] and that the distress to the witness related to a face-to-face confrontation with the defendant would be "more than de minimus."[385]

Proponents of allowing the use of the witness' hearsay statements in forfeiture by wrongdoing proceedings are likely to argue that this compromise is limited in scope, in large part because a witness alleging intimidation may not want a defendant to know that he or she has testified at all against a defendant, and that the manner of testimony, i.e., in the courtroom where a defendant can see the

380. *See id.*

381. Lisa Hamilton Thielmeyer, Note, *Beyond* Maryland v. Craig*: Can and Should Adult Rape Victims be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797, 810 (1992); Beckett & Stennett, *supra* note 377, at 338–39.

382. *Craig*, 497 U.S. at 852. For a discussion of the public policy reasons supporting "tender years" statutes, such as those upheld in *Craig*, see Lynn McLain, *Children are Losing Maryland's "Tender Years" War*, 27 U. BALT. L. REV. 21, 25–29 (1997).

383. *Craig*, 497 U.S. at 852.

384. *Id.* at 856.

385. *Id.* (quoting Wildermuth v. State, 310 Md. 496, 524, 530 A.2d 275, 289 (1987)).

witness and vice versa, or via closed-circuit television where only the defendant can see the witness, does not adequately address that fear.

Nonetheless, the *Craig*-like compromise may provide some witnesses with an appropriate alternative, as the possibility of not having to face a defendant allegedly involved in intimidation may provide enough of a safe space for a witness to come forward and testify. In addition, this compromise is in keeping with the need to provide sufficient constitutional guarantees of confrontation at the forfeiture hearing, including an opportunity for contemporaneous cross-examination, and for the defendant to view the witness. Any compromise that completely vitiates the constitutional rights of a defendant would be no compromise at all.

Another possible compromise approach can be found in the Maryland forfeiture by wrongdoing statute itself.[386] The Maryland statutes limits witness out-of-court statements that may be admitted at trial under the forfeiture doctrine to those that are: (1) under oath, (2) in a signed writing, or (3) recorded.[387] The statute provides:

> A statement may not be admitted under this section unless: (1) [t]he statement was: (i) [g]iven under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (ii) [r]educed to writing and signed by the declarant; or (iii) [r]ecorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement . . . .[388]

It may be a viable option for state legislatures to consider creating a hearsay exception for hearsay statements that can be used at a forfeiture hearing, and mandating that any hearsay statements used at the hearing must pass the dictates of *Crawford*, i.e., not testimonial and the witness is unavailable, which would include an unavailable victim's passing statement to a friend about intimidation, provided it fell under an acceptable exception to the rule against hearsay, and/or if they are given under oath in prior trial, hearing, or deposition, reduced to writing and signed by the declarant, or recorded in substantially verbatim fashion. This measure of reliability in a statement may be enough to create a narrow exception in the context of a forfeiture hearing to the application of strict rules of evidence. This, however, must be considered with great caution. The strength of confrontation rights lies in part in the fact that a witness may not

386. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (LexisNexis 2006).
387. *Id.* § 10-901(c)(1).
388. *Id.*

be as willing to fabricate or exaggerate testimony when confronted face-to-face with the defendant. The possibility that a witness could opt-out of this face-to-face confrontation may open up the same potential for abuse as simply allowing in hearsay statements.

In the end, no matter the approach, forfeiture by wrongdoing needs to be addressed by the Supreme Court. The Court should address the issues presented in this article and, at a minimum, produce a framework for a national consensus of constitutional dimension. *Crawford* represented a move forward in strengthening Sixth Amendment confrontation rights. Forfeiture by wrongdoing represents a way to ensure defendants do not profit from those rights by exploiting the system through their own misconduct. At the same time, forfeiture by wrongdoing should not represent a way to arrest the movement forward initiated by *Crawford*. Maryland's approach best ensures *Crawford*'s confrontation protections while allowing space for the forfeiture doctrine, and can and should be a model applied at the national level.