THE FORFEITURE BY WRONGDOING EXCEPTION TO THE CONFRONTATION RULE

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INTRODUCTION

The Supreme Court's decision in *Crawford v. Washington*[1] transformed its doctrine governing the Confrontation Clause of the Sixth Amendment to the Constitution. Under *Crawford*, the Confrontation Clause bars the admission of out-of-court testimonial statements by declarants who do not testify, unless the defendant has had a prior opportunity to cross-examine the witness.[2] This new construction of the confrontation right replaced the prior rule under *Ohio v. Roberts*, which held that the Confrontation

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[1] 541 U.S. 36 (2004).
[2] *Id.* at 68.

Clause did not bar admission of an unavailable witness's statement if the statement fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness.[3] Although *Crawford* left many questions unanswered,[4] this paper focuses on the scope and application of a particular exception to the *Crawford* rule: forfeiture by wrongdoing.

Under the forfeiture exception to the confrontation rule, a defendant may not complain about the inability to confront and cross-examine a witness whose absence is a result of the defendant's own wrongful act.[5] A straightforward illustration of the forfeiture exception arises when a defendant, on trial for a narcotics crime, kills a witness scheduled to testify in the drug trial.[6] If the court finds as a preliminary matter that the defendant killed the witness, the court will deem the defendant to have forfeited the confrontation right and will overrule the defendant's confrontation objection.

Crawford's strict interpretation of the Confrontation Clause with respect to testimonial evidence[7] has put increased pressure on this previously little-used exception to the confrontation rule. Justice Scalia recently said as much when, writing for the Court in *Davis v. Washington*, he noted that the "[*Ohio v.*] *Roberts* approach to the Confrontation Clause undoubtedly made recourse to [forfeiture] doctrine less necessary, because prosecutors could show the 'reliability' of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence."[8] The forfeiture by wrongdoing exception survives *Crawford* because it is based not on the reliability of the declarant's statement, but rather on the equitable consequences of the defendant's misconduct. Although North Carolina courts have yet to rule on the forfeiture exception

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[3] 448 U.S. 56 (1980), *overruled in part by* Crawford v. Washington, 541 U.S. 36 (2004).

[4] Many of these questions are explored in Jessica Smith, Crawford v. Washington*: Confrontation One Year Later* (School of Government, April 2005), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf, and its May 1, 2006 supplement.

[5] Reynolds v. United States, 98 U.S. 145, 158–59 (1879).

[6] *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984) (witness killed on his way to the courthouse to testify against the defendant).

[7] *See* Smith, *supra* note 4, at 7–8.

[8] Davis v. Washington, No. 05-5224, slip op. at 19 (U.S. June 19, 2006) (holding statements made to the police during a 911 call, when the primary purpose of the interrogation is to meet an ongoing emergency, are not testimonial, whereas statements made during an in-home interrogation designed to establish or prove past events relevant to a criminal prosecution are testimonial).

directly, the doctrine has been mentioned in dicta by the North Carolina[9] and United States[10] Supreme Courts, including an invitation by the *Davis* Court for lower courts to develop the doctrine more fully.[11]

Courts agree that in the witness-tampering scenario described above, defendants have, on equitable grounds, forfeited the confrontation right; defendants will not be allowed to profit from their wrongdoing.[12] Courts are divided, however, on the more difficult question of whether forfeiture can apply "reflexively"—that is, when the wrongdoing alleged to support the forfeiture is the very act for which the defendant is on trial.[13] The obvious example would be a murder trial in which the killing clearly renders the victim unavailable to testify; but a reflexive forfeiture could also arise in the context of spousal or child abuse, when the abuse itself so traumatizes the victim that he or she will not or cannot testify.

After *Crawford*, courts have expanded the confrontation forfeiture rule in two ways. First, some jurisdictions have held that an accused might be deemed to have forfeited the confrontation right even if the wrongdoing alleged to support the forfeiture was committed without the intent to silence the witness. Second, courts have shown an increased willingness to apply the reflexive forfeiture described above.

This paper catalogues the post-*Crawford* cases that address the issues likely to come before the North Carolina courts in the future, including (1) the role of the hearsay forfeiture rule under Federal Rule of Evidence 804(b)(6), (2) whether the defendant must intend to silence a witness for a forfeiture to arise, (3) the reflexive application of forfeiture described above, and (4) the standard of proof applicable to a judicial determination that the accused has forfeited the confrontation right.

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[9] State v. Lewis, 360 N.C. 1, 619 S.E.2d 830 (2005), *vacated*, No. 05-8875, 2006 U.S. LEXIS 5201 (U.S. June 30, 2006) (remanding the case to the Supreme Court of North Carolina for consideration in light of *Davis*).

[10] *Davis*, slip op. at 18–19 (U.S. June 19, 2006).

[11] *Id.* at 19.

[12] *See, e.g.*, United States v. Dhinsa, 243 F.3d 635, 652 (2d Cir. 2001) ("[T]he law [will not] allow a person to take advantage of his own wrong.").

[13] Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 508 (1997). "Reflexive" is a term used by Professor Friedman, but which has not yet been adopted by courts.

