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**FORESHADOWING THE FUTURE OF
FORFEITURE/ESTOPPEL
BY WRONGDOING:
DAVIS V. WASHINGTON AND THE
NECESSITY OF THE DEFENDANT'S INTENT
TO INTIMIDATE THE WITNESS**

James F. Flanagan *

INTRODUCTION

Justice Scalia's refusal to define "testimonial" evidence or to explain the enigmatic reference to "forfeiture by wrongdoing" in *Crawford v. Washington*¹ continues to raise significant practical and policy issues in the reformulation of the right of confrontation, particularly in domestic violence prosecutions. Forfeiture by wrongdoing is the most significant exception to the exclusion of testimonial hearsay. Despite its importance, the only reference to the doctrine in *Crawford* appeared in Justice Scalia's discussion of the defects of the reliability standard of *Ohio v. Roberts*,² and was addressed only to distinguish forfeiture's essentially equitable rationale from *Roberts*' reliability standard. The Court adopted it in a parenthetical without any discussion of its elements or the extensive case law on the topic. The discussion is short: "For example, the rule of

* Oliver Ellsworth Professor of Federal Practice, University of South Carolina. L.L.B., University of Pennsylvania, 1967; A.B., University of Notre Dame, 1964. My thanks to Professor Robert Pitler for including me in the seminar and to the participants who provided many helpful comments on the issues discussed in this article.

¹ 541 U.S. 36 (2004).

² 448 U.S. 56 (1980).

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. *See Reynolds v. United States*, 98 U.S. 145, 158-59, 25 L.Ed 244 (1879).”³

Crawford & Beyond: Revisited in Dialogue, the second *Crawford* focused symposium organized by Professor Robert Pitler at Brooklyn Law School and held on September 29, 2006, explored the developing scope of “testimonial” and also focused on the aforementioned exception to *Crawford*, the constitutional doctrine originally known as waiver by misconduct,⁴ and now commonly referred to as forfeiture by wrongdoing.

This doctrine provides that a defendant who deliberately acts to prevent a witness from testifying loses any right to object to the admission of the witness’ testimonial hearsay statement on constitutional or evidentiary grounds.⁵ This doctrine has always

³ *Crawford*, 541 U.S. at 62.

⁴ The modern case law, beginning in 1976, generally referred to the doctrine as “waiver”, although some cases used the term “forfeiture”, and others used both terms interchangeably. Federal Rule 804(b)(6) which codified the doctrine as a rule of evidence was originally titled “waiver by misconduct”, but was later changed to “forfeiture by misconduct.” James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for “Forfeiture” by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1209-18 (2005) [hereinafter *The Misnamed Exception for “Forfeiture” by Wrongdoing*].

⁵ Several pre-*Crawford* articles discuss the origins of the doctrine and its promulgation in Federal Rule 804(b)(6). *See* James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459 (2003) [hereinafter *Forfeiture by Wrongdoing*] (discussing the development, elements and procedure of the doctrine originally known as waiver by misconduct codified in Federal Rule of Evidence 804(b)(6)); 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 Rule 804(b)(6)*, 80 NEB. L. REV. 891 (2001); Enrico B. Valdez & Shelley A. Nieto Dahlberg, *Tales from the Crypt: An Examination of Forfeiture by Misconduct and its Applicability to the Texas Legal System*, 31 ST. MARY’S L. J. 99 (1999); Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506

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required that the defendant specifically intend to prevent the witness from testifying, *and* was previously limited to cases of deliberate witness tampering.⁶ However, *Crawford's* characterization of this doctrine as “forfeiture” by wrongdoing has created an unfortunate misperception about its scope,⁷ prompting some courts to expand the doctrine beyond its original use in witness tampering cases to admit any victim’s testimonial hearsay, provided the defendant can be found responsible for the witness’ unavailability to testify for any reason.

This expansion of the doctrine thus creates a broad exception to the Confrontation Clause for all testimonial hearsay from an unavailable victim. In the lower courts, a conflict is emerging between this expanded rule of forfeiture and that expressed in *Reynolds v. United States*⁸ and the pre-*Crawford* cases, which held that the right of confrontation can only be lost by deliberate action aimed at preventing the witness from testifying.⁹

This article focuses on the intent element of the constitutional forfeiture or estoppel by wrongdoing doctrine. Part I briefly

(1997) [hereinafter *Chutzpa*]; John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U.L. REV. 835 (1996); Alycia Sykora, *Forfeiture by Misconduct: Proposed Federal Rule of Evidence 804(b)(6)*, 75 Or. L. Rev. 855 (1996); Paul T. Markland, *The Admission of Hearsay Evidence Where Defendant Misconduct Causes the Unavailability of a Prosecution Witness*, 43 AM. U. L. REV. 995 (1994); David J. Tess, *Losing the Right to Confront: Defining Waiver to Better Address a Defendant’s Actions and Their Effects on a Witness*, 27 U. MICH. J. L. REFORM 877 (1994).

