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Hearsay, Confrontation, and Forfeiture by Wrongdoing: Crawford v. Washington, a Reassessment of the Confrontation Clause

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Hearsay, Confrontation, and Forfeiture by Wrongdoing: *Crawford v. Washington*, a Reassessment of the Confrontation Clause

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During the 2004 legislative session, the Governor of Maryland introduced two bills designed to address the issue of witness intimidation in criminal cases. The bills, Senate Bill 185 and House Bill 296, contained numerous measures aimed at combating the problem of witness intimidation. Among the provisions was a proposal to add to the Courts and Judicial Proceedings Article of the Annotated Code of Maryland a "forfeiture by wrongdoing" exception to the hearsay rule, patterned after Federal Rule of Evidence 804(b)(6), which has been in existence for more than twenty years. Neither bill was enacted into law. Legislators interviewed by the press during the legislative session expressed concern about the proposed hearsay exception, specifically citing the Supreme Court's March 8, 2004 decision in *Crawford v. Washington*[3] as evidence that the Governor's proposal was unconstitutional under the Sixth Amendment

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[3] *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

Confrontation Clause.[4] In fact, *Crawford* does not directly address the constitutionality of the forfeiture by wrongdoing hearsay exception; in *dicta*, the Court clearly expressed its approval of this Rule.

This article first examines the *Crawford* decision, then the forfeiture by wrongdoing exception to the hearsay rule, and demonstrates that the proposed exception is not constitutionally infirm.

Michael Crawford allegedly stabbed Kenneth Lee after learning that Lee tried to rape Crawford's wife. In a recorded statement to police, Crawford's wife, Sylvia, said that Lee did not draw a weapon before Crawford stabbed him. The State intended to use Sylvia's statement to controvert Crawford's claim of self-defense. At trial, Sylvia invoked the marital privilege, and was, therefore, "unavailable" to testify for the State against her husband. Under Washington law, the marital privilege does not extend to a spouse's out-of-court statement that is otherwise admissible under an exception to the hearsay rule.[5] The State, therefore, sought to introduce Sylvia's statement as admissible hearsay.

The State argued that, by invoking the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent, Sylvia was an "unavailable" witness, under the Washington evidence rule equivalent of Federal Rule of Evidence 804(a)(1). Further, noting that Sylvia admitted leading Crawford to Lee's apartment, thereby facilitating the assault, the State contended that her statement qualified as an exception to the hearsay rule as a statement against penal interest, under the Washington evidence rule equivalent of Fed. R. Evid. 804(b)(3). The prosecutor played the tape of Sylvia's statement to the jury during Crawford's trial for assault and attempted murder, and, in closing, argued that the tape was "damning evidence that completely refute[d] [Crawford's] claim of self-defense."[6] Sylvia's tape-recorded statement was offered against

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[4] Kimberly A.C. Wilson, *Ehrlich Urges Panel to Give 2nd Chance to Criminal Justice Bill Legislators Killed*, THE BALTIMORE SUN, Mar. 10, 2004 at Local 5B. The story reports Delegate Joseph F. Vallario, Jr., chairman of the house committee that considered HB 296, as saying, "Clearly, if that bill had gone to the floor that way [containing the proposed hearsay exception], it would have been deemed unconstitutional [under *Crawford*]."

[5] WASH. REV. CODE §5.60.060 (West, WESTLAW through 2004 legislation).

[6] *Crawford*, 124 S. Ct. at 1358.

Crawford without affording him the opportunity to confront or cross-examine her, and the jury subsequently convicted Crawford of first degree assault.

The crucial issue presented was whether this procedure complied with the Sixth Amendment guarantee that, "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."[7] *Crawford* presented the Court with an old dilemma. On the one hand, the Government has a legitimate interest in prosecuting criminal defendants, and therefore, should be allowed to offer relevant and otherwise admissible evidence to prove a defendant's guilt. On the other hand, the Constitution provides rights to the accused in criminal proceedings and bars the admissibility of certain evidence violative of those rights, even though the evidence is otherwise admissible under the rules of evidence.

Crawford also raises a host of intriguing questions. These are but a few: What does the phrase, "witnesses against him," as provided in the Sixth Amendment, actually mean? When is a statement a "testimonial" statement and when is it "non-testimonial?" Which statements implicate the Confrontation Clause? Are certain hearsay statements beyond the scope of the Confrontation Clause? Do the Constitutional rights of an accused "trump" (if that is an appropriate metaphor) the rules of evidence? Do the rules of evidence ever "trump" the Constitutional rights of an accused, or does neither "trump" the other? Under what circumstances must the defendant have the opportunity to confront and cross-examine a now "unavailable" hearsay declarant before those statements can be admitted? Can a criminal defendant, by his conduct, "waive" or "forfeit" an objection to the admissibility of certain hearsay statements? Can he "waive" or "forfeit" his right to Confrontation?

No doubt, in the fullness of time, scholars and judges will answer many of these questions, or die trying. There are already available excellent analyses of *Crawford* by various legal scholars;[8]

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[7] U.S. CONST. amend. VI.

[8] *See* Christopher B. Mueller & Laird C. Fitzpatrick, 4 FEDERAL EVIDENCE, 3d ed., Little Brown & Co. (database updated July 2004, Chapter 8 Hearsay, §398.1 Testimonial and Nontestimonial Hearsay and the Confrontation Clause); George Fisher, EVIDENCE, Foundation Press, 2002 (2004 Replacement to text pages 521-50); Jon R. Waltz & Roger Park, EVIDENCE CASES AND MATERIALS, 10th ed. (June 2004 Update Memo); Daniel J. Capra, Dennis D. Prater, Stephen A. Salzburg & Christine

therefore, any further attempt by us to do so is unnecessary. Rather, for our comprehension and appreciation of the broader and finer points of *Crawford*, we go to the "horse's mouth," so to speak. For our understanding of *Crawford*, we rely principally upon the comments, thoughts, and observations of Jeffrey L. Fisher, lead counsel for Michael D. Crawford in the United States Supreme Court.[9]

The article begins, in Part I, with an historical review of the Confrontation Clause. In Part II, we discuss *Crawford*'s impact on the Confrontation Clause. Finally, in Part III, we argue that, in light of *Crawford*, Maryland should adopt Fed. R. Evid. 804(b)(6), which provides that statements made by witnesses that are unavailable to testify at trial because of threat, intimidation, chicanery, or elimination by the defendant or his agents are admissible as an exception to the hearsay rule.[10]

Although the facts in *Crawford* did not involve forfeiture by wrongdoing, the Court, in passing, made clear that when a criminal defendant wrongfully prevents witnesses from testifying, his conduct "extinguishes confrontation claims on essentially equitable grounds."[11] We discuss "forfeiture by wrongdoing" more fully in

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M. Arguello, EVIDENCE: THE OBJECTION METHOD, 2d ed. LexisNexis, (2004 Letter Update; Paul F. Rothstein, Myrna Raeder & David Crump, EVIDENCE: CASES, MATERIALS AND PROBLEMS, 2d ed., Mathew Bender (note by Prof. Rothstein, 2004 Letter Update).

[9] The authors wish to thank Jeffrey L. Fisher, Attorney at Davis Wright Tremaine LLP, Seattle, WA, for his kindness and generosity in allowing us to draw upon the outline notes of his lecture, entitled *Crawford v. Washington: Reframing The Right To Confrontation.* This outline incorporates post-*Crawford* decisions through August 3, 2004. We owe an additional debt of gratitude to Professor Lynn McLain of the University of Baltimore School of Law for her thoughtful suggestions.

[10] Fed. R. Evid. 802.

[11] *Crawford*, 124 S. Ct. at 1370 (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)); *see also United States v. Dhinsa,* 243 F.3d 635, 651 (2d Cir. 2001) ("threats, actual violence, or murder" forfeit confrontation rights); *People v. Moore,* 2004 Colo. App. LEXIS 1354, (declarant's death at the hands of the defendant was a "forfeiture of the constitutional right of confrontation with respect to a witness or potential witness whose absence the defendant wrongfully procures). *Id.* at 10; s*ee post-Crawford cases: State v. Meeks,* 277 Kan. 609 (2004) (Defendant's right of confrontation forfeited because he killed the declarant). *Id.* at 793-94. (The Court cited *Crawford* as support for the extinction of a confrontation claim. Statement by witness was admitted under K.S.A. 2003 Supp. 60-460(d)(3). That statutory exception requires (1) that the declarant be unavailable, (2) that the statement was made at a time when the declarant recently perceived the matter, while declarant's recollection was clear, and (3) that the statement was made in good faith prior to the

sections II and III. As will be seen, not all hearsay statements are excluded by the Confrontation Clause where a defendant does not have a prior opportunity to cross-examine.

I. *Crawford v. Washington*: An Historical Overview

Crawford provides an interesting glimpse of the Court's approach to Constitutional interpretation. It begins by looking to the language of the Constitution – in this case, the Sixth Amendment. When the Constitution's text alone is inadequate to resolve a particular issue, the Court turns to the history of the Confrontation Clause.[12] While the right to confront one's accusers can be traced to Roman times, the founding generation's immediate source was common law.[13] English common law differs from the civil law tradition in the manner in which witnesses provide testimony in criminal trials. The former is a tradition of live testimony, while the latter condones examination in private by judicial officers.[14]

England adopted some elements of civil law practice, including the practice of admitting *ex parte* statements of accusers against the accused at trial. This practice "occasioned frequent demands by the prisoner to have his 'accusers' brought before him face to face."[15] During the 16th Century reign of Queen Mary, justices

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commencement of the action and with no incentive to falsify or distort). *Id.* at 613. (The Court decided on the grounds of "forfeiture by wrongdoing," and declined to assess whether the statement was testimonial or not). *Id.* at 614; *State v. Fields*, 679 N.W. 2d 341 (Minn. 2004) (In its analysis of *Crawford* as applied in the case at bar, the Court held that the defendant's right to confrontation was not violated, as he forfeited that right by his wrongdoing). *Id.* at 346-47. (The Court also noted that FED. R. EVID. 804(b)(6) "probably amounts as well to a forfeiture of an *objection* based on the right of confrontation" and that the Minnesota Rules of Evidence do not include such a rule). *Id.* at 347 n.2.