I. BACKGROUND

The Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[14] Before *Crawford*, under *Ohio v. Roberts* and its progeny,[15] it was generally understood that the Confrontation Clause did not bar the admission of an unavailable witness's out-of-court statement, so long as the statement fell under a "firmly rooted hearsay exception," or bore "particularized guarantees of trustworthiness."[16]

Crawford dramatically altered this landscape, holding that when testimonial evidence is at issue, the Confrontation Clause cannot be satisfied by a mere showing that the out-of-court statement is reliable. Rather, the Constitution "demands what the common law required: unavailability and a prior opportunity for cross-examination."[17] The *Crawford* opinion itself "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial,'"[18] and made only passing reference to the forfeiture by wrongdoing exception.[19] A subsequent case, *Davis v. Washington*, shed additional light on the definition of testimonial, but left to the lower courts the task of determining when a defendant has forfeited the confrontation right by wrongdoing.[20] As discussed below, the courts that have addressed the scope of the forfeiture exception have reached mixed results.

II. THE FORFEITURE EXCEPTION TO THE *CRAWFORD* RULE

The forfeiture by wrongdoing exception to the Confrontation Clause traces its roots to *Reynolds v. United States*, in which the Court held that "if a witness is absent by [the accused's] own wrongful procurement, [the accused] cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own

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[14] U.S. CONST. amend. VI.
[15] Ohio v. Roberts, 448 U.S. 56 (1980); *see also* White v. Illinois, 502 U.S. 346 (1992) (holding hearsay exceptions for spontaneous declarations and for statements for medical treatment to be firmly rooted for purposes of the Confrontation Clause).
[16] *Roberts*, 448 U.S. at 66, *quoted in* Crawford v. Washington, 541 U.S. 36, 60 (2004).
[17] *Crawford*, 541 U.S at 68.
[18] *Id.*
[19] *Id.* at 62.
[20] Davis v. Washington, No. 05-5224, slip op. at 19 (U.S. June 19, 2006).

wrongful act."[21] In *Reynolds*, a defendant charged with bigamy refused to reveal the whereabouts of one of his wives, who had been subpoenaed to testify against him.[22] Because the defendant caused her absence, the Court found he had forfeited his confrontation right and allowed the prosecutor to present the absent wife's testimony from an earlier trial, over the defendant's objection.[23] The Court emphasized that "[t]he rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong."[24]

Before *Crawford*, the typical application of forfeiture doctrine arose in the hearsay context in witness tampering cases, in which a defendant engaged in an affirmative act separate from the crime charged that resulted in a witness's unavailability to testify at trial.[25] In *United States v. Mastrangelo*, for example, the defendant was charged with importing drugs.[26] The sole witness against the defendant, who had previously testified against him before a grand jury, was killed on his way to the courthouse to testify at trial. The court determined that the defendant knew of the plot to kill the witness and admitted the witness's grand jury testimony at trial over the defendant's confrontation and hearsay objections. "Any other result," the court found, "would mock the very system of justice the confrontation clause was designed to protect."[27]

A. A Note on Federal Rule of Evidence 804(b)(6)

In 1997, the rationale of the *Mastrangelo* court was incorporated into Federal Rule of Evidence (FRE) 804(b)(6), which, according to the North Carolina and United States Supreme Courts, "codifies the forfeiture doctrine."[28] The rule sets forth the

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[21] 98 U.S. 145 (1879).
[22] *Id.* at 159–60.
[23] *Id.* at 160.
[24] *Id.* at 159.
[25] *See, e.g*, United States v. Cherry, 217 F.3d 811, 814–15 (10th Cir. 2000); United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999); United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997); United States v. Miller, 116 F.3d 641, 667–68 (2d Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1278–79 (1st Cir. 1996); Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982).
[26] 693 F.2d 269, 271 (2d Cir. 1982).
[27] *Id.* at 273.
[28] Davis v. Washington, No. 05-5224, slip op. at 19 (U.S. June 19, 2006); State v. Lewis, 360 N.C. 1, 26, 619 S.E.2d 830, 846 (2005), *vacated*, No. 05-8875, 2006 U.S. LEXIS 5201 (U.S. June

following exception to the hearsay rule: "Forfeiture by wrongdoing. 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."[29]

The Advisory Committee notes accompanying the rule make clear that the rule's purpose is to fill the "need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'"[30] The Advisory Committee notes go on to say that the wrongdoing supporting the forfeiture "need not consist of a criminal act."[31] The Fourth Circuit, in concert with the other federal courts of appeals, has held that in order for a court to apply a forfeiture under FRE 804(b)(6), it must find that "(1) the defendant engaged or acquiesced in wrongdoing (2) that was intended to render the declarant unavailable as a witness and (3) that did, in fact, render the declarant unavailable as a witness."[32]

Before *Crawford*, courts often collapsed the hearsay and confrontation forfeiture issues into a single analysis—an understandable approach, given the *Roberts* rule that out-of-court statements falling within a firmly rooted hearsay exception presumptively satisfied the Confrontation Clause. Justice Scalia made clear in *Crawford*, however, that when testimonial evidence is at issue, "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."[33] A number of courts, honing in on this language, have noted that what suffices for a forfeiture under the hearsay rules is not dispositive in determining what constitutes an equitable forfeiture of the confrontation right.[34] Thus, courts looking for guidance on how to apply the forfeiture

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30, 2006). Unlike many other states, North Carolina does not have a rule analogous to FRE 804(b)(6).

[29] FED. R. EVID. 804(b)(6).

[30] FED. R. EVID. 804(b)(6) advisory committee's note (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982)).

[31] *Id.*

[32] United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005); *see also* United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005); United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002); United State v. Dhinsa, 243 F.3d 635 (2d Cir. 2001); United States v. Emery, 186 F.3d 921 (8th Cir. 1999); United States v. White, 116 F.3d 903 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996).