⁶ See *infra* notes 25-34 and accompanying text.

⁷ Flanagan, *The Misnamed Exception for “Forfeiture” by Wrongdoing*, *supra* note 4, at 1218-23; *infra* notes 40-50 and accompanying text.

⁸ 98 U.S. 145 (1878).

⁹ Compare *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005) (adopting specific intent to prevent testimony), *and* *State v. Alvarez-Lopez*, 98 P.3d 699 (N.M. 2004), *cert. denied*, 125 S. Ct. 1334, 1335 (2005) (same) *with* *People v. Giles*, No. S129852, 2007 WL 635716 (Cal. Sup. Ct. March 5, 2007), (adopting strict forfeiture rule), *cert. granted*, 102 P.3d 930 (Cal. 2004); *Gonzalez v. State*, 155 S.W. 3d 603, 610 (Tex. Ct. App. 2004) (adopting strict forfeiture rule), *aff’d*, No. PD-0247-05, 2006 WL 1688345 (Tex. Crim. App. 2006) (advocating strict forfeiture rule but finding intent under the facts).

recapitulates the doctrine's development, with emphasis on the principal precedent, *Reynolds v. United States*,¹⁰ and follows with the effect that *Crawford*'s brief reference to the doctrine has had by implying that it could be used in any case in which the defendant can be held responsible for the witness's unavailability for any reason. Part II analyzes the post-*Crawford* opinion in *Davis v. Washington*¹¹ and concludes that the Court views the doctrine as directed against witness tampering, which is consistent with the pre-*Crawford* case law that required the defendant's intent to prevent testimony. Part III then addresses some procedural issues the Court will have to consider as it further defines the doctrine, including the causal link between the defendant's acts and the witness's unavailability for trial, the need for a hearing to determine admissibility, and whether additional foundation evidence beyond the hearsay itself is necessary to admit victim hearsay. Finally, Part III addresses the point that, under current applications of the doctrine, the finding that the defendant was responsible for the witness' unavailability to testify not only allows the prosecution to admit the absent witness' hearsay, but under Federal Rule of Evidence 804(a), precludes the defendant from offering any of the victim's hearsay. This article argues that the defendant's right to present a defense, most recently reaffirmed in *Holmes v. South Carolina*¹² overcomes this rule of evidence, so that a defendant cannot be precluded from offering admissible evidence under that rule simply because he was the procuring cause of the witness' unavailability.

¹⁰ *Reynolds*, 98 U.S. at 145.

¹¹ 126 S. Ct. 2266, 2270 (2006).

¹² 126 S. Ct. 1727, 1729 (2006).

FORESHADOWING THE FUTURE OF FORFEITURE 867I. ESTOPPEL BY WRONGDOING AND *CRAWFORD*'S EXPANSIVE EFFECT ON THE DOCTRINEA. *Short Note on Terminology and the Tyranny of Labels*

Words matter, and this article deliberately uses the term “estoppel by wrongdoing” to describe the doctrine by which a defendant may lose his right to confrontation by acting against a witness, rather than the term used by Justice Scalia in *Crawford*—“forfeiture by wrongdoing.”¹³ The principal reason is to avoid what Justice Cardozo called the “tyranny of labels.”¹⁴ The key issue in determining the scope of the doctrine is the necessity of the defendant’s intent to prevent the witness from testifying. Labeling the rule as one of forfeiture all but assumes that intent is irrelevant to the loss of the right to confrontation. The term *forfeiture* connotes an automatic and unintentional loss of a right upon the happening of a specified condition.¹⁵ The courts reaching this decision after *Crawford* rely heavily on the term forfeiture to justify that result.¹⁶ Moreover, this simplistic analysis makes it easy to ignore the historical and constitutional reasons for an intent element. I have argued that the constitutional doctrine is better viewed as one of waiver,¹⁷ but using that term may be viewed as assuming my

¹³ *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

¹⁴ *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934), *overruled by* *Mallow v. Hogan*, 378 U.S. 1 (1978).

¹⁵ Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214-15 (1977) (distinguishing between constitutional rights that may be unknowingly forfeited by a guilty plea from constitutional rights that can only be deliberately waived based upon the interest of the state in being able to retry the defendant).