[12] The Court's opinion provides a detailed and informative discussion of the historical development of the right to confrontation; it is, therefore, unnecessary, for the purposes of this article, to repeat it here. We have included only those historical facts needed to aid in our discussion.

[13] *Crawford*, 124 S. Ct. at 1359 (*See Coy v. Iona*, 457 U.S. 1012, 1015 (1988); Herman & Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994)).

[14] *Crawford*, 124 S. Ct. at 1359 (*See* 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (1768)).

[15] *Crawford*, 124 S. Ct. at 1359-60 (citing 1 James F. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (London, MacMillan 1883)).

of the peace were appointed, under the Marian bail and committal statutes, to examine suspects and witnesses in felony cases and certify the results to the court. While it is unlikely the original purpose of these examinations was to produce evidence admissible at trial,[16] they were used this way in subsequent cases, thereby adopting the continental, civil law procedure.[17]

Perhaps the most notorious example of this practice was the 1603 trial of Sir Walter Raleigh. Raleigh was charged with treason. Damning evidence against him consisted of a letter and a statement, obtained by the Privy Council, of Raleigh's alleged accomplice, Lord Cobham, which was read to the jury over Raleigh's objections. Raleigh believed Cobham made the statement to save his own life and that he would recant if he was required to face Raleigh at trial. Raleigh, protesting that he was being tried "by the Spanish Inquisition,"[18] demanded that the judges call Cobham to appear. Raleigh argued, unsuccessfully, that "the Proof of the Common Law is by witness and jury: Let Cobham be here, let him speak it. Call my accuser before my face."[19] Cobham did not appear at trial, however, and Raleigh was convicted and sentenced to death.

Following considerable dissatisfaction with the process used to convict Raleigh, English law, through a series of statutory and judicial reforms, developed a right of confrontation to limit such abuses in certain cases, such as treason. Courts developed relatively strict rules of unavailability, admitting *ex parte* examinations only when the witness was demonstrably unable to testify in person.[20]

Throughout this period, a "recurring question was whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him."[21] This question was answered in the affirmative in 1696 by the Court of the King's Bench, which ruled that the statement

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[16] *Id.* (*See* John H. Langrein, PROSECUTING CRIME IN THE RENAISSANCE 21-34 (Harvard Univ. Press 1974)).

[17] *Crawford*, 124 S. Ct. at 1359-60 (*See* M. Hale, PLEAS OF THE CROWN 284 (1736); 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 528-30 (3d ed. 1944)).

[18] *Crawford*, 124 S. Ct. at 1359 (*See Raleigh's Case*, 2 HOW. ST. TR. 15-16 (H.L. 1603)).

[19] *Id.*

[20] *Crawford*, 124 S. Ct. at 1359 (*See Lord Morley's Case*, 6 HOW. ST. TR. 769-71 (H.L. 1666)).

[21] *Crawford*, 124 S. Ct. at 1360.

of a deceased witness was inadmissible "where 'the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of cross-examination.'"[22]

Following the *Crawford* Court's discussion of the development of the right to confrontation in England, the Court turned its attention to the colonies, where similar practices were employed.[23] "Early in the 18th Century, the Virginia Council protested against the Governor for having 'privately issued several commissions to examine witnesses against particular men *ex parte*,' complaining that 'the person accused is not admitted to be confronted with, or defend against his defamers.'"[24] The Court also noted that, prior to the American Revolution, England allocated jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil law, and thus regularly took testimony by deposition or private judicial examination.[25]

"Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation."[26] While the proposed Federal Constitution did not, the First Congress, responding to objections to its exclusion, included the Confrontation Clause in what became the Sixth Amendment.[27] While all states adopted the Confrontation Clause, some went so far as to hold out-of-court statements inadmissible even where the accused had a prior opportunity to cross-examine the declarant.[28] Many states rejected this view, but only after reaffirming that admissibility depended on the prior opportunity of the accused to cross-examine.[29]

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[22] *Id.* at 1360-61 (quoting *King v. Paine*, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (1896)).

[23] *Crawford*, 124 S. Ct. at 1362.

[24] *Id.* (quoting A MEMORIAL CONCERNING THE MAL-ADMINISTRATION OF HIS EXCELLENCY FRANCIS NICHOLSON, reprinted in 9 ENGLISH HISTORICAL DOCUMENTS 253, 257 (D. Douglas ed. 1955)).

[25] *Crawford*, 124 S. Ct. at 1362.

[26] *Id. See* MARYLAND DECLARATION OF RIGHTS, Article 21 (1867), providing, *inter alia*, right to confrontation and examination of witnesses under oath to citizens of Maryland.

[27] *Id.* at 1362-63.

[28] *Id.* at 1363.

[29] *Id.*

II. *Crawford* and the Right to Confrontation

Crawford argued that, state law notwithstanding, the admission of Sylvia's tape-recorded statement violated his federal constitutional right to be confronted with the witnesses against him.[30] Applying the then-current standard set forth in *Ohio v. Roberts*,[31] the Washington trial court held that the Confrontation Clause does not bar the statement of an unavailable witness (such as Sylvia) against a criminal defendant if the statement bears *"adequate indicia of reliability."*[32] To meet that standard, evidence must either fall within a *"firmly rooted hearsay exception,"* or *"bear particularized guarantees of trustworthiness."*[33] The trial court admitted the statement on the latter ground, offering as proof of the statement's trustworthiness that Sylvia was not shifting blame to Crawford, but rather corroborating his story that he acted in self-defense or "justified reprisal."[34] The trial court found persuasive that Sylvia had direct knowledge as an eyewitness, that she was describing recent events, and that a "neutral" law enforcement officer questioned her.[35]

The Washington Court of Appeals reversed, applying a nine-factor test to determine if Sylvia's statement bore particularized guarantees of trustworthiness. In concluding that it did not, the court offered several reasons: The statement contradicted one she had previously given; it was made in response to specific questions; and, at one point, Sylvia admitted that she closed her eyes during the stabbing.[36] The court considered and rejected the State's argument that Sylvia's statement was reliable because it coincided with Crawford's to such a degree that the two "interlocked."[37] Although the two statements were consistent in their accounts of events leading up to the stabbing, they differed on the crucial issue of self-defense.

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[30] *Id.*
[31] 448 U.S. 56 (1980).
[32] *Crawford*, 124 S. Ct. at 1359 (quoting *Roberts*, 448 U.S. at 66 (1980)) (Emphasis added).
[33] *Crawford*, 124 S. Ct. at 1359 (Emphasis added).
[34] *Id.*
[35] *Id.* at 1358.
[36] *Id.*
[37] *Id.* at 1355.

"[Crawford's] version assert[ed] that Lee may have had something in his hand when Crawford stabbed him; but Sylvia's version [had] Lee grabbing for something only after he [had] been stabbed."[38]

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia's statement did not fall within a firmly rooted hearsay exception, it bore guarantees of trustworthiness. The court found that "when a co-defendant's confession is virtually identical [*i.e.*, interlocks] to that of a defendant, it may be deemed reliable."[39]

This procedural history reflects both the Supreme Court's struggle to resolve the controversy and the inadequacies of the *Roberts* two-pronged standard. The failings of *Roberts* were indeed "on full display in the proceedings below."[40] As Professor George Fisher points out:

> [T]he Court's many attempts to reconcile the hearsay exception with the Confrontation Clause's command have been halting and nonlinear . . . . In the *pre-Roberts* era, beginning with *Mattox v. United States,* the Court issued a number of *ad hoc* judgments to resolve particular controversies, but made little attempt to systematize the Confrontation Clause's impact on the admission of hearsay. The Court first undertook this task in earnest in *Ohio v. Roberts,* 448 U.S. 56 (1980).

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[38] *Id.* at 1358.

[39] *Crawford v. State of Washington*, 54 P.3d 656, 663 (2002) (The Court, quoting *State of Washington v. Rice*, 844 P.2d 416, 427 (1993), explained: "Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap . . . . [B]oth of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the Court to question when, if ever, Lee possessed a weapon. In this respect they overlap . . . . [N]either Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." *Id.* at 664. (Internal quotation marks omitted).

[40] *Crawford*, 124 S. Ct at 1372.

> There the Court launched an ultimately aborted attempt to crystallize Confrontation doctrine around the familiar hearsay principles of necessity and reliability. Early in 2004, after tinkering with the *Roberts* framework for nearly a quarter-century, the Court finally abandoned the task. In *Crawford v. Washington*, 124 S. Ct. 1354 (2004), it set Confrontation on an entirely new footing, focused on the "testimonial" nature of the out-of-court statement. After *Crawford*, it seems, *Roberts* and its reliability-based analysis are dead.[41]

The Supreme Court drew two inferences from its exhaustive historical analysis about the meaning of the Sixth Amendment. "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[42] The English Crown employed "these practices in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right of confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind."[43]

Second, the Court determined that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[44] As will be seen, neither of these two evils are implicated by the

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[41] George Fisher, EVIDENCE, Supplement, at p.1, Foundation Press, 2004 (discussing the Pre-*Roberts* Era Cases: *Pointer v. Texas*, 380 U.S. 400 (1965); *California v. Green*, 399 U.S. 149 (1970); *Dutton v. Evans*, 400 U.S. 74 (1970); and the *Roberts* Era Cases: *Ohio v. Roberts*, 448 U.S. 56 (1980) (rules of "necessity" and "reliability"); *United States v. Inadi*, 475 U.S. 387 (1986); *Maryland v. Craig*, 497 U.S. 836 (1990); *Idaho v. Wright*, 497 U.S. 805 (1990); *White v. Illinois*, 502 U.S. 346 (1992); *Lilly v. Virginia*, 527 U.S. 116 (1999)).