[33] Crawford v. Washington, 541 U.S. 36, 61 (2004).

[34] *See infra* notes 44–49 and accompanying text.

exception to the Confrontation Clause should note that federal law interpreting the hearsay forfeiture rule may not control.

After *Crawford*, courts have expanded the confrontation forfeiture rule in two ways. First, some jurisdictions have held that an accused might be deemed to have forfeited the confrontation right even if the wrongdoing alleged to support the forfeiture was committed without the intent to silence the witness. Second, there are an increasing number of courts willing to apply a confrontation forfeiture reflexively.

B. Intent to silence

A number of courts have found that an equitable confrontation forfeiture, unlike a FRE 804(b)(6) hearsay forfeiture, does not include an intent-to-silence requirement. That is, defendants can be found to have forfeited the confrontation right if their wrongdoing brings about the witness's inability to testify, regardless of whether they specifically intended it to do so. Other courts have refused to dispense with the intent element. Professor Richard Friedman, a long-time advocate of the Confrontation Clause framework set forth in *Crawford*, has written that he does "not think it is necessary, for the [forfeiture] principle to apply, that rendering the declarant unavailable to testify have been the motivating, or the principal, purpose of the defendant's conduct."[35] Friedman argues that, in the realm of equitable forfeiture, there is no principled way to distinguish between acts intended to silence a witness and acts of vengeful, malicious, or even arbitrary violence—if the acts are wrongful, he argues, the defendant should not benefit from them.[36] Another commentator, on the other hand, argues that the defendant must act "intentionally, not accidentally or inadvertently, . . . with the specific intent that the prosecution be deprived of that witness's inculpatory evidence."[37] She bases her argument on language from *Reynolds v. United States* stating that the defendant must

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[35] Friedman, *supra* note 13, at 518 n.25.

[36] Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4 (2004).

[37] Joan Comparet-Cassani, Crawford *and the Forfeiture by Wrongdoing Exception*, 42 SAN DIEGO L. REV. 1185, 1189 (2005); *see also* James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 WM. & MARY BILL OF RTS. J. 1193, 1196 (2006) (arguing that courts' confusion about the intent-to-silence element stems from the improper use of the term "forfeiture" to describe what should be construed as a "waiver").

"voluntarily keep[] the [witness] away" in order for a forfeiture to arise.[38] In her view, because equitable principles should not apply until legal remedies have been exhausted,[39] "there must be something other than . . . the act underlying the criminal charge . . . which transgresses equitable standards of conduct in order for the forfeiture doctrine to apply."[40]

Relatively few post-*Crawford* courts have ruled on this precise issue in the context of a forfeiture of the confrontation right. As outlined below, the only federal court of appeals to have considered the confrontation forfeiture dispensed with the intent-to-silence requirement.[41] Lower federal and state courts are divided, and no North Carolina appellate court has reached the issue.[42]

1. Cases Finding No Intent-to-Silence Requirement.

In *United States v. Garcia-Meza*, the defendant admitted to stabbing his wife, but argued that his confrontation right survived because he did not kill her with the specific intent to prevent her from testifying against him.[43] The Sixth Circuit rejected this argument, holding that unlike FRE 804(b)(6), a confrontation forfeiture is "based on principles of equity" and does not "hinge on the wrongdoer's motive."[44]

The Court of Appeals of Michigan adopted the *Garcia-Meza* court's reasoning in *People v. Bauder*, holding that the intent-to-procure-unavailability requirement for forfeiture under state rules of evidence did not apply to the court's determination of an equitable forfeiture of the defendant's Confrontation Clause right.[45] Likewise in *State v. Gonzales*, a Texas appellate court saw no reason to limit the forfeiture rule to situations in

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[38] 98 U.S. 145, 158 (1878).
[39] *Id.*
[40] *Id.* at 1206.
[41] United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005).
[42] A North Carolina superior court judge determined in State v. Wiggins, No. 99 CRS 46567, 2005 WL 857109 (N.C. Super. Mar. 18 2005) (unpublished), that the rule of forfeiture by wrongdoing was inapplicable when there was no evidence that the victim's murder "was motivated in whole or in part by a desire to prevent her from testifying at a later trial," *id.* at *2.
[43] *Id.* at 370.
[44] *Id.* at 370–71 ("Though the Federal Rules of Evidence may contain [the intent-to-silence] requirement, the right secured by the *Sixth Amendment* does not.").
[45] People v. Bauder, 712 N.W.2d 506, 514 (Mich. Ct. App. 2005); *see also* People v. Jones, 714 N.W.2d 362, 366–67 (Mich. Ct. App. 2006) (holding state rules of evidence did not limit the court's ability to find an equitable forfeiture).

which the defendant intentionally prevented a witness from testifying.[46] The court held that a defendant, who shot a man and a woman in the process of stealing their vehicle—with no indication that he intended to silence future testimony—forfeited his confrontation right by the killings. He was therefore unable to object to the admission of one victim's pre-death statements to the police.[47]

In *People v. Giles*, the California Court of Appeal rejected the defendant's argument that a forfeiture by wrongdoing can only arise once an accused is charged with or under investigation for a crime and he "wrongfully procures the witness's absence from trial with the intent of preventing testimony about that crime."[48] Writing that forfeiture is an extension of the "equitable principle that no person should benefit from his own wrongful acts," and that it was "not confined by a statutory provision" comparable to FRE 804(b)(6), the court held that the defendant, by shooting the victim, forfeited his confrontation right "whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act."[49]

2. Cases Preserving the Intent-to-Silence Requirement

Although no federal court of appeals has held that the defendant must act with an intent to silence a witness in order for a confrontation forfeiture to arise, one federal district court and several state courts have reached that conclusion. There is not enough case law to discern a clear trend, but preservation of the intent-to-silence requirement appears to be a minority rule in the confrontation forfeiture context.