¹⁶ *See, e.g.,* *People v. Giles*, No. S129852, 2007 WL 635716 at *9 (Cal. Sup. Ct. March 5, 2007) (rejecting defendant’s argument that doctrine is based on waiver by pointing to term “forfeiture” used in *Crawford*).

¹⁷ Flanagan, *The Misnamed Exception for “Forfeiture” by Wrongdoing*, *supra* note 4, at 1203-23 (tracing the history of the doctrine from its English antecedents to modern case law, the adoption of FED. R. EVID. 804(b)(6),

conclusion, just as forfeiture assumes that intent is irrelevant. To avoid a debate dominated by value laden terms, the Article uses the more neutral and more accurate name of estoppel by wrongdoing. *Crawford* mentioned its equitable origins¹⁸ and Professor Friedman has argued that the doctrine is based on estoppel.¹⁹ Estoppel accommodates both waiver and forfeiture while also incorporating the rich traditions of equity that may be necessary to define the contours of this important constitutional doctrine.²⁰ I will refer to the rule that one may lose confrontation rights by conduct against witnesses as one of estoppel by wrongdoing, or of confrontation estoppel, unless direct citation requires otherwise.

B. A Short History of the Constitutional Doctrine of Estoppel by Wrongdoing

*Reynolds v. United States*²¹ is the principal Supreme Court precedent used to determine whether the defendant loses the right to confrontation because of conduct against a witness. *Reynolds* was a case of “intentional” witness tampering because the defendant deliberately concealed the location of his second wife during a bigamy prosecution to prevent her from being subpoenaed in his second trial. The Court found that his acts were an intentional waiver of his right to confrontation. Chief Justice Waite noted that Reynolds had been given every chance to reveal the location of the witness, but chose not to do so: “Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption

and to *Crawford* and arguing that the cases are based on express or implied waiver, and that the description as “forfeiture” was made erroneously and without analysis).

¹⁸ *Crawford*, 541 U.S. at 62.

¹⁹ Friedman, *Chutzpa*, *supra* note 5 at 516-17.

²⁰ Flanagan, *The Misnamed Exception for “Forfeiture” by Wrongdoing*, *supra* note 4, at 1241-45 (arguing that equitable considerations help define the doctrine, and may impose obligations on the prosecution when it seeks to invoke it.).

²¹ 98 U.S. 145 (1878).

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is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own.”²² The opinion also used an estoppel rationale based upon the defendant’s deliberate choice to conceal the witness. The Constitution “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.”²³ The Court also stated that the doctrine is triggered by the defendant’s wrongful act: “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.”²⁴ The admitted wrong in *Reynolds* was the defendant’s deliberate concealment of the witness, which supported the waiver and estoppel rationales.

The constitutional rule stated in *Reynolds* was that a deliberate intention to prevent a witness from testifying supports the loss of confrontation as to that witness. This principle had little impact until the Sixth Amendment became applicable to the states nearly 90 years later in the 1960s.²⁵ In the 1970s, the lower courts began facing deliberate witness tampering in drug

²² *Id.* at 160.

²³ *Id.* at 158. The Court also recognized that the judicial process had legitimate and lawful responses to such conduct. “If therefore, when [the witnesses are] absent by [the defendant’s] procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.” *Id.* The modern cases, faced with more brutal organized crime and drug conspiracies see witness tampering as a direct attack on the judicial system. *See e.g.*, *United States v. White*, 116 F.3d 903, 912 (D.C. Cir. 1997) (stating that the “forfeiture principle, as distinct from the Confrontation Clause, is designed to prevent a defendant from thwarting the normal operation of the criminal justice system); *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984) (describing the murder of a witness as “behavior which strikes at the heart of the justice system itself”).

²⁴ *Reynolds*, 98 U.S. at 159.

²⁵ *See Pointer v. Texas*, 380 U.S. 400, 403 (1965) (“We hold today that the Sixth Amendment’s right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment”).

and organized crime cases and the prosecution often offered the absent witness' hearsay. The courts used *Reynolds* to resolve the defendant's Sixth Amendment claims by concluding that deliberate witness intimidation waived the right of confrontation.²⁶

As in *Reynolds*, the modern cases all involved acts against declarants because of their status as witnesses. All the cases mentioned the victim's status as an actual or potential witness or the defendant's acts against a witness.²⁷ As in *Reynolds*, the rationale was that the defendant expressly or implicitly waived the right by deliberate conduct inconsistent with actually desiring to confront that witness.²⁸ No pre-*Crawford* case held that the Confrontation Clause was satisfied merely because the defendant was the procuring but unintentional cause of the witness' absence.²⁹ In fact, the courts refused to extend estoppel by

²⁶ Flanagan, *Forfeiture by Wrongdoing*, *supra* note 5 at 466-69.