[42] *Crawford*, 124 S. Ct. at 1363.

[43] *Id.*

[44] *Id.* at 1365.

Constitution or the hearsay exception provided by Fed. R. Evid. 804(b)(6). So then, when does the Sixth Amendment right to confrontation apply?

The Sixth Amendment right to confrontation applies only in a criminal case and only when the prosecutor offers a hearsay statement against the accused. If the declarant testifies in court and is, therefore, subject to cross-examination, the right is not violated. If the accused had the opportunity to cross-examine the declarant previously, the right is not violated. If the statement offered is the declarant's, it is not hearsay if it is offered as a prior statement, under Fed. R. Evid. 801(d)(1), or as an admission of a party-opponent, under Fed. R. Evid. 801(d)(2); therefore, the right is not violated.

Under Maryland Rule 5-802(1), certain prior statements by witnesses are not excluded by the hearsay rule. Nor are statements, otherwise admissible, made by the accused when offered by the State, under Md. Rule 5-803(a) as a statement by a party-opponent. Furthermore, under Md. Rule 5-803(a), statements of a party-opponent are not excluded by the hearsay rule, even though the defendant is available as a witness. If a statement is not offered to prove the truth of the matter asserted, it is not hearsay and the right is not violated. If the statement is offered for its truth, the prosecutor must offer an appropriate exception; if she cannot, the hearsay statement is excluded and the right is not violated. It is only when a statement is offered for its truth *and* falls within an exception that we consider the statement's effect on the Confrontation Clause. If the statement is "testimonial," *then* we turn to *Crawford* to determine whether it violates the Confrontation Clause, even though it may be admissible under the rules of evidence. If the statement is not testimonial, then it appears that, despite Justice Scalia's severe criticism of *Roberts*'s reliance upon such an "amorphous" concept as reliability, its unpredictability, and its "unpardonable vice" (*i.e.*, its capacity to admit core testimonial statements that the Confrontation Clause clearly meant to exclude),[45] states may continue to rely upon the *Roberts* standard.

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[45] *Id.* at 1371.

When Is a Statement a "Testimonial?"

While it is clear that *Crawford* applies to "testimonial" statements, it is not entirely clear what that term means. In a concurring opinion, Chief Justice Rehnquist, joined by Justice O'Connor, severely criticized the majority opinion for both its linguistic ambiguity and its difficult implementation for judges and lawyers alike.[46] The Court opted to "leave for another day any effort to spell out a comprehensive definition of 'testimonial;'" nevertheless, there is language in the opinion from which we may attempt to glean its meaning.[47] According to the Court, "testimonial" statements include:

> *Ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony . . . or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. . . [, and] [e]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.[48]

The Court described these as "core" testimonial statements, but suggested that this list was not exhaustive.[49] As Jeffrey L. Fisher, lead counsel for Michael Crawford in his case before the Supreme Court, points out, "the confrontation right does not apply only to abuses at the time of the Founding; it also applies to modern types of statements that the Framers would have barred."[50]

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[46] *Id.* at 1374-78.

[47] *Id.* at 1374.

[48] *Crawford*, 124 S.Ct. at 1364 (Internal citations omitted).

[49] Fisher notes (p. 3) (citing *Crawford*, 124 S. Ct. at 1364).

[50] Fisher notes (p. 3) (citing *Crawford*, 124 S. Ct. at 1365 n.3). (In addition, Fisher suggests several "clues" within the Court's jurisprudence that might provide meaning to the term. For example: "*An accuser who makes a formal statement to government officers* bears testimony in a sense that a person who makes a casual

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial [] and to police interrogations,[51]. . . [] allocutions, guilty pleas, and other formal statements admitting guilt[52]. . . . [In addition,] "letters" to police or other governmental officials accusing someone of wrongdoing are testimonial.[53] . . . Coroner reports, drug chemist reports, etc. [] should be testimonial because they are statements made for the purpose of producing evidence for litigation.[54]. . . [S]tatements of elderly or dependent adult victims to law

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remark to an acquaintance does not. . . . *Involvement of government officers in the production of testimony with an eye toward trial* presents a unique potential for prosecutorial abuse. . . . Sylvia's *recorded statement, knowingly given in response to structured police questioning*, qualifies under any conceivable definition . . . . *[W]hen the government is involved in the statements' production and when the statements describe past events* . . . [the statements] implicate the core concerns of the old *ex parte* affidavit practice . . . . *[A]n out-of-court accusation* is universally conceded to be constitutionally inadmissible against the accused." While this definition would seem to include excited utterances, opinions differ about whether such statements are, or should be, included. Fisher's "clues", however, are more problematic and several are likely to be the subject of considerable debate.).

[51] Fisher notes (p. 3) (quoting *Crawford*, 124 S. Ct. at 1374) ("We use the term 'interrogation' in its colloquial, rather than any technical legal, sense. . . . '[S]tructured police questioning' qualifies as an interrogation 'under any conceivable definition.'") (quoting *Crawford,* 124 S. Ct. at 1365 n.4).

[52] Fisher notes (p. 3) ("These are testimonial. *See* 124 S. Ct. at 1372, *abrogating United States v. Aguilar,* 295 F.3d 1018, 1021-23 (9th Cir. 2003), and similar holdings in other circuits allowing admission of allocutions. *See also Kirby v. United States*, 174 U.S. 47, 53 (1899) (guilty pleas); *United States v. Massino*, 319 F. Supp. 2d 295 (E.D.N.Y. 2004) (guilty pleas)").

[53] Fisher notes (p. 4) (citing *Crawford*, 124 S. Ct at 1360) (noting that an accusatory "letter" was used against Sir Walter Raleigh).

[54] Fisher notes (p. 4) (*See City of Las Vegas v. Walsh,* 91 P.3d 591 (Nev. 2004) (nurse's chain-of-custody affidavit concerning method of conducting and preserving blood alcohol test is testimonial); *People v. Rogers,* 780 N.Y.S. 2d 393 (2004) (report of blood test is testimonial). Immigration reports may be testimonial for the same reasons. (Fisher notes p.4).

> enforcement officials . . . are by definition testimonial,[55]. . . [as are] [d]omestic violence accusations,[56]. . . .

Fisher, taking a decidedly pro-defense spin, argues that the following statements are "testimonial"; however, others would disagree, urging that their status as "testimonial statements" is by no means clear nor have they been universally accepted as such by the courts:

> [c]hild hearsay statements,[57]. . . [w]itness statements to officers investigating a

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[55] Fisher notes (p. 4) (citing *People v. Pirwani*, 14 Cal. Rptr. 3d 673 (Cal. Ct. App. 2004)) (holding that a California law was invalid on its face).

[56] Fisher notes (p. 4) (stating, "These are testimonial almost by definition, for they condition admissibility on the statement accusing someone of criminal behavior; being made within 24 hours of alleged event; and being . . .'recorded, either electronically or in writing' or 'made to a peace officer . . . corrections officer, youth corrections officer, parole [or] probation officer, emergency medical technician or firefighter.') (*See also People v. Thompson*, 812 N.E.2d 516 (Ill. App. 2004) (wife's statements in a protection order testimonial.)").

[57] Fisher notes (p. 4-5) (stating, "When a child makes an accusation of abuse to a governmental agent in an interview, the statements are testimonial, in that they are given in a formalized setting as part of a criminal investigation, and a reasonable person would know that the statements would likely be used for evidentiary purposes. *See Snowden v. State*, 846 A.2d 36 (Md. App. 2004) (holding that statements obtained under Maryland's child interview statute are testimonial); *See People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004) (child's statement to child interview specialist at private victim assessment center was testimonial); *State v. Courtney*, 682 N.W. 2d 185 (Minn. Ct. App. 2004) (interview with child protective services worker testimonial); *Blanton v. State*, 880 So. 2d 798 (Fla. Dist. Ct. App. 2004) (child's statement to police investigator testimonial); *People v. Vigil*, 2004 WL 1352647 (Colo. App. June 17, 2004) (child's statements to police officer and to a physician who was a member of a child protection team and a frequent prosecution witness in child abuse cases were testimonial, but prior statements to father and father's friend were not.). It is worth noting that the child's statements in *Idaho v. Wright*, 497 U.S. 805 (1990), were given to a doctor in conjunction with the police's investigation; the Court suggested these statements were testimonial at oral argument in *Crawford* and arguably by its silence in the section of the opinion canvassing its prior holdings. *See* 124 S. Ct. at 1367-68 ('Our case law has largely been consistent with these two principles.'). If statements are given to a non-governmental addressee before the police are involved and before litigation is contemplated, the question gets harder. *See* 124 S. Ct 1368 n.8 (stating that the child's statements to the police officer in *White v. Illinois*, 502 U.S. 326 (1992), were testimonial but not mentioning the child's statements to parent and others)").

crime,[58]. . . 911 calls,[59]. . . [s]tatements to private investigators or to private