In *United States v. Jordan*, a memorandum opinion from the U.S. District Court for the District of Colorado, one inmate stabbed another in the recreation yard of a United States Penitentiary.[50] Before he died, the victim was questioned by police and twice identified the defendant as his attacker. The government argued that the declarant-

[46] 155 S.W.3d 603 (Tex. Crim. App. 2004).
[47] *Id.* at 609.
[48] 19 Cal. Rptr. 3d 843 (Ct. App. 2004), *as modified on denial of rehearing* (Nov. 22, 2004), *review granted*, 102 P.3d 930 (Cal. 2004) ("[W]e see no reason why the doctrine should be limited to such cases.").
[49] *Id.* at 848; *see also* People v. Ruiz, No. H026609, 2005 Cal. App. Unpub. LEXIS 6296, at *17–18 (Ct. App. July 19, 2005) (dispensing with the intent-to-silence requirement, and postulating that it arose "form the erroneous use of a 'waiver-by-misconduct' label").
[50] No. 04-CR-229-B, 2005 U.S. Dist. LEXIS 3289, at *1 (D. Colo. Mar. 3, 2005) (mem.).

victim's statements to the police were admissible because the defendant had forfeited his confrontation right by killing the victim. The court rejected this argument, holding that the "government's unsupported premise is that Defendant killed [the victim] to make sure [the victim] was not able to testify that [the defendant] was the one who stabbed him."[51] Lacking evidence that the defendant had acted with an intent to silence the victim, the court declined to apply a forfeiture.

The Supreme Judicial Court of Massachusetts held in *Commonweath v. Edwards* that a "defendant forfeits, by virtue of wrongdoing, the right to object to the admission of an unavailable witness's out-of-court statements on both confrontation and hearsay grounds on findings that . . . the defendant acted with the intent to procure the witness's unavailability."[52] Because there was little doubt on the facts in *Edwards* that the defendants had intentionally procured the witness's absence,[53] the court did not reach the issue of whether intent was strictly necessary for a forfeiture to arise in the confrontation context. The Court of Appeals of New York (the state's high court) held in *People v. Maher* (a pre-*Crawford* case) that forfeiture "cannot be invoked where . . . there is not a scintilla of evidence that the defendant's acts against the absent witness were motivated, even in part, by a desire to prevent the victim from testifying against him in court."[54]

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[51] *Id.* at *15.

[52] 830 N.E.2d 158 (Mass. 2005); *see also* People v. Melchor, 841 N.E.2d 420, 430 (Ill. App. Ct. 2005) (holding equitable forfeiture of the confrontation right, like the FRE 804(b)(6) forfeiture of the hearsay objection, includes a requirement that the defendant intend to procure the witness's unavailability).

[53] 830 N.E.2d at 163 (noting that the defendants were suspected of colluding with the witness in order procure his unavailability and refusal to testify).

[54] 677 N.E.2d 728, 731 (N.Y. 1997). A post-*Crawford* dictum from a New York lower court has retained the *Maher* rule. *See People v. Ayrhart*, No. 1986-35, 2005 N.Y. Misc. LEXIS 1447, at *8–9 (June 30, 2005) (noting that *Crawford* does not "bar relevant declarations of an absent declarant when it can be demonstrated that . . . the defendant was the cause of that unavailability and that he was motivated by the desire specifically to prevent the declarant from testifying."); *see also* State v. Wright, 701 N.W.2d 802, 815 (Minn. 2005) (noting in dicta that "[i]n Minnesota, a defendant will be found to have forfeited by his own wrongdoing his right to confront a witness against him if the state proves . . . he intended to procure the witness's unavailability"). The Court of Appeals of New Mexico likewise noted in *State v. Romero* that an equitable forfeiture of the confrontation right probably does not include an intent-to-silence element, but declined to depart from New Mexico Supreme Court precedent requiring a showing of intent. *See* 133 P.3d 842, *cert. denied*, No. 29,159, 2006 N.M. LEXIS 172 (N.M. Mar. 24, 2006) (citing State v. Alvarez-Lopez, 98 P.3d 699 (N.M. 2004), which "required the State to prove the defendant's intent to silence the witness").