²⁷ *See, e.g.*, *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996) (stating that "intent to deprive prosecution of testimony need not be the actor's sole motivation."); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) (stating test is whether defendant procures a witness' absence); *United States v. Potamitis*, 739 F.2d 784, 788 (2d Cir. 1984) (stating defendant waives confrontation right "when his own conduct is responsible for a witness' unavailability at trial"); *Rice v. Marshall*, 709 F.2d 1100, 1101 (6th Cir. 1983) (stating declarant was an expected witness against defendant), *cert. denied*, 465 U.S. 1034 (1984); *United States v. Mastrangelo*, 693 F.2d 269, 271 (2d Cir. 1982) (stating declarant was murdered on way to testify); *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982) (stating 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 of confrontation"); *Steele v. Taylor*, 684 F.2d 1193, 1198-98 (6th Cir. 1982) (stating that defendant has procured his wife's refusal to testify); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979) (stating "the law should not permit an accused to subvert a criminal prosecution by causing *witnesses*, not to testify at trial") (emphasis added); *United States v. Carlson*, 547 F.2d 1346, 1358 (8th Cir. 1976) (noting that defendant acted only when he learned that declarant was going to testify at his trial). *See also*, *United States v. Jordan*, No. Crim, 04-CR-229-B 2005 WL 513501 at *6 (D. Colo. Mar. 3. 2005) (stating that no Fed. R. Evid. 804(b)(6) case holds that a murder whose byproduct is the unavailability of a witness is covered by the rule).

²⁸ *Id.*

²⁹ A few pre-*Crawford* cases, taken in isolation, may be viewed as

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wrongdoing to ordinary manslaughter cases,³⁰ or to apply it when the defendant acted for reasons unrelated to potential testimony.³¹ Thus, the Supreme Court in *Reynolds*, as well as federal and state appellate courts, articulated and applied a constitutional standard based on express or implied waiver or estoppel inferred from the defendant's knowing misconduct against a potential witness. This approach was consistent with prior constitutional cases because the Supreme Court has always viewed the loss of confrontation rights as based on principles of

supporting a true forfeiture theory. One court held that a defendant's slaying of a government agent in an exchange of gunfire during a bungled arrest was sufficient to avoid a Confrontation Clause claim. Interestingly, the court described it as a waiver of his right of confrontation. *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985). Another speaks of the doctrine without mentioning an intent to prevent testimony. *See United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (convicting defendant of intentionally tampering with declarant/witness under federal witness tampering statute). *United States v. Miller*, 116 F.3d 641, 648 (2d Cir. 1997) (suggesting that intent was relevant but not necessary).

³⁰ *Commonwealth v. Laich*, 777 A.2d 1057, 1064 n.4 (Pa. 2001) (rejecting misconduct exception in manslaughter prosecution); *Wyatt v. State*, 981 P.2d 109, 115 n.11 (Alaska. 1999) (recognizing that forfeiture by misconduct does not apply to domestic homicide); *Cf. State v. Jarzbek*, 529 A.2d 1245, 1253 (Conn. 1987) (stating that "The constitutional right of confrontation would have little force, however, if we were to find an implied waiver of that right in every instance where the accused, in order to silence his victim uttered threats during the commission of the crime for which he is on trial."); *People v. Maher*, 677 N.E.2d 728, 731 (N.Y. 1997) (holding that the exception does not apply to murder unrelated to testimony). *People v. Flowers*, 667 N.Y.S.2d 546, 547 (App. Div. 1997) (same). *See also Commonwealth v. Edwards*, 830 N.E.2d 158, 175 (Mass. 2005) (refusing to apply forfeiture doctrine to defendants who did not arrange for witness's absence).

³¹ *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979) (holding that accessory who did not threaten defendant did not waive confrontation rights); *United States v. Houlihan*, 887 F. Supp. 352, 363-64 (D. Mass. 1995) (holding that codefendant Fitzgerald participated in murder as favor for another gang but did not intend to prevent victim from testifying); *State v. Hansen*, 312 N.W.2d 96, 105-06 (Minn. 1981) (finding no proof that this defendant threatened witnesses).

waiver, express or implied, rather than a true forfeiture.³²

Furthermore, the estoppel or waiver rationale was doctrinally necessary to address Confrontation Clause claims because the reliability standard of *Ohio v. Roberts*³³ was inapplicable to victim hearsay offered under estoppel by wrongdoing. As Justice Scalia noted in *Crawford*, there was never a claim that intimidated witness statements were reliable,³⁴ and this evolving doctrine could not be considered a “firmly rooted” hearsay exception. Lacking any claim of reliable hearsay to satisfy *Roberts*, the only rationale to support the loss of confrontation rights was waiver or estoppel.