[58] Fisher notes (p. 5-6) (stating, "Since these statements generally are given for evidentiary purposes, they ordinarily are testimonial. *See* [*Crawford*,] 124 S. Ct. [at] 1368 n.8 (statement in *White v Illinois*, 502 U.S. 346 (1992), 'to an investigating police officer' was testimonial) . . . (defining police 'interrogation'). It does not matter whether the statements are reproduced in police reports that ordinarily would satisfy 'business records' or any other hearsay exception . . . . The United States Solicitor General, in fact, has agreed that 'statements made to officers at the scene by a disinterested bystander who directly observed the commission of a crime and promptly reported it to the police' are testimonial. Brief for the United States as *Amicus Curiae* in *Crawford* at 26. Early court decisions, however, [are] divided on this issue. [*Cf.*] *United States v. Neilsen*, 371 F.3d 574 (9th Cir. 2004) (statement to an officer during execution of search warrant testimonial); *Bell v. State*, 597 S.E.2d 350 (Ga. 2004) (alleged victim's statement to police officers 'during the officers' investigations of complaints made by the victim' testimonial); *Heard v. Commonwealth*, 2004 WL 1367163 (Ky. App. June 18, 2004) (unpublished) (agitated victim's statements to responding police officer were testimonial even though they qualified as excited utterances); and *People v. Sisavath*, 13 Cal. Rptr.3d 753 (Cal. Ct. App. 2004) (alleged victim statement to investigating officer testimonial); *State v. Clark*, 598 S.E.2d 213 (N.C. Ct. App. 2004) (statement made to officer 'during his initial investigation' at the scene of crime is testimonial) *with Leavitt v. Arave*, 371 F.3d 663, n. 22 (9th Cir. 2004) (alleged victim statement to officer responding to 911 call not testimonial); *State v. Fowler*, 809 N.E.2d 960 (Ind. Ct. App. 2004) ("[W]hen police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial.'"); *People v. Cage*, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004) (same); *State v. Forrest*, 596 S.E.2d 22 (N.C. Ct. App. 2004) (holding, over a dissent, that such a statement not testimonial because given right after event) *and Cassidy v. Texas*, 2004 WL 1114483 (Tex. App. May 20, 2004) (alleged victim's statement in police interview right after event not testimonial). For a very good discussion of this issue in an article prior to the *Roberts* era that advocated a rule similar to the testimonial approach, see Michael H. Graham, *The Confrontation Clause, the Hearsay Rule and the Forgetful Witness*, 56 TEX. L. REV. 151, 194-95 (1978) (distinguishing nontestimonial spontaneous declaration to robber in midst of robbery from a testimonial spontaneous declaration to a police officer immediately after robbery)").

[59] Fisher notes (p. 6) (stating, "A call to report a crime (especially when followed by questions and answers with an operator) is testimonial, but a call solely for help may not be. *See* Friedman & McCormack, *Dial-In Testimony*, 150 PA. L. REV. 1171, 1240-42 (2002). But even in the latter situation, statements made in a call in the heat of the moment that say more than 'come help me' should still be considered testimonial. *Id.; People v. Cortes*, 781 N.Y.S.2d 401 (2004) (holding that 911 call was testimonial) *but see People v. Muscat*, 777 N.Y.S.2d 875 (2004) (suggesting that all 911calls that include requests for help are nontestimonial in their entirety). If statements in a 911 call explicitly accuse a particular person of wrongdoing, it may

> victim's services organizations,[60]. . . [s]tatements to doctors,[61]. . . [s]tatements to undercover agents or informants[62] [, and] [d]ying declarations.[63]

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also be worth citing the 'accusatory' language . . . to bolster the argument. A case involving a 911 call is currently pending in the Washington Supreme Court and is set for oral argument . . . . *See State v. Davis,* 64 P.3d 661 (2003), *review granted,* 75 P.3d 969 (2003) (supplemental briefing ordered in light of *Crawford*)").

[60] Fisher notes (p. 6) (stating, "If the setting was like an interview in that a reasonable witness would have expected his statements to be used for evidentiary purposes, then it seems testimonial even without governmental involvement. *See People v. Sisavath,* 13 Cal. Rptr.3d 753 (Cal. Ct. App. 2004) (child's statement to child interview specialist at private victim assessment center was testimonial); Friedman, *Confrontation: The Search for Basic Principles,* 86 GEO. L. REV. 1011 ,1038-43 (1998); *but see People v. Geno*, 261 Mich. App. 624 (2004) (statement to director of Children's Assessment Center not testimonial because addressee was 'not... a government employee.')").

[61] Fisher notes (p.7) (stating, "If the police already are involved so that the examination is, in a sense, part of the investigation, then statements to the doctor are testimonial. *Cf. Idaho v. Wright,* 497 U.S. 805 (1990) (holding, prior to *Crawford,* that the Confrontation Clause barred admission of victim's statement to doctor performing examination in coordination with police investigation). If, however, the police are not yet involved, this presents a closer question. But accusatory statements that are unnecessary for the medical treatment – such as identifying 'who did this'– are probably still testimonial, especially when laws impose reporting requirements on doctors. Early decisions on this score have not yet really dealt with the subtleties of this issue. *See State v. Vaught*, 682 N.W.2d 284 (Neb. 2004) (holding that statement to doctor identifying perpetrator was not testimonial simply because 'there was [no] indication of government involvement in the initiation or course of the examination'); *People v. Cage.* 15 Cal Rptr. 3d 846 (Cal. Ct. App 2004) (same)").

[62] Fisher notes (p. 7) (stating, "A statement to such a person in the course of allegedly criminal activity is probably not testimonial. *See* [*Crawford,*] 124 S. Ct. at 1368 ('[a]nd *Bourjaily v.United States,* 483 U.S. 171, 181-84 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement.'); *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004) (statement to undercover informant not testimonial). But if the government really is trying to produce testimony rather than capture evidence of ongoing crime, the statements could be testimonial, especially if governmental involvement becomes a clearer touchstone in future cases for the testimonial inquiry. In other words, if one can argue that the government is really trying to circumvent the 'testimonial' rule in order to insulate a witness's narrative from a confrontation challenge, the declarant's statements may be testimonial even without the declarant's knowledge that his statement could be used for evidentiary purposes.)").

[63] Fisher notes (p.7) (stating, "'If this exception must be accepted on historical grounds, it is *sui generis*.' [*Crawford,*] 124 S. Ct. [at] 1367 n.6. Dying declarations

The *Crawford* Court held that "the constitutional admissibility of statements that declarants would reasonably expect to be used for evidentiary purposes no longer turns in any way on 'the vagaries of the rules of evidence, much less [on] amorphous notions of 'reliability.'"[64] Rather, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[65] Constitutional consideration requiring testimonial statements to be subject to cross-examination in criminal cases, "do[es] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances."[66]

"*Crawford* continues to require that the defendant [have] an opportunity to cross-examine the witnesses against him prior to trial."[67] "If the defendant was represented by counsel who had an

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that obviously are accusations for purpose of future prosecutions might also . . . be viewed as admissible under the forfeiture doctrine, rather than as exception to realm of testimonial statements. . . . *McDaniel v. State,* 16 Miss. 401 (1847) ('It would be a perversion of [the Constitution's] meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness by causing his death.'); *State v Meeks,* 88 P.3d 789 (Kan. 2004) (same)").

[64] Fisher's notes (p. 2) (quoting *Crawford,* 124 S. Ct. at 1370); *cf. Roberts.*

[65] Fisher's notes (p. 2) (quoting *Crawford,* 124 S. Ct. at 1374).

[66] Fisher's notes (p. 3) (quoting *Crawford,* 124 S. Ct. at 1367 n. 7) (citing *United States. v. Gonzalez-Marichal,* 317 F.Supp. 2d 1200 (S.D. Cal. 2004) (irrelevant whether testimonial statement falls within hearsay exception for personal and family history); *State v. Cox,* 876 S.2d 932 (La. Ct. App. 2004) (same with regard to co-conspirator statements). "The Court's further notation that 'to the extent that a hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made "immediate[ly]" upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage,' 124 S. Ct. at 1367 n. 7, was only by way of saying that to the extent that hearsay rules even existed as such at the time of the Founding, they respected the confrontation right's restrictions on testimonial statements. In other words, the scope of hearsay exceptions in criminal cases in 1791 gives us clues as to how broadly the Framers' conception of 'testimonial' evidence was." (Fisher notes (p. 3)).

[67] Fisher notes (p. 8-9) (stating, "If the defendant was represented by counsel who had an adequate opportunity to cross-examine the witness and the same or similar motive for doing so, this satisfies the Confrontation Clause for statements given at that time. [*Cf.*] *Mancusi v. Stubbs,* 408 U.S. 204, 213-16 (1972) (adequate cross because statement given at prior trial on same charges); *California v. Green,* 399 U.S. 149, 165-68 (1970) (adequate opportunity where statement was given at preliminary hearing where defendant was represented by counsel); *United States v.*

adequate opportunity to cross-examine the witness and the same or similar motives for doing so, this satisfies the Confrontation Clause for statements given at the time."[68] Similarly, "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of prior statements[;] . . . the Clause does not bar the admission of a statement so long as the declarant is present at trial to defend or explain it."[69]

Crawford does not change the law regarding the "unavailability" of a witness. The burden of proving that a witness is unavailable lies with the Government and requires a good faith effort to procure the witness, or, in the alternative, prove unavailability.[70] Unavailability can be occasioned by a witness who is physically unavailable, such as when a witness has died, or when the

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Avants, 367 F.3d 433, 443 (5th Cir.2004) (same, although improperly resting decision on 'firmly rooted' language) *with Pointer v. Texas*, 380 U.S. 400, 406-08 (1965) (inadequate opportunity when statement given in preliminary hearing where defendant was not represented by counsel); *Kirby v. United States,* 174 U.S. 47, 54-57 (1899) (inadequate opportunity when statement was given at prior trial where defendant was not a party and thus had no opportunity to cross-examine); *and People v. Fry*, 92 P.3d 970 (Colo. 2004) (inadequate opportunity at all preliminary hearings because state law requires such hearings to be truncated)").

[68] Fisher notes (p. 9).