C. Reflexive Application of the Forfeiture Rule

Courts also have broadened the forfeiture rule by applying it reflexively, meaning the predicate wrongdoing alleged to support the forfeiture, such as killing a potential witness, is the very act for which the accused is currently on trial. Courts are divided on whether or not a forfeiture should arise in this situation. The principal objection to this type of broadening is that allowing a forfeiture based on a preliminary determination that the defendant has committed the act for which he or she is on trial chips away at the presumption of innocence. Reflexive forfeiture is also subject to a bootstrapping[55] objection when the out-of-court statement in question is considered as evidence of the act allegedly supporting the forfeiture. Proponents of a broader forfeiture rule, including Professor Friedman, maintain that a reflexive forfeiture determination is no different in these respects than any other preliminary matter of admissibility decided by a judge.[56] This type of preliminary determination is, they argue, "closely analogous to that of a judge presiding over a conspiracy trial who decides that a statement may be admitted because it was made during the course of and in furtherance of a conspiracy—the very conspiracy being tried—of which the accused was a part."[57] Of note, the only *Crawford* brief to mention forfeiture advocated the reflexive approach.[58]

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[55] The term bootstrapping describes a piece of evidence "lift[ing] itself by its own bootstraps to the level of competen[ce]." Glasser v. United States, 315 U.S. 60, 75 (1942). For example, suppose victim (*V*) is shot by the defendant (*D*), and *V* tells the police, "*D* shot me." If *V* dies or is otherwise unavailable at *D*'s murder trial, *D* could presumably object to the introduction of *V*'s statement on confrontation grounds. The prosecution will respond by arguing that *D* forfeited the confrontation right by killing *V*. When a judge considers *V*'s statement as evidence that *D* did, in fact, commit the act alleged to support the forfeiture, the judge is said to have bootstrapped the evidence, i.e., allowed the statement to provide the basis for its own admissibility. *See* Joshua Deahl, Note, *Expanding Forfeiture Without Sacrificing Confrontation After* Crawford, 104 MICH. L. REV. 599, 620 n.100 (2005).

[56] *See* Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 252 (2002).

[57] *See id.* at 253 (citing Bourjaily v. United States, 483 U.S. 171 (1987), in which the court determined the existence of a conspiracy as a preliminary matter in order for the FRE 801(d)(2)(E) exemption for statements made by conspirators of an adverse party to apply).

[58] *See* Brief for Law Professors Clark, et al. as Amici Curiae Supporting Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958. The brief argued:

> If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, even though the act with which

Before considering reflexive application of the post-*Crawford* equitable forfeiture rule, it is instructive to note how courts have handled similar situations in the FRE 804(b)(6) hearsay forfeiture context. The Fourth Circuit in *United States v. Gray* applied an 804(b)(6) forfeiture reflexively in a murder case in which the defendant-wife killed the victim-husband in part to render him unavailable as a witness.[59] The *Gray* decision cleared up earlier confusion in the circuit about the proper interpretation of FRE 804(b)(6). In *United States v. Lentz*, for example, a pre-*Gray* case from the Eastern District of Virginia, the court initially found that statements of the decedent victim were inadmissible under 804(b)(6) because the defendant was on trial for her murder.[60] In a later proceeding, however, the district court wrote that after *Gray*, a showing that the defendant engaged or acquiesced in wrongdoing that led to the witness's unavailability will support a forfeiture of the hearsay objection, "regardless of whether the defendant happens to be on trial for the murder of the unavailable declarant, as here."[61] Some circuits have reached the same conclusion as the *Gray* court in the hearsay context,[62] while others have declined to apply FRE 804(b)(6) reflexively.[63]

Returning to the realm of confrontation forfeiture, the only federal court of appeals to have reached the issue—again, the Sixth Circuit in *United States v. Garcia-Meza*—found no bar to applying the doctrine reflexively.[64] In *Garcia-Meza*, the defendant admitted to stabbing the victim (the dispute at trial was whether the killing was premeditated), leaving the court with "no doubt that the Defendant [wa]s responsible for [the victim's] unavailability," and thus no difficulty in finding a forfeiture of the confrontation right. Two federal district courts have reached the same conclusion on

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> the accused is charged is the same as the one by which he allegedly rendered the witness unavailable.

Id. at *24 n.16.

[59] 405 F.3d 227, 241 (4th Cir. 2005).

[60] 282 F. Supp. 2d 399 (E.D. Va. 2002).

[61] United States v. Lentz, 384 F. Supp. 2d 934, 942 (E.D. Va. 2005).

[62] *See, e.g.*, United States v. Dhinsa, 243 F.3d 635, 653–54 (2d Cir. 2001); United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999).

[63] *E.g.*, United States v. Scott, 284 F.3d 758 (7th Cir. 2002), *cert. denied*, 537 U.S. 1031 (2002); United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996).

[64] 403 F.3d 364 (6th Cir. 2005).

similar facts.[65] Although the North Carolina Supreme Court has not reached the issue directly, it has seemingly endorsed another state high court that did apply a confrontation forfeiture reflexively.[66]

1. Cases Applying the Confrontation Forfeiture Reflexively

In *State v. Lewis*, Justice Brady of the North Carolina Supreme Court wrote an extensive dicta discussing the potential application of forfeiture doctrine in an assault case.[67] He emphasized a quotation from *State v. Meeks*, a leading case on the forfeiture exception in which the Kansas Supreme Court applied a reflexive confrontation forfeiture in a murder case:

> If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, *even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable*.[68]

The *Lewis* decision was vacated by the United States Supreme Court[69] and remanded to the Supreme Court of North Carolina for consideration in light of *Davis v. Washington*. However, because the victim's "official cause of death was pneumonia, and the State stipulated for purposes of the trial that defendant was not responsible for her death," forfeiture is not likely to be an issue considered on remand.[70]

In *People v. Giles*, another oft-cited case on the reflexive forfeiture issue, the California Court of Appeal held that the wrongdoing alleged to support a forfeiture may be the very crime for which the defendant is being tried.[71] In *Giles*, the defendant admitted to shooting the victim, but claimed to have acted in self-defense.[72] Having dispensed with the intent-to-silence requirement,[73] the trial court found the defendant had