In practice, however, constitutional analysis became largely irrelevant. With estoppel by wrongdoing the courts soon concluded that a factual finding of witness tampering resolved both constitutional and evidence claims, shifting the focus to the evidence of witness tampering.³⁵ *Roberts* essentially eliminated confrontation claims arising from other hearsay because its reliability standard was easy to meet under the rules of evidence.³⁶ Thus, confrontation issues became evidence issues.³⁷

³² Flanagan, *The Misnamed Exception for “Forfeiture” by Wrongdoing*, *supra* note 4, at 1223-31.

³³ 448 U.S. 56 (1980). Prior to *Roberts* the courts seemed to be using a reliability standard. See *United States v. Carlson*, 547 F.2d 1346, 1357-58 (8th Cir. 1976) (discussing indicia of reliability); Mueller & Kirkpatrick, EVIDENCE § 8.85 at 971 (3rd ed. 2003) (noting that the Court favored the reliability standard).

³⁴ *Crawford*, 541 U.S. at 62.

³⁵ *United States v. Balano*, 618 F.2d 624, 626 (10th Cir. 1979) (“A valid waiver of the constitutional right is a fortiori a valid waiver of an objection under the rules of evidence.”). Other courts quickly followed *Balano*. See *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982); *United States v. Emery*, 186 F.3d 921 926-27 (8th Cir. 1999); *United States v. White*, 116 F.3d 903, 911-12 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1279-80 (1st Cir. 1996); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992).

³⁶ *Crawford*, 541 U.S. at 62-69.

³⁷ Several of the speakers at the symposium noted this trend. See Margaret Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86

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Reflecting this trend, Federal Rule of Evidence 804(b)(6), originally titled Waiver by Misconduct but promulgated as Forfeiture by Wrongdoing, was adopted in 1996.³⁸ Nevertheless, both the evidence rule and the constitutional rule required a specific intent to procure the unavailability of the witness.³⁹ Similarly, the states adopted an intent element when they promulgated rules of evidence⁴⁰ or adopted the estoppel doctrine by judicial decision.⁴¹ Consequently, the rules of evidence stated the constitutional standard for loss of confrontation rights.⁴²

GEO. L. REV 1011 (1998); Randolph A. Jonakait, *The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615 (1992).

³⁸ Advisory Committee on Evidence Rules, Minutes of the Meeting of April 22, 1996.

³⁹ See *Id.* The rule does not exclude as hearsay any “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.” *Id.* See generally, FED. R. EVID. 804(b)(6).

⁴⁰ MIL. R. EVID. 804(b)(6); UNIF. R. EVID. 804(b)(6); DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(B)(6); PA. R. EVID. 804(b)(6). TENN. R. EVID. 804(b)(6) (deleting “acquiescence”). The governor of Maryland proposed a comparable provision in 1994, but it was not adopted. Paul W. Grimm & Jerome E. Deise, Jr., *Hearsay, Confrontation, and Forfeiture by Wrongdoing: Crawford v. Washington, A Reassessment of the Confrontation Clause*, 35 U. BALT. L.F. 5, 41 (2004). After *Crawford*, Oregon amended its version of the evidence rule to delete the intent requirement when the party caused the witnesses’ unavailability by criminal conduct. OR. REV. STAT. 40.465. California enacted an estoppel provision in 1985 that was more restrictive than rule 804(b)(6). CAL. EVID. CODE § 1350.

⁴¹ See *Steele*, 684 F.2d at 1199-1200 (noting unreported Ohio Court of Appeals opinion admitted evidence because of threats); *State v. Valencia*, 924 P.2d 497 (Ariz. Ct. App. 1996); *Devonshire v. United States*, 691 A.2d 165, 166 (D.C. 1997); *State v. Hallum*, 606 N.W.2d 351 (Iowa 2000); *State v. Gettings*, 769 P.2d 25 (Kan. 1989); *State v. Magouirk*, 539 So. 2d 50, 64-66 (La. Ct. App. 1988) (on rehearing); *State v. Black*, 291 N.W.2d 208, 213-14 (Minn. 1980); *State v. Sheppard*, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984) (applying waiver by threats to overcome defendant’s objections to use of video by child witness); *Matter of Holtzman v. Hellenbrand*, 460 N.Y.S.2d 591, 597-98 (App. Div. 1983).