[69] Fisher notes (p. 9) (stating, "This is so even if the witness cannot, or claims not to be able to, remember her prior testimonial statement. *United States v. Owens,* 484 U.S. 554 (1988) (no confrontation violation even though head injury impaired witness's memory after he gave testimonial statement, so cross-examination was of limited utility); *California v. Green,* 399 U.S. 149 (1970) (same with respect to witness [who] claimed memory loss at trial); *See also People v. Martinez,* 810 N.E.2d 199 (Ill. Ct. App. 2004) (testimonial statement admissible because witness took the stand); *Cooley v. State,* 849 A.2d 1026 (Md. App. 2004) (same where witness recanted on the stand). If, however, the witness is forced to take the stand but refuses on privilege grounds to answer any questions at all, this does *not* suffice to make his prior testimonial statement admissible. *See Douglas v. Alabama*, 380 U.S. 415 (1965). Finally, if the defendant fails to ask for a witness he knows is available to take the stand, he may be found to have had an adequate opportunity for cross-examination. [*Cf.*] *In re Personal Restraint of Suave,* 692 P.2d 818 (Wash. 1985) (failing to call witness foreclosed confrontation claim) *and State v. Salazar*, 796 P.2d 773 (Wash. 1990) (same) *with State v. Cox*, 876 So.2d 932 (La. Ct. App. 2004) (confrontation rights violated even though trial court offered defendant opportunity to subpoena witness)").

[70] Fisher notes (p. 8) (stating, "*See e.g. Barber v. Page*, 390 U.S. 719, 722-25 (1969); *People v. Miranda* WL 1386237, at *7 (Cal. App. June 22, 2004) (unpublished opinion); Government negligence allowed witness to abscond. *See Motes v. United States,* 178 U.S. 458, 470-71 (1900)").

Government is unable to locate a witness after making good faith efforts. Most frequently, a finding that a witness is unavailable is the result of a valid waiver, such as the Fifth Amendment or marital privilege.[71] "Perhaps when a witness (usually a young child) is incompetent to testify, she is unavailable as well."[72] Failure by the Government to produce a witness may also violate the Confrontation Clause if the Government fails either to make a good faith effort to produce the witness, or to prove that the witness is legitimately unavailable.[73]

Finally, we turn to the issue of "forfeiture by wrongdoing." The *Crawford* Court stated, "the rule of forfeiture by wrongdoing (*which we accept*) extinguishes confrontation claims on essentially equitable grounds."[74] Although the terms "waiver" and "forfeiture" are frequently used interchangeably, they are distinct concepts. "Forfeiture is a penalty against a party who engages in conduct of which a court disapproves."[75] In this context, causing a witness to be

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[71] Fisher notes (p. 8) (stating, "*See Lilly v. Virginia,* 527 U.S. 116, 124 (1999) (plurality opinion) (Fifth Amendment) (Assuming Fifth Amendment invocation establishes unavailability); *State v. Crawford,* 147 Wn.2d 424 (2002) (marital privilege)").

[72] Fisher notes (p. 8) (stating, "*e.g. State v. C.J.,* 63 P.3d 765, 771 (2003) (incompetence establishes unavailability); [*cf.*] *Idaho v. Wright,* 497 U.S. 805, 816 (1990) ('assuming without deciding' that incompetence satisfies unavailability test)").

[73] *Supra* fn. 65.

[74] *Crawford*, 124 S. Ct. at 1370 (citing *Reynolds v. United States*, 98 U.S. 145, 150 (1879) (a defendant who "voluntarily keeps the witness away . . . cannot insist on his privilege" of confrontation) (Emphasis added).

[75] Valdez and 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, n.32 (citing Alycia Sykora, Comment, *Forfeiture by Misconduct: Proposed Federal Rule of Evidence 804(b)(6)*, 75 OR. L. REV. 855, 860-61 (1996)) ("distinguishing forfeiture from waiver because forfeiture is punishment by wrongdoing, unlike waiver, which occurs through other forms of defendant conduct."); *United States v. Potamitis*, 739 F.2d (2d Cir. 1984) (citing *United States v. Mastrangelo,* 693 F.2d. at 272-73) (stating that a defendant who causes the unavailability of a witness as an example of giving rise to a waiver of a right.) (explaining that "if [the] witness' silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights in order to prevent [use of] prior grand jury testimony." Although this behavior has often been referred to as waiver, it is more accurately characterized as misconduct that results in forfeiture of confrontation rights. See Alycia Sykora, Comment: *Forfeiture By Misconduct: Proposed Federal Rules of Evidence 804(b)(6)*, 75 OR. L. REV. 855, 860-61 (1996). *United States v. Bolano*, 618 F.2d at

unavailable through misconduct operates as a forfeiture of both the right to confrontation and the right to object on hearsay grounds.[76]

III. Confrontation and "Forfeiture by Wrongdoing"

Fed. R. Evid. 804(b)(6), titled "forfeiture by wrongdoing," creates a hearsay exception permitting the introduction into evidence of "a statement 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."[77]

The exception was added to the rules by the 1997 changes:

> [T]o provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the

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629-30 (10th Cir. 1979) (recounting how a witness who threatened a witness waived his right of confrontation, resulting in the introduction of the witness's grand jury testimony into evidence); *United States v. Carlson*, 547 F.2d 1346, 1352-53 (8th Cir. 1976) (allowing grand jury testimony into evidence because the defendant threatened the witness). *See also,* John R. Kroger, "*The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 846 (1996) (describing the effect of the waiver of the right of confrontation);" *See Simon & Shuster, Inc. v Members of the New York State Crime Victims Board*, 502 U.S. 105, 118 (1991) (noting that "no man shall 'take advantage of his own wrong'"); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 838 n.6 (Stevens, J. dissenting) (citing the "standing maxim that no man shall be allowed to make any advantage of his own wrong"). *See United States v. White,* 116 F. 3d 903, 912 (D.C. Cir. 1997) (agreeing with a majority of the courts that misconduct resulting in the loss of confrontation rights necessarily causes the forfeiture of the hearsay exception.)).

[76] *United States v. Houlihan*, 92 F.3d 1271, 1281-82 (1st Cir. 1996) (holding that the murder of a witness results in the simultaneous waiver of confrontation rights and a hearsay objection) (*See Tales From The Crypt*, 31 ST. MARY'S L. J. 99, n. 130: "[O]nce the waiver occurs through defendant misconduct, the need for the evidence grows."). Although the courts refer to this concept as waiver, it is more accurately described as forfeiture. Because the cases uniformly refer to this concept as waiver, however, this article will do the same; *United States v. Smith*, 792 F.2d 441, 442 (4th Cir. 1986) (holding that the defendant waived all hearsay objections by procuring the witness's absence); *See also United States v. Balano,* 618 F.2d 624, 626 (10th Cir. 1979).

[77] Fed. R. Evid. 804(b)(6).

> declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself'. . . . The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government. It applies to actions taken after the event to prevent a witness from testifying.[78]

Although only added to Rule 804 as its own "stand-alone" exception in 1997, Rule 804(b)(6) previously had been widely recognized by many courts of appeals as a hearsay exception under the residual hearsay rule, then codified as Rule 804(b)(5).[79] The origin of the Rule can be traced to a 1982 decision from the Second Circuit.[80] In *United States v. Mastrangelo,* the defendant was charged with various drug offenses, though only one eyewitness could tie him to the drug conspiracy. The Government had undercover wiretap evidence of the defendant threatening the witness and warning him not to testify against him at the grand jury. During trial, the witness was murdered on the way to the courthouse to testify. The trial judge, Chief Judge Jack Weinstein, declared a mistrial and denied the defendant's motion to preclude his re-prosecution based on the double jeopardy clause.[81] In denying the motion, Chief Judge Weinstein expressed his belief that a preponderance of the evidence showed the defendant was either directly involved or indirectly acquiesced to the murder of the eyewitness.

At the second trial, presided over by a different district judge, the Government moved to admit the grand jury testimony of the murdered eyewitness against the defendant under the residual

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[78] Commentary to the 1997 changes to the Federal Rules of Evidence. (Internal citations omitted).

[79] The 1997 changes to the Rules of Evidence deleted separate but identical "residual hearsay" exceptions in Rule 803 and 804 and codified them as a new Rule, Rule 807, the text of which was the same as the previous exceptions. Commentary to the 1997 changes to the Rules of Evidence, 171 F.R.D. 708, 709 (1997).

[80] *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982).

[81] *Id.* at 272.

hearsay rule, then codified as Rule 804(b)(5). The defendant objected on the basis of the hearsay rule and the Sixth Amendment Confrontation Clause. The trial judge overruled both objections, finding particularized indicia of trustworthiness sufficient to admit the grand jury testimony under Rule 804(b)(5). The defendant was convicted and appealed.

The Court of Appeals for the Second Circuit remanded the case for an additional evidentiary hearing to determine the involvement, if any, of the defendant in the murder of the eyewitness. In doing so, however, the court clearly agreed with the district court that an issue was raised regarding whether the defendant waived his Sixth Amendment rights and hearsay objection by directly causing or acquiescing to the witness's murder. It stated:

> If [the defendant] was involved in [the witness's] death, his involvement waived his confrontation clause objections to the admission of [the witness's] testimony. Because a waiver, if factually supported, will allow us to avoid resolution of the difficult legal and constitutional issues arising under the confrontation clause and Rule 804(b)(5), we remand the case to the District Court for an evidentiary hearing on the question of [the defendant's] involvement in the murder of [the witness].[82]

As authority for its holding that a defendant may waive his or her Confrontation Clause rights by misconduct, the second circuit cited a series of Supreme Court decisions, as well as a host of circuit court cases standing for the principle that in either criminal or civil cases, "the law will not allow a person to take advantage of his own wrong."[83] The court summed up this point as follows:

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[82] *Id.*

[83] *Id.*at 272-73 (*See also Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Diaz v. United States*, 223 U.S. 442, 452-53; and *Reynolds v. United States*, 98 U.S. 145, 159

> Thus, if a witness' silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause 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 confrontation clause was designed to protect.[84]

In addition, the court set forth the procedural requirements needed to establish the foundation to support a finding of waiver by wrongdoing. First, an evidentiary hearing is needed in the absence of the jury to determine the involvement of the party against whom the statement will be offered in procuring the unavailability of the declarant. Because the purpose of this hearing is to enable the trial court to determine, as a preliminary matter, whether a waiver by wrongdoing has occurred, the hearing is governed by Fed. R. Evid. 104(a).[85] Further, the court held that the party seeking to introduce the statement of the unavailable declarant bears the burden of proof to establish the waiver.[86] The court noted, however, that there was a split in authority as to the burden of proof that must be shown to establish the waiver – preponderance of the evidence (the standard typically applying to Fed. R. Evid. 104(a) preliminary determinations), or clear and convincing evidence.[87] The court ultimately concluded:

> [w]e see no reason to impose upon the government more than the usual burden

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(1878)).