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[65] *See infra* notes 83–89 and accompanying text.
[66] *See* State v. Lewis, 360 N.C. 1, 28, 619 S.E.2d 830, 847 (2005), *vacated*, No. 05-8875, 2006 U.S. LEXIS 5201 (U.S. June 30, 2006); *see also* notes 67–68 and accompanying text.
[67] 360 N.C. at 28, 619 S.E.2d at 847 ("In the instant case, whether defendant participated in procuring the unavailability of the victim and witness . . . is not an issue raised on appeal.").
[68] *Id.* at 27 (quoting State v. Meeks, 88 P.3d 789, 794 (Kan. 2004)) (emphasis in *Meeks*).
[69] No. 05-8875, 2006 U.S. LEXIS 5201 (U.S. June 30, 2006).
[70] *Lewis*, 360 N.C. at 28, 619 S.E.2d at 847 (2005).
[71] 19 Cal. Rptr. 3d 843 (Ct. App. 2004), *review granted*, 102 P.3d 930 (Cal. 2004).
[72] *Id.* at 845.
[73] *See supra* text accompanying note 49.

forfeited his confrontation right, and admitted statements made by the murder victim to the police during an earlier domestic disturbance involving the defendant.[74] In response to defendant's objection that a forfeiture under these circumstances amounted to a conclusion that "in essence . . . [he] is guilty of the very crime with which he is accused," the court noted that this type of forfeiture determination was no different from any preliminary question of admissibility determined by a judge, and that it would "not infringe in any way upon the ultimate question for the jury's resolution."[75]

As a way to cabin this expansive application of a forfeiture, the *Giles* court imposed several additional limitations on the doctrine. First, the court held that a forfeiture could only arise from the defendant's *intentional criminal act*. This is a narrower rule than that embodied in FRE 804(b)(6), under which a forfeiture of the hearsay objection can arise from "wrongdoing" that, according to the Advisory Committee note accompanying the rule, "need not consist of a criminal act."[76] Second, the court held that because forfeiture is equitable in nature, the trial court cannot apply the doctrine "when it would be unjust to do so."[77] Although the Giles court did not elaborate on this limitation, it suggested that even when the confrontation right has been forfeited, some unconfronted statements might be so unreliable as to be inadmissible. Other courts have discussed a similar limitation under the aegis of the Due Process Clause of the Fourteenth Amendment.[78] Finally, the court held that when a court finds a forfeiture based on the defendant's commission of an intentional criminal act, the jury shall not be advised of the finding.[79]

The California Supreme Court has granted review of the *Giles* case with the following questions presented:

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[74] *Giles*, 19 Cal. Rptr. 3d. at 845.
[75] *Id.* at 859 ("A court is not precluded from determining the preliminary facts necessary for an evidentiary ruling merely because they coincide with an ultimate issue in the case.").
[76] FED. R. EVID. 804(b)(6) advisory committee's note.
[77] *Giles*, 19 Cal. Rptr. at 850.
[78] *See, e.g.*, United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); State v. Hallum, 606 N.W.2d 351, 359 n.6 (Iowa 2000).
[79] *Giles*, 19 Cal. Rptr. at 851.

> 1. Did defendant forfeit his Confrontation Clause claim regarding admission of the victim's prior statements concerning an incident of domestic violence under the doctrine of "forfeiture by wrongdoing" because defendant killed the victim, thus rendering her unavailable to testify at trial?
>
> 2. Does the doctrine apply where the alleged "wrongdoing" is the same as the offense for which defendant was on trial?[80]

Citing *Giles*, the Texas Court of Appeals in *Gonzales v. State* found a defendant forfeited his confrontation right by killing the victim for whose murder he was on trial.[81] The court held that the defendant was "precluded from objecting to the introduction of [the victim's] statements on Confrontation Clause grounds because it was his own criminal conduct (in this case, murder) that rendered [the victim] unavailable for cross-examination."[82]

In *United States v. Johnson*, the defendant, on trial for murder, argued that the "wrongdoing [supporting a forfeiture] must be unrelated to the conduct for which she [wa]s on trial."[83] The U.S. District Court for the Northern District of Iowa disagreed, finding no Confrontation Clause bar to admitting the out-of-court statements of the victim-declarant. The defendant also argued that forfeiture should only apply when the alleged wrongdoing is committed against a "witness," meaning the act supporting the forfeiture could only occur *after* criminal charges were brought against the defendant and witnesses were scheduled to testify. The court rejected this argument, writing that "common sense shows that it is not the indictment of a defendant that makes someone a potential witness . . . , but the witness's knowledge of the defendant's illegal conduct."[84]

The U.S. District Court for the Southern District of Ohio met the reflexive forfeiture issue even more squarely in *United States v. Mayhew*.[85] In *Mayhew*, the court admitted an audio recording of a police interview of the defendant's ex-girlfriend's daughter, whom he had kidnapped and shot. In the interview, which took place in an ambulance shortly after the victim had been shot, the victim identified the defendant and

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[80] People v. Giles, 102 P.3d 930 (Cal. 2004).
[81] Gonzales v. State, 155 S.W.3d 603, 610 (Tex. Crim. App. 2004).
[82] *Id.*
[83] 354 F. Supp. 2d 939, 961 (N.D. Iowa 2005).
[84] *Id.* at 965.
[85] 380 F. Supp. 2d 961 (S.D. Ohio 2005).