⁴² Some courts depreciate the importance of Rule 804(b)(6) in determining the constitutionality of the doctrine of estoppel by wrongdoing by

Thus, the history of estoppel by wrongdoing from *Reynolds* to the modern case law, including the rules of evidence, always required the defendant's knowledge of the declarant's status as a witness and intentional efforts to prevent that witness from testifying.⁴³

Crawford did not discuss or change the constitutional standard for estoppel by wrongdoing. In the two sentences that mentioned the doctrine, Justice Scalia cited as authority only *Reynolds*, a witness tampering case. Perhaps relying on the title of Rule 804(b)(6), however, he referred to the doctrine as forfeiture by wrongdoing,⁴⁴ which had immediate consequences.

Forfeiture implied that intent was irrelevant, and that confrontation rights could be terminated whenever the witness' absence could be traced to the defendant, although a by-product and unintended consequence of the defendant's act.⁴⁵ In particular, it suggested that confrontation rights could be lost, not only in witness tampering cases, but in any prosecution where the defendant could arguably be found responsible for the witness' absence. Professor Richard Friedman had argued that the intent to prevent testimony was unnecessary for forfeiture by wrongdoing.⁴⁶ Moreover, some language in *Reynolds*, if it were

arguing that a constitutional standard should not depend upon the "vagaries of the Rules of Evidence." *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005). In doing so, they ignore the history which clearly shows that the evidence rule is the constitutional standard.

⁴³ See *supra* notes 25-34 and accompanying text.

⁴⁴ The two sentences were short and enigmatic. "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. See *Reynolds v. United States*, 98 U.S. 145, 158-59, 25 L.Ed 244 (1879)." *Crawford*, 541 U.S. at 62 (2004).

⁴⁵ Adam M. Krischer, *Though Justice May be Blind, It Is Not Stupid*, 38 PROSECUTOR 14 (Nov. Dec. 2004) (arguing that perpetrators of domestic violence automatically forfeit their right to confront their victims).

⁴⁶ Friedman, *Chutzpa*, *supra* note 5, at 518 n. 25 (taking into account defendant's accidental collision affecting witness on way to court); *Id.* at 519 n. 30 (noting that legitimate advice to claim a privilege may avoid forfeiture only if witness is a close relative). Fed. R. Evid. 804(b)(6) used the term in the title, and it first appeared in a footnote in an opinion where the Sixth

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freed from its facts and the other rationales that supported the decision, seemed to justify a strict approach because “no one shall be permitted to take advantage of his own wrong.”⁴⁷ Since *Crawford* directly impacted domestic violence prosecutions, it was inevitable that the outer limits of forfeiture would be emphasized in those cases.⁴⁸

The immediate reaction of some state courts was the application of estoppel by wrongdoing to homicide cases, in part because this approach avoided difficult decisions on what constitute testimonial statements.⁴⁹ The first case interpreting

Circuit mused about its underlying rationale, while finding specific intent to prevent the witness from testifying in that case. *Steele*, 684 F.2d at 1201 n.8.

⁴⁷ *Reynolds*, 98 U.S. at 159.

⁴⁸ Much of the commentary after *Crawford* focused on domestic violence cases and the utility of the forfeiture exception in those prosecutions. See, e.g., Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 212 (2005); Myrna Raeder, *Remember the Ladies and the Children Too*, 71 BROOK. L. REV. 311 (2005); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005); Matthew M. Stabb, *Child's Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 108 W. VA. L. REV. 501 (2005); Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?* 28 SEATTLE U. L. REV. 301 (2005); Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, 20 CRIM. JUST. 24 (2005); Adam M. Krischer, *Though Justice May be Blind, It Is Not Stupid*, 38 PROSECUTOR 14 (Nov. Dec. 2004); Allie Phillips, *A Flurry of Court Interpretations: Weathering the Storm After Crawford v. Washington*, 38 PROSECUTOR 37 (Nov./Dec. 2004).

⁴⁹ Many of the post-*Crawford* cases used forfeiture to avoid the testimonial issue. *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (avoiding decision on whether excited utterance was testimonial); *People v. Baca*, No. E032929 2004 WL 2750083 at *10 (Cal. Ct. App. Dec. 2 2004) (avoiding whether identification was testimonial); *People v. Jiles*, 18 Cal. Rptr. 3d 790, 795 (Cal. Ct. App. 2004) (avoiding issue of dying declaration as testimonial); *State v. Meeks*, 88 P.3d 789, 793-94 (Kan. 2004) (avoiding issue of whether response to police question was testimonial); *People v. Giles*, 19 Cal. Rptr. 3d 843 (Cal. Ct. App. 2004) (avoiding issue of whether casual statements to police are testimonial); *Gonzalez v. State*, 155 S.W.3d 605, 609 (Tex. Ct. App. 2004) (avoiding issue of whether statements to police were testimonial).