[84] *Mastrangelo*, 693 F.2d at 272-73.

[85] *Id.* at 273 (*See* FED. R. EVID. 104(a), which requires the Court to make preliminary determinations regarding the admissibility of evidence, the qualifications of witnesses, and the existence of privileges. In doing so, it need not strictly adhere to the rules of evidence, except for privilege. *See also* Rule 1101(d)(1)).

[86] *Mastrangelo*, 693 F.3d at 273.

[87] *Id.* at 274.

> of proof by a preponderance of the evidence where waiver by misconduct is concerned. Such a claim of waiver is not one which is either unusually subject to deception or disfavored by the law. To the contrary, such misconduct is invariably accompanied by tangible evidence such as the disappearance of the defendant, disruption in the courtroom or the murder of a key witness, and there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself.[88]

The second circuit did caution, however, that despite its preliminary finding that the proper standard of proof was preponderance of the evidence, it was prudent for the district court, on remand, to make its fact-findings under the clear and convincing standard as well. The court further announced its intention to retain jurisdiction to address the issue again if raised in a subsequent appeal.[89] As will be seen, the issue of what standard of proof governs preliminary hearings to determine whether to apply the waiver by wrongdoing doctrine continued to be a subject of disagreement among the federal courts for many years thereafter.

The cases following *Mastrangelo* acknowledge its importance in shaping the doctrine of forfeiture of Confrontation Clause rights and hearsay objections by wrongdoing. In understanding this doctrine, it is important to recognize the narrow foundation on which it rests. It was not adopted following a comprehensive examination of the substantive issues associated with either the Confrontation Clause or the hearsay rule;[90] rather, it rests on a single concept – one whose wrongdoing directly or indirectly procures the unavailability of the declarant whose statement is offered at trial, by his own misconduct, waives the right to object. It is, therefore, an

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[88] *Id.*
[89] *Id.*
[90] *Id.* at 272.

unapologetic rule of necessity recognizing that any other outcome produces a result that is repugnant to a society that values the rule of law.

The waiver doctrine on which *Mastrangelo* was premised has long been accepted in both the United States and Great Britain, which was the "immediate source" of our own Confrontation Clause protections.[91]

Reynolds v. United States[92] was the first case in which the Supreme Court recognized that Sixth Amendment Confrontation Clause rights could be waived by a party's own misconduct. It continues to have vitality today, as it was cited with approval by the majority opinion in *Crawford*.[93] Reynolds was charged with bigamy and prosecuted in the territorial courts of the Utah Territory. Prior to trial, the Government attempted to serve a subpoena on his second wife, but Reynolds and his first wife prevented the marshal from serving the subpoena by falsely representing that the second wife was not present. At trial, the Court allowed the prosecution to offer the testimony of the second wife against Reynolds in a prior bigamy charge, over Reynolds's objection.[94] Reynolds was convicted, and subsequently appealed on a number of grounds, including an alleged violation of the Sixth Amendment Confrontation Clause. The Supreme Court affirmed the trial court, analyzing the Confrontation Clause issue as follows:

> 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

[91] *Crawford*, 124 S. Ct. at 1359.
[92] 98 U.S. 145 (1878).
[93] *Crawford*, 124 S. Ct. at 1370.
[94] *Reynolds*, 98 U.S. at 149.

> 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 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.[95]

As authority for this ruling, the Court cited a series of cases from Great Britain, most notably *Lord Morley's Case*,[96] in which the House of Lords discussed the forfeiture of confrontation rights by misconduct of a defendant, stating:

> [I]n case oath should be made that any witness, who has been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination [by the coroner] might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships.[97]

The *Reynolds* Court noted that the ruling in *Lord Morley's Case* was "recognized as the law in England" following that decision,

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[95] *Id.* at 158.
[96] *Lord Morley's Case*, 6 State Trials, 770 (1666).
[97] *Reynolds*, 98 U.S. at 158 (quoting *Lord Morley's Case*).

citing a series of English precedents that followed the rule in *Lord Morley's Case*.[98] The Supreme Court also explained the policy underlying the rule of forfeiture of Confrontation Clause rights by misconduct as follows:

> The Rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony [of the unavailable witness]. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.[99]

Finally, the Court noted that the determination of whether a party committed misconduct that would waive confrontation rights was for the trial court to decide as a preliminary matter.[100] In *Diaz v. United States*,[101] the Court reaffirmed its ruling in *Reynolds*, stating, "[t]he view that this right [of confrontation of witnesses in a criminal trial] may be waived also was recognized by this court *in Reynolds v. United States* . . . where testimony given on a first trial was held admissible on a second, even against a timely objection, because the witness was absent by the wrongful act of the accused."[102] The Court reiterated this position in *Snyder v. Commonwealth of Massachusetts*,[103]

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[98] *Reynolds*, 98 U.S. at 158 (citing *Lord Morley's Case*) (citing *Harrison's Case*, 12 Id. 851; *Regina v. Scaife*, 17 Ad. & El. N.S. 242; *Drayton v. Wells*, I Nott & M. (S.C.) 409; and *Williams v. State of Georgia*, 19 Ga. 403).
[99] *Reynolds*, 98 U.S. at 159.
[100] *Id.*
[101] 223 U.S. 442 (1912).
[102] *Id.* at 452 (Internal citations omitted).
[103] 291 U.S. 97, 106 (1934).

by stating "[n]o doubt [a constitutional privilege] . . . may be lost by consent or at times even by misconduct,"[104] and most recently in *Crawford* itself, where the Court stated, importantly:

> The *Roberts* test[105] 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.[106]

Thus, the key to understanding the constitutionality of Rule 804(b)(6), as measured by the Confrontation Clause, is to recognize that it is predicated not on the assumption that the out-of-court statement of the unavailable declarant is admissible because there is some underlying indicia of reliability (such as with the other hearsay exceptions in Rules 803, 804, and 807, which excuse the need to produce the declarant for in-court testimony, cross examination, and to be confronted by the defendant), but instead on the equitable principle of forfeiture, or, less accurately, waiver. This outcome is viewed as necessary upon a finding that the unavailable witness's absence was caused by wrongful conduct initiated by, or acquiesced in, by a party, and done with the intent to render the witness unavailable. Thus, confrontation rights are not lost absent a showing of wrongful conduct by the defendant intended to induce a declarant

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[104] *Id.* (citing *Diaz v. United States*).
[105] The *Roberts* test was overruled in *Crawford* .
[106] *Crawford v. Washington*, 124 S. Ct. at 1370.

not to testify, which in fact produces that result. If properly established, it is difficult to summon much sympathy for the defendant who complains that introduction of the prior statement of the unavailable witness is unfair and violative of the Sixth Amendment.

Every federal circuit court of appeal, and a number of state courts, has found that, under these circumstances, forfeiture of Sixth Amendment rights is appropriate. The constitutionality of the doctrine of forfeiture by wrongdoing has been accepted by every federal circuit court of appeal that has considered it, without exception, as reflected in the following table:

First Circuit *United States v. Houlihan*, 92 F. 3d 1271, 1279 (1st Cir. 1996).	"Though the Confrontation Clause is a cornerstone of our adversary system of justice, it is not an absolute . . . [m]oreover, a defendant may waive his right to confrontation by knowing and intentional relinquishment . . . [w]hile a waiver of right to confront witnesses typically is express, the law is settled that a defendant also may waive it through his intentional misconduct . . . . By the same token, courts will not suffer a party to profit by his own wrongdoing. Thus, a defendant who wrongfully procures a witness's absence for the purpose of denying the government that witness's testimony waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements." (Internal citations omitted).
Second Circuit *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992).	"A defendant who procures a witness's absence waives the right of confrontation for all purposes with regard to that witness, not just to the

admission of sworn hearsay statements. We may assume that the admission of facially unreliable hearsay would raise a due process issue, although it is hard to imagine circumstances in which such evidence would survive Fed. R. Evid. 403's test of weighing probative value against prejudicial effect, an objection that is not waived by procuring a witness's absence."

Fourth Circuit
United States v. Johnson,
219 F.3d 349, 355
(4th Cir. 2000).

"The district court appears to have admitted Thomas' hearsay because, *inter alia*, Raheem forfeited his hearsay objections, under Fed. R. Evid. 804(b)(6), by having caused the unavailability of Thomas as a witness . . . . The district court did not abuse its discretion in so holding."

Fifth Circuit
United States v. Thevis,
665 F.2d 616, 630
(5th Cir. 1982).

"We conclude that 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 . . . . A defendant who undertakes this conduct realizes that the witness is no longer available and cannot be cross-examined. Hence in such a situation the defendant has intelligently and knowingly waived his confrontation rights. The policy interests underlying the confrontation clause, moreover, mandate this result. We recognize that the right of confrontation is so fundamental to our concept of a fair trial that it is a

privilege specifically guaranteed by the Constitution. Nevertheless . . . the right is not absolute, and must give way at times to stronger state interests. Similarly, when confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived. The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution 'would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause' . . . and make a mockery of the system of justice that the right was designed to protect." (Internal citations omitted).

Sixth Circuit
Steele v. Taylor,
684 F.2d 1193, 1201-03
(6th Cir. 1982).