gave information about other crimes he had committed.[86] The court concluded that "equitable considerations demand that a defendant forfeits his Confrontation Clause rights if . . . the declarant is unable to testify because the defendant intentionally murdered her, regardless of whether the defendant is standing trial for the identical crime that has caused the declarant's unavailability."[87]

The *Mayhew* court met the presumption-of-innocence and bootstrapping objections with the following reasoning. First, forfeiture is essential to prevent defendants from profiting from their own wrongdoing. Second, the jury will never learn of the judge's preliminary finding, and the jury will use different information and a different standard of proof[88] to decide the defendant's guilt. And third, courts make similar decisions in analogous evidentiary situations all the time, such as determining the existence of a conspiracy as a predicate to finding the defendant's participation in the conspiracy.[89]

Some other courts have yet to rule directly on reflexive forfeiture, but have mentioned in dicta that a forfeiture could be invoked against a defendant for the very act for which he or she is on trial.[90]

2. Cases Refusing to Apply the Confrontation Forfeiture Reflexively

The Court of Appeals of Michigan noted a distinction between cases like *United States v. Lentz*, in which the "defendant admitted to the killing and the trial is about the degree of responsibility," and cases in which the defendant denies doing the killing

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[86] *Id.* at 968.

[87] *Id.* at 968; *see also* People v. Baca, No. E032929, 2004 Cal. App. Unpub. LEXIS 11056 (Ct. App. Dec. 2, 2004); Commonwealth v. Morgan, No. CR05-F-2280, 2005 Va. Cir. LEXIS 189, at *7 (Va. Cir. Oct. 27, 2005) (finding, in the defendant's murder trial, that he forfeited his confrontation right by killing the victim, and thus admitting into evidence the murder victim's last-breath statements to the police identifying the defendant).

[88] See *infra* notes 94–101 and accompanying text for a discussion of the standard of proof applicable to a finding of a confrontation forfeiture.

[89] *Mayhew*, 380 F. Supp. 2d at 968 (citing Bourjaily v. United States, 483 U.S. 171, 175–76 (1987)).

[90] In *People v. Ayrhart*, for example, a New York court noted the possibility that "forfeiture by misconduct could apply in a murder case, so long as the prosecution could demonstrate by clear and convincing evidence . . . that the defendant was responsible for the decedent's unavailability and that he had been motivated by a desire to specifically prevent that victim from giving testimony." No. 1986-35, 2005 N.Y. Misc. LEXIS 1447, at *9 (June 30, 2005).

altogether. In *People v. Gilmore*, the court refused to apply a forfeiture in the latter situation, holding that to do so would "ignore the presumption of innocence and invade the province of the jury and make a preliminary finding of guilt."[91]

At least one pre-*Crawford* court held that even when the threats against a minor victim *were* intended to conceal wrongdoing, they could not support the forfeiture because they were the very crimes with which he was charged. In *State v. Jarzbek*, the defendant was charged with impairing the morals of a child and sexual assault of a minor. Over the defendant's confrontation objection, the trial court admitted the videotaped testimony of the victim. On appeal, the state argued that the defendant had forfeited his confrontation right by "intimidating her and threatening to punish her if she told anyone about the games she had played with him."[92] While acknowledging the fact that threats such as those made by the defendant could inhibit a witness, the Connecticut Supreme Court rejected the state's argument and held that the defendant could not be found to have forfeited the confrontation right by threats "made *during* the commission of the very crimes with which he is charged."[93]

D. Standard of Proof

Courts disagree on the standard of proof applicable to a finding of forfeiture by wrongdoing, although Justice Scalia noted in *Davis v. Washington* that federal courts using FRE 804(b)(6) "have generally held the Government to the preponderance-of-the-evidence standard."[94] The lone court of appeals to hold otherwise is the Fifth Circuit, which in *United States v. Thevis* required clear and convincing proof of the predicate act.[95]

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[91] No. 258334, 2006 Mich. App. LEXIS 868, at *6 (Ct. App. Mar. 23, 2006).
[92] 539 A.2d 1245, 1253 (Conn. 1987).
[93] *Id.* at 1253.
[94] Davis v. Washington, No. 05-5224, slip op. at 19 (U.S. June 19, 2006); *see also* United States v. Rivera, 412 F.3d 562 (4th Cir. 2005) ("[T]his court has addressed the proper burden of proof applicable to a Rule 804(b)(6) motion and joined the majority of circuits holding that the government need prove that the defendant engaged or acquiesced in the wrongdoing . . . by only a preponderance of the evidence."); United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005) (same).
[95] 665 F.2d 616, 630 (5th Cir. 1982). The *Thevis* court compared the waiver-by-misconduct problem to the admissibility of in-court identifications that follow tainted out-of-court

In applying the preponderance-of-the-evidence standard to forfeiture determinations, most courts analogize to determinations made under the co-conspirator exception to the hearsay rule under FRE 801(d)(2)(E). Under that rule, the proponent of the out-of-court statement must show by a preponderance of the evidence that a conspiracy embracing both the declarant and the defendant existed, and that the declarant uttered the statement during and in furtherance of the conspiracy.[96]