Crawford, State v. Meeks,⁵⁰ was decided six weeks after *Crawford*. In *Meeks*, the Supreme Court of Kansas admitted the homicide victim's identification of his assailant.⁵¹ The court extended earlier witness tampering precedent in Kansas to uphold the introduction of the decedent's identification of his assailant, principally relying on the maxim that "the law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him."⁵² The California Court of Appeals had a similar response in *People v. Giles*,⁵³ a domestic homicide case where it was conceded that there was no evidence that the defendant killed the victim to prevent her testimony.⁵⁴ The court peremptorily rejected the defendant's argument that such proof was required by precedent, in favor of an argument relying on forfeiture principles.⁵⁵ The California Supreme Court affirmed the decision, again relying principally on its title as a forfeiture.⁵⁶ Several other state courts⁵⁷ and at

⁵⁰ 88 P.3d 789 (Kan. 2004).

⁵¹ *Id.* at 792-93.

⁵² *Id.* at 794; *State v. Gettings*, 769 P.2d 25, 28 (Kan. 1989).

⁵³ 19 Cal. Rptr. 3d. 843 (Cal. App. 2d Dist. 2004), *aff'd* No. S129852, 2007 WL 635716 at * 9 (Cal. Sup. Ct. March 5, 2007),

⁵⁴ *Id.* at 848.

⁵⁵ *Id.* The court further noted that:

Although the [*Houlihan*] opinion contains language suggesting that a killing must be motivated by a desire to silence the victim to trigger a forfeiture of the right of confrontation, we see no reason why the doctrine should be so limited to such cases. Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.

Id. at 843, 848, 848n.3 (citing *U.S. v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996)).

⁵⁶ "Defendant's argument relating to the intent requirement rests on the premise that the forfeiture by wrongdoing doctrine is, in essence, not based

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least one federal court⁵⁸ also adopted the strict view that any act by the defendant which had the effect, albeit unintended, of preventing testimony would trigger a forfeiture of confrontation rights. As in *Meeks* and *Giles*, these courts relied on the argument that the defendant should not benefit from his wrongful conduct, ignoring the witness tampering facts in *Reynolds* and other cases that were based on principles of waiver and estoppel flowing from the defendant's voluntary choice.⁵⁹

on broad forfeiture principles, but instead on waiver principles. . . . However, the United States Supreme Court has characterized the rule in question as a 'forfeiture' that 'extinguishes confrontation claims on essentially equitable grounds,' not a waiver (*Crawford, supra*, 541 U.S. at [p. 62, 124 S. Ct. 1354].) *People v. Giles*, No. S129852, 2007 WL 635716 at * 9 (Cal. Sup. Ct. March 5, 2007).

⁵⁷ *People v. Moore*, 117 P.3d 1, 5 (Colo. Ct. App. 2004); *Gonzales v. State*, 155 S.W. 3d 603 (Tex. Ct. App. 2004), *aff'd*, No. PD-0247-05 2006 WL 1688345 (Tex. Crim. App. 2006) (finding intent to prevent testimony and deferring decision on whether such intent is required); *State v. Jensen*, 727 N.W.2d 518 (Wisc. 2007).

⁵⁸ *United States v. Garcia-Meza*, 403 F.3d 364, 370-71 (6th Cir. 2005).

⁵⁹ *Id.* (arguing that the defendant, regardless of intent, "would benefit through his own wrongdoing if such a witness' statements could not be used against him"); *People v. Baca*, No. E032929 2004 WL 2750083 at *12 n.6 (Cal. Ct. App. 2004) (questioning intent element by contending that if the forfeiture rule is to further the maxim that "no one shall be permitted to take advantage of his own wrong (citation omitted) than the motivation for the wrongdoing is irrelevant."); *People v. Moore*, 117 P.3d 1, 5 (Colo. Ct. App. 2004) (stating that under the forfeiture rule a person is not to benefit from his wrongful prevention of testimony); *Gonzales v. State*, 155 S.W.3d. 603, 610 (Tex. Ct. App. 2004) (adopting language of *People v. Giles*, 19 Cal. Rptr. 3d at 848, that a defendant whose wrongful act renders a witness unavailable for trial benefits from his conduct if he can use the witness' unavailability to exclude otherwise admissible hearsay statements regardless of intent). The maxim also is cited in many cases where the intent to prevent testimony was required. In those cases, however, the courts also referred to waiver, estoppel, and other rationales that emphasized the deliberate nature of the act. *E.g.*, *United States v. Dhinsa*, 243 F.3d 635, 652 (2d Cir. 2001) (citing maxim and equity and need for fit incentives for defendants); *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982) (finding waiver by deliberate murder of witness and citing maxim); *United States v. Mastrangelo*, 693 F.2d 269, 272-73 (2d Cir. 1982) (citing maxim but remanding for consideration of whether defendant waived right by participating in murder of witness in any

This post-*Crawford* case development expanded the doctrine beyond prior precedent and history, creating new questions for the Court to address.