"From these cases we derive essentially the same rule as the one stated by the state trial judge. A prior statement given by a witness made unavailable by the wrongful conduct of a party is admissible against the party if the statement would have been admissible had the witness testified. The rule . . . is based on a public policy protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness. The rule is also based on a principle of reciprocity similar to the equitable doctrine of 'clean hands.' 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 . . . while repudiating that preference by creating the condition that prevents it."
Seventh Circuit *United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002).	"It is, of course, well-established that a defendant forfeits his Confrontation Clause rights by wrongfully procuring the unavailability of a witness."
Eighth Circuit *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1977).	"The law will not place its imprimatur on the practice of threatening Government witnesses into not testifying at trial and courts should not permit the accused to derive any direct or tangential benefit from such conduct . . . [n]or 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 confrontation clause."
Tenth Circuit *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979)(*rev'd* *on other grounds*).	"We agree that, under the common law principle that one should not profit by his own wrong, coercion can constitute voluntary waiver of the right of confrontation."

District of Columbia Circuit *United States v. White*, 116 F.3d 903, 911 (D.D.C. 1997).	"Even though the right of confrontation is both constitutional and critical to the integrity of the fact-finding process . . . the defendant may lose it through misconduct . . . . It is hard to imagine a form of misconduct more extreme than the murder of a potential witness. Simple equity supports a forfeiture principle, as does a common sense attention to the need for fit incentives. The defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him. And where a defendant has silenced a witness through the use of threats, violence or murder, admission of the victim's prior statements at least partially offsets the perpetrator's rewards for his misconduct. We have no hesitation in finding, in league with all circuits to have considered the matter, that a defendant who wrongfully procures the absence of a witness or potential witness may not assert confrontation rights as to that witness." (Internal citations omitted).

Although the circuit courts have not always agreed entirely on how the Rule should be administered,[107] not one has expressed any

[107] For example, most of the circuit courts, and the drafters of Rule 804(b)(6), conclude that because the determination whether the defendant actively, or indirectly, procured by wrongdoing the absence of the witness whose prior statement is offered under the Rule is a preliminary determination under FED. R. EVID. 104(a), the foundational facts need only be shown by a preponderance of evidence. *See United States v. Dhinsa*, 243 F.3d 635, 653-54 (2d Cir. 2001); *United States v. Johnson*, 219 F.3d 349, 356 (4th Cir. 2000); *United States v. Scott*, 284 F.3d 758,

serious reservations about the need for the Rule. What was absent prior to *Crawford* was any direct comment from the United States Supreme Court on the constitutionality of Rule 804(b)(6) following its codification as a separate hearsay exception in 1997. *Crawford* supplied this missing link: "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."[108]

Critics of the forfeiture by wrongdoing rule certainly can argue that *Crawford* principally addresses a different rule (*i.e.* statements of an unavailable declarant against a penal, proprietary, or pecuniary interest),[109] and therefore, the comments of the majority constitute mere *dicta*. This view, however, offers scant support for a conclusion that there is any serious constitutional infirmity in Rule 804(b)(6), given the breadth of *Crawford's* examination of the hearsay rule and Confrontation Clause, as well as its discussion of many hearsay exceptions other than Rule 804(b)(3).

In addition to the federal courts, at least ten state courts have adopted the forfeiture by wrongdoing exception to the hearsay rule:

Arizona *State v. Valencia*, 924 P.2d 497, 502 (Ariz. Ct. App. 1996).	"If a defendant silences a witness by violence or murder, the defendant cannot then assert his Confrontation Clause rights in order to prevent the admission

762 (7th Cir. 2002); *United States v. Emery*, 186 F.3d 921, 926-27 (8th Cir. 1999); *United States v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001); Commentary to the Federal Rule of Evidence 804(b)(6), 171 F.R.D. 719 ("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"). One circuit court, however, has ruled that the foundational facts must be shown by clear and convincing evidence. *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. 1982). Similarly, some circuit courts have required that the court hold a hearing outside the presence of the jury to hear the evidence supporting the introduction of a statement under Rule 804(b)(6). *United States v. Dhinsa*, 243 F.3d 635 (2d. Cir. 2001) ("[T]he district court must hold an evidentiary hearing outside the presence of the jury in which the government has the burden of proving [the foundational facts] by a preponderance of the evidence"). Other courts have not required a separate evidentiary hearing. *United States v. Emery*, 186 F.3d 921, 926; *United States v. White*, 116 F.3d 903, 914-15 (D.C. Cir. 1997).

[108] *Crawford*, 124 S. Ct. at 1370 (Emphasis added).

[109] Fed. R. Evid. 804(b)(3).

of prior testimony from that witness . . . . In such circumstances, a defendant is deemed to have waived both his Confrontation Clause *and* hearsay objections to the admission of the witness's statements. . . . Prior to admitting testimony pursuant to this principle, the trial court must hold a hearing at which the government has the burden of proving by a preponderance of the evidence that the defendant was responsible for the witness' absence." (Internal citations omitted).

District of Columbia
Devonshire v. United States,
691 A.2d 165, 168
(D.C. 1997).

"We agree with the overwhelming weight of authority that appellant's Confrontation Clause rights must fall in these circumstances. As the trial judge correctly observed, a defendant's rights under the Confrontation Clause are not absolute. A defendant may waive his right to confrontation by express waiver . . . or through his own intentional misconduct . . . . Nor is a defendant protected when he 'does away with witnesses against him.' All federal and state courts that have addressed this issue, that we could find, have concluded that when a defendant procures a witness's unavailability for trial with the purpose of preventing the witness from testifying, the defendant waives his rights under the Confrontation Clause to object to the admission of the absent witness' hearsay statements." (Internal citations omitted).

Iowa *State v. Hallum,* 606 N.W.2d 351, 354-56 (Iowa 2000).	"A waiver is an intentional relinquishment of a known right . . . . A forfeiture, on the other hand, is the loss of a right as a result of misconduct . . . . As a review of the case law shows, the focus of the courts holding that a defendant has lost his right to object to the admission of an out-of-court statement falls more clearly within the common definition of a forfeiture . . . . When a court finds that a defendant has procured a witness's unavailability, the defendant is precluded from asserting his constitutional right to confront the witnesses against him as a basis to prevent the admission of prior statements given by the witness . . . . Hearsay objections are also forfeited." (Internal citations omitted).
Kansas *State v. Gettings,* 769 P.2d 25, 28 (Kan. 1989).	"The Sixth Amendment to the United States Constitution and § 10 of the Bill of Rights of the Kansas Constitution provide criminal defendants with the right to confront witnesses against them . . . . A defendant, however, can waive the right to confrontation. '[W]hen confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived. The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him.'" (Internal citations omitted).
Louisiana *State v. Magouirk,* 539 So. 2d 50, 64-65 (La. Ct. App. 1988).	Adopting as the Law of Louisiana the rulings in the federal cases, including *Mastrangelo, Thevis* and *Balano, supra.*

Minnesota *State v. Black,* 291 N.W.2d 208, 214 (Minn. 1980).	"The law is clear that if a witness is unavailable because of the wrongdoing of the defendant, the defendant cannot complain if other competent evidence is introduced to take the place of the witness' testimony." (Internal citations omitted).
New Jersey *State v. Sheppard,* 484 A.2d 1330, 1341-43 (N.J. Super. Ct. Law Div. 1984).	Adopting the position taken by the Supreme Court in *Reynolds,* and the forfeiture by wrongdoing rule articulated in other federal cases.
New York *Holtzman v. Hellenbrand,* 460 N.Y.S.2d 591, 595-98 (App. N.Y. Div. 1983).	Adopting the forfeiture by wrongdoing rule articulated in *Mastrangelo, Balano, Thevis,* and other federal cases.
Pennsylvania and Tennessee Penn. R. Evid. 804(b)(6) and Tenn. R. Evid. 804(b)(6).	Adopting the forfeiture by wrongdoing rule articulated by *Reynolds, Snyder, Diaz* and *Mastrangelo.*

The Maryland Rules do not contain an equivalent to Rule 804(b)(6). During the 2004 legislative session, however, the Office of the Governor introduced bills in the House of Delegates and the Senate to add such a rule. Senate Bill 185 and House Bill 296 proposed to add to the Courts & Judicial Proceedings Article, section 10-901, the following:

> (A) A statement is not excluded by the hearsay rule 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 Witness as defined in Maryland Rule 5-804 who was the declarant of the statement.
> (B) The court shall determine the admissibility of a statement under this section in the manner provided in the Maryland Rules.

Proposed section 10-901(a) is substantially identical to Fed. R. Evid. 804(b)(6). The provision in 10-901(b) of the proposed Rule directs that, in determining whether to admit statements under the Rule, the trial court is governed by the Maryland Rules. The effect of this provision would be to incorporate by reference Rule 5-104(a) of the Maryland Rules, which governs preliminary evidentiary determinations and applies a preponderance of the evidence standard.[110] Neither bill passed, and the effort to adopt the Rule failed.

Given the likelihood that the Rule again will be proposed in future legislative sessions, or, alternatively, that it will be proposed for consideration to the Rules Committee of the Maryland Courts for incorporation into the Maryland Rules, it is appropriate to consider whether Maryland should have the Rule. With respect to the constitutionality of the forfeiture by wrongdoing rule, the case law discussed above, particularly the Supreme Court's decision in *Crawford,* disposes of any credible Sixth Amendment Confrontation Clause argument against the Rule. It cannot be argued seriously that there is any independent basis for opposing the Rule under the Confrontation Clause provisions of Article 21 of the Maryland Declaration of Rights, given that the origin of the forfeiture by wrongdoing rule comes from the English Common law, and the Maryland Declaration of Rights is *in pari materia* with the Sixth Amendment Confrontation Clause.[111]

If it is accepted that there is no viable Confrontation Clause challenge to adopting a forfeiture by wrongdoing exception to the

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[110] L. MCLAIN, MARYLAND RULES OF EVIDENCE (1994), § 2.104.4, at p. 69.