Although the standard of proof applied under FRE 804(b)(6) and other rules of evidence is instructive, it is not binding on courts as they determine equitable forfeitures of the confrontation right. New York, for example, has applied a clear and convincing standard for proof of the predicate wrongdoing alleged to support the forfeiture.[97] Interestingly, Professor Friedman—whose Confrontation Clause scholarship heavily influenced the *Crawford* Court and who argued one of the cases ruled on in *Davis*—has written that the preponderance-of-the-evidence standard is a "plausible" standard for forfeiture, but that a higher standard would probably be preferable.[98] In light of the importance of the confrontation right, Friedman and others have envisioned the higher standard of proof as a welcome and necessary corollary to forfeiture doctrine's post-*Crawford* expansion.[99]

Finally, when a forfeiture issue is raised, jurisdictions differ on whether the judge must hold a hearing to consider the evidence supporting the forfeiture, including the unavailable witness's out-of-court statements.[100] In the Fourth Circuit, "the district court

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identifications. *See* United States v. Wade, 388 U.S. 218 (1967) (requiring government to prove by "clear and convincing" evidence in such circumstances that the proposed in-court identification has a reliable independent basis).

[96] Bourjaily v. United States, 483 U.S. 171, 175–76 (1987).

[97] *See, e.g.*, People v. Ayrhart, No. 1986-35, 2005 N.Y. Misc. LEXIS 1447, at *9 (June 30, 2005) (citing People v. Johnson, 711 N.E.2d 967 (N.Y. 1999)).

[98] Friedman, *supra* note 13, at 519 ("[G]iven the importance of the confrontation right, the court should not hold that the accused has forfeited it unless the court is persuaded to a rather high degree of probability that the accused has rendered the declarant unavailable.").

[99] Daniel E. Monnat & Paige A. Nichols, *The Kid Gloves are Off: Child Hearsay After* Crawford v. Washington, 30 CHAMPION 18, 23 (2006).

[100] *E.g.*, People v. Giles, 19 Cal. Rptr. 3d 843 (Ct. App. 2004), *as modified on denial of rehearing* (Nov. 22, 2004), *review granted*, 102 P.3d 930 (Cal. 2004); Commonwealth v. Edwards, 830 N.E. 2d 158, 174 (Mass. 2005) (collecting cases).

need not hold an independent evidentiary hearing if the requisite findings may be made based upon evidence presented in the course of the trial."[101]

CONCLUSION

After *Crawford* and *Davis*, prosecutors are certain to put additional pressure on the forfeiture exception to the confrontation rule. *Sua sponte* mention of forfeiture by the United States and North Carolina Supreme Courts in their leading Confrontation Clause cases[102] seems an open invitation to courts and litigants alike to explore the doctrine's boundaries. Two initial fronts in this expansion of forfeiture doctrine are the elimination of the requirement that the wrongdoing be intended to silence a witness, and the growing acceptance of the reflexive application of forfeiture. These two trends are related; it is fairly easy to see that once a court dispenses with the intent-to-silence requirement, there is an increased likelihood that the act for which the defendant is on trial will also support a forfeiture of the confrontation right.

An interesting question arises in cases like *United States v. Garcia-Meza*, *State v. Gonzales*, and *People v. Giles*, in which the court dispenses with the intent-to-silence requirement *and* applies a forfeiture reflexively. If the confrontation forfeiture is broadened in both ways simultaneously, the defendant in nearly any murder case would be deemed to have forfeited the right to confront the deceased, and thus the victim's prior testimony could come in over a confrontation objection.

An increase in the standard of proof required to support a forfeiture might arise as a check on the expansion of the doctrine. Particularly in the context of reflexive application, a higher standard of proof helps answer the bootstrapping objection—even when taking the declarant's out-of-court statement into account, a judge is obviously less likely to find a forfeiture under a clear and convincing standard than under a preponderance regime. Although Justice Scalia took "no position on the standards

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[101] United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005) (citing United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000)).

[102] Davis v. Washington, No. 05-5224, slip op. at 19 (U.S. June 19, 2006); Crawford v. Washington, 541 U.S. 36, 61 (2004); State v. Lewis, 360 N.C. 1, 619 S.E.2d 830 (2005), *vacated*, No. 05-8875, 2006 U.S. LEXIS 5201 (U.S. June 30, 2006).

necessary to demonstrate such forfeiture" in *Davis*,[103] his reference to the standard applied under FRE 804(b)(6), which, he wrote, "codifies the forfeiture doctrine,"[104] seems at odds with his statement in *Crawford* that the Framers did not intend to leave "the Sixth Amendment's protection to the vagaries of the rules of evidence."[105] Nevertheless, courts may take the language from *Davis* as an invitation to import 804(b)(6) precedent into equitable forfeiture doctrine. Ultimately, to the extent that Professor Friedman's work has presaged other Confrontation Clause developments, his suggestions about what he believes to be the appropriate standard of proof are as good an indication as any of future trends.[106]

Ultimately, as forfeiture doctrine continues to expand in *Crawford*'s wake, judges will find themselves making prelimarily determinations about whether or not the defendant committed acts that rendered witnesses unavailable. These determinations, of course, will rest on whether or not there is reliable evidence of those acts. The scope the confrontation right will thus hinge on very nearly the same factor the Court found so objectionable in *Crawford*: reliability.[107]

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[103] *Davis*, slip op. at 19 (U.S. June 19, 2006).
[104] *Id.* at 18.
[105] *Crawford*, 541 U.S. at 61.
[106] *See supra* note 98 and accompanying text.
[107] *See Crawford*, 541 U.S. at 61 ("[W]e do not think the Framers meant to leave the Sixth Amendment's protection to . . . amorphous notions of 'reliability.'").