[111] *See, e.g. Simmons v. State*, 333 Md. 547, 636 A. 2d 463 (1994); *Craig v. State*, 322 Md. 418, 588 A. 2d 328 (1991); and *Tyler v. State*, 105 Md. App. 495, 660 A. 2d 986 (1995).

hearsay rule, the only remaining question to address is whether there is a need for it. While there is no useful empirical evidence to answer this question, there is an abundance of anecdotal evidence demonstrating a compelling need for adopting the forfeiture by wrongdoing rule in Maryland.[112]

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[112] *See, e.g. Protecting Witnesses*, Editorial, THE BALTIMORE SUN, July 14, 2004, 2004 WL 84123923 (Discussing witness intimidation in Baltimore City and Prince George's County. Reporting that in May, 2004 Baltimore City prosecutors dropped 13 of 52 shooting cases because of witness problems); Gail Gibson, *Drug Trial Witness Helps Efforts to Convict Ex-Friends: U.S. Prosecutors Say Men Were Members of Gang*, THE BALTIMORE SUN, Mar. 6, 2004 at Local 1B (Recounting evidence of witness intimidation in drug prosecution in federal court in Baltimore City); *Conspiracy of Silence*, Editorial, THE BALTIMORE SUN, Feb. 16, 2004 at 18A (Stating that in the past year Baltimore City prosecutors relocated 95 witnesses for their protection, dismissed 90 non-fatal shootings because of witness problems, primarily witness intimidation); Gail Gibson, *Survivor Tells Jury of Attack that Left Two Friends Dead, Federal Death-Penalty Trial Focuses on Drug Activity*, THE BALTIMORE SUN, Feb. 12, 2004 at Local 2B (Describing killing of key witness in federal drug prosecution in Baltimore City); Allison Klein, *Ehrlich Targets Witness Threats Under Bill, Intimidation or Harm Would Carry Increased Penalties: Measure Could Allow Hearsay Opponents Include Defense Attorneys*, THE BALTIMORE SUN, Feb. 9, 2004 at Local 1B (Reporting comments of a Baltimore City homicide prosecutor that in 90 percent of his cases, witnesses are afraid to testify; commenting on 2002 arson death of Baltimore family as act of retaliation; and describing other cases where witness intimidation hampered or prevented prosecution of criminal cases); Neely Tucker, *Girl's Slaying Opens Window on Intimidation*, THE WASHINGTON POST, Feb. 2, 2004 at A01 (Reporting efforts to address witness intimidation in Maryland, Virginia, and the District of Columbia; reporting opinions of District of Columbia Superior Court judge and Prince George's County Circuit Court judge that witness intimidation is a frequent event; reporting estimate of the U.S. Attorney that in last decade, drug gangs have killed more than two dozen informants or witnesses in the District of Columbia); Robert Redding, Jr., *Annapolis Mayor Wants Assembly to Protect Witnesses*, THE WASHINGTON TIMES, Dec. 1, 2003 (Reporting efforts of Annapolis mayor to introduce legislation before the Maryland General Assembly to offer protections against witness intimidation; reporting that witness problems in Baltimore City prevented 60 percent of city's criminal cases); Allison Klein, *Spain Gets 25 Years in Shooting: W. Baltimore Boy, 10, Hit with Stray Bullet on Stoop in July 2002; Judge Calls Crime 'Vicious'; Case Heard in Two Trials; Key Witness Also Killed*, THE BALTIMORE SUN, Oct. 24, 2003 at Local 1B (Reporting "catastrophic loss" to prosecution case caused by killing of key witness); Kimberly A.C. Wilson, *Suspect in Shooting is Killed Days After Charge Is Dropped*, THE BALTIMORE SUN, Jan. 26, 2003 at Local 8B (Reporting comments of representative of city prosecutor's office regarding killing of prosecution witness, describing an "escalating pattern"); Caitlin Francke, *Changing Stories Tangle City Courts: Recanting Witnesses Frequently Switch Statements When They Get on the Stand, Frustrating Judges and Prosecutors*, THE BALTIMORE SUN, Nov. 20, 2000 at Telegraph 1A (Reporting that prosecutor's and judges in

The problem does not seem to be restricted to Maryland and Washington D.C. Commentators have noted the increasing problem of witness intimidation throughout the country:

> [A] Department of Justice Study found evidence that there had indeed been an increase in witness intimidation in the late 1980s and continuing into the 1990s. A number of prosecutors linked this increase in violent victim and witness intimidation to the advent of gang-controlled crack sales in the mid to late 1980s. Several prosecutors estimated that victim and witness intimidation is suspected in up to 75-100 percent of the violent crimes committed in some gang-dominated neighborhoods. A National Institute of Justice assessment found that "51 percent of prosecutors in large jurisdictions and 43 percent in small jurisdictions said that intimidation of victim and witnesses was a major problem". . . . An additional 30 percent of prosecutors in large jurisdictions and "25 percent in small jurisdictions labeled intimidation a moderate problem."[113]

Those who oppose the adoption of the forfeiture by wrongdoing exception to the hearsay rule often raise objections other than constitutional challenges. They talk about the danger of criminal convictions based upon false testimony of witnesses who make incriminating pretrial statements to police, or in grand jury testimony,

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Baltimore City say that witness recantations seriously hamper criminal prosecution, estimating that witnesses change stories in approximately 50 percent of cases).

[113] Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b()6)*, 80 NEB. L. REV. 891, 904-05.

but who do not testify at trial where they may be cross-examined and must confront the defendant against whom they testify.[114] Candor requires an acknowledgment that adoption of a forfeiture by wrongdoing exception to the hearsay rule does pose some risk of admitting unreliable testimony. The existing rules of evidence, however, offer abundant safeguards to address this risk. Proper administration of the Rule by trial judges, with oversight by the appellate courts, would reduce any realistic degree of risk such that, when compared to the societal harm posed by not having the Rule, the risk is substantially outweighed.

First, if the Rule proposed by the Governor, which is in substance Fed. R. Evid. 804(b)(6), is adopted, it would require prosecutors to lay a proper foundation before the statement of the unavailable witness may be admitted. The State would be required to show: (1) that the witness was unavailable to testify because of any of the reasons stated in Md. Rule 5-804(a);[115] (2) that the party against whom the statement would be offered at trial (typically the criminal defendant) either personally acted, or acquiesced in, the action of others; (3) that the action was wrongful; (4) that the action was intended to procure the unavailability of the witness; and (5) that the action actually did procure the unavailability of the witness.

The trial court has discretion, under Md. Rule 5-104(a), not to relax application of the rules of evidence and to require the prosecutor

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[114] Allison Klein, *Ehrlich Targets Witness Threats Under Bill: Intimidation or Harm Would Carry Increased Penalties; Measure Could Allow Hearsay Opponents Include Defense Attorneys*, THE BALTIMORE SUN, Feb. 9, 2004 at Local 1B (Reporting the opposition to the legislation proposed to adopt the forfeiture by wrongdoing exception to the hearsay clause of Baltimore criminal defense attorney).

[115] Rule 5-804(a) identifies five circumstances in which a witness is deemed unavailable: if exempted from testifying by asserting a privilege; by refusing to testify despite a court order to do so; if the witness testifies to a lack of memory about the subject of the testimony; if the witness may not testify because of death, infirmity or physical or mental illness; and if the witness is beyond the power of the court to compel his or her presence at trial. Importantly, the rule also states "[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." Thus, if there is evidence that the prosecution or law enforcement authorities have engaged in any wrongdoing to induce the declarant to be unavailable, the absent witness's statement would not be admissible.

to make this showing through facts that are admissible under the rules of evidence. Furthermore, Md. Rule 5-104(c) permits the trial judge to require that the prosecutor lay the foundation for the statement out of the presence of the jury, so it cannot be prejudiced if the court rules that the statement is not admissible. Even after the prosecutor has made the preliminary showing required by the Rule, the trial judge may still examine the content of the statement to be offered and exclude it if it otherwise would be inadmissible, even if the witness was present to testify. Thus, if the absent witness's statement contains inadmissible speculation or opinion, it may be excluded under Md. Rules 5-701 or 5-702. If it appears that the witness did not have personal knowledge of the facts contained in the statement, it may be excluded under Md. Rule 5-602. The credibility of the witness could be attacked if (1) he had a qualifying prior criminal conviction affecting his truthfulness; (2) he is biased against the defendant; (3) he has a poor reputation for truthfulness; (4) there is some defect in the ability of the witness to perceive, remember and relate facts; or (5) the witness has given an inconsistent version of the facts, all of which are impeaching facts that may be brought out by the defendant under Md. Rule 5-806. Additionally, if the trial court determines that the probative value of the witness's statement is substantially outweighed by the danger of unfair prejudice to the defendant, the statement may be excluded under Md. Rule 5-403. Finally, if the trial judge admits the statement over the defendant's objection and the defendant is convicted and appeals, the appellate courts can review the trial judge's ruling for error.

These procedural protections, combined with the preliminary foundation that must be shown by the prosecutor, provide powerful protections against convictions based on unreliable evidence. Moreover, it must be remembered that, in the federal system, the rule of forfeiture by wrongdoing has been in widespread use for more than twenty years. There has been no credible showing that its use has resulted in unfair convictions.

In the end, the question of whether to adopt the forfeiture by wrongdoing exception to the hearsay rule requires the making of a choice between possible harmful outcomes. On one hand, there is overwhelming anecdotal evidence that witness intimidation is widespread in Maryland, and that this problem is imposing a serious

burden on prosecutors in obtaining convictions in very serious cases. Defendants have literally been able to get away with murder by killing or intimidating the witnesses who could prove their guilt. On the other hand, there is the theoretical possibility that, notwithstanding the procedural and substantive safeguards built into the forfeiture by wrongdoing rule and the rules of evidence in general, there may be instances of convictions based, in part, on unreliable witness statements. The evidence of the harm done by not having the Rule is voluminous and immediate. The evidence of harm in adopting the Rule is conjectural and unsupported by more than twenty years of experience in the federal system. On balance, the time is long overdue to adopt this Rule.