II. *DAVIS V. WASHINGTON*—FORESHADOWING THE FUTURE OF THE ESTOPPEL DOCTRINE

*Davis v. Washington*⁶⁰ was the Supreme Court's first return to *Crawford* and provided an opportunity to address the scope of the terms "testimonial" and estoppel by wrongdoing. Justice Scalia authored the opinion as he had in *Crawford*, and he narrowed the definition of testimonial, all but stating that the estoppel doctrine is limited to witness-tampering cases.⁶¹ The issue in *Davis*,⁶² and its companion case *Hammond v. Indiana*,⁶³ was whether statements made in a 911 call in *Davis*, and at the crime scene in *Hammond*, were testimonial statements under *Crawford*.⁶⁴ The majority drew the line based on the objective purpose of the inquiry.

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁶⁵

way); *United States v. Carlson*, 547 F.2d 1346, 1358-60 (8th Cir. 1976) (citing maxim and also stating that defendant waived right of confrontation by intimidation when he learned that witness would testify, as well as estoppel principles).

⁶⁰ 126 S. Ct. 2266 (2006).

⁶¹ See *infra* notes 70-92 and accompanying text.

⁶² *Davis v. Washington*, 126 S. Ct. 2266 (2006).

⁶³ *Id.*

⁶⁴ *Id.* at 2270.

⁶⁵ *Id.* at 2273-74.

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The Court in *Davis* held that the victim's identification of her assailant to the operator in the initial stage of a 911 call was not testimonial because it was made to the operator during an ongoing emergency.⁶⁶ The statements in *Hammond*, on the other hand, were deemed testimonial, having been made after the police arrived, had separated the husband-assailant from the victim, and learned from her that things were "fine." The Court concluded that the police were not reacting to an emergency but were investigating and establishing the historical facts of the situation.⁶⁷ *Davis*' broad definition of testimonial statements reflects an expansive view of the Confrontation Clause.

Perhaps anticipating criticism for the broad definition of testimonial statements, the Court discussed the estoppel by wrongdoing doctrine in section IV of its opinion in *Davis*. The states and others had argued that domestic violence cases required "greater flexibility in the use of testimonial evidence"⁶⁸ and that the higher incidence of witness intimidation in those cases required a narrow definition of testimonial. "When this occurs, the Confrontation Clause gives the criminal a windfall."⁶⁹ This windfall argument is another form of the rationale in *Reynolds*⁷⁰ that "no one shall be permitted to take advantage of his own wrong" and is often relied upon to justify on strict forfeiture grounds the loss of confrontation rights in the all too typical domestic homicide case.⁷¹

The Court rejected the windfall argument and its analogue, the benefits rationale: "We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free."⁷² Constitutional rights would have no meaning if they were available only when they provided no protection.⁷³ Moreover, to consider constitutional rights as

⁶⁶ *Id.* at 2276-78.

⁶⁷ *Id.* at 2278-79.

⁶⁸ *Davis v. Washington*, 126 S. Ct. 2266, 2279 (2006).

⁶⁹ *Id.* at 2280.

⁷⁰ 98 U.S. 145, 159 (1878).

⁷¹ *See supra* note 61.

⁷² *Davis*, 126 S. Ct. at 2280 (citation omitted).

⁷³ Michael J. Polelle, *The Death of Dying Declarations in a Post-*

benefits of the crime misstates their importance as fundamental, pre-existing protections inherent in citizenship.⁷⁴ In rejecting the windfall and benefits arguments, the Court rejected the principal rationale underlying the strict rule of forfeiture, which views intent as irrelevant.

The *Davis* opinion then discussed estoppel by wrongdoing in a context that emphasized its witness tampering underpinnings.

But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have a duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*; that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.”⁷⁵

That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.⁷⁶

The opinion identifies the evil addressed by the estoppel doctrine as acts that undermine the judicial process, specifically by procuring or coercing silence from witnesses. The terms “coercing” and “procuring” refer to intentional action specifically directed toward achieving a goal.⁷⁷ In this context,

Crawford World, 71 MO. L. REV. 285, 308 (2006) (describing constitutional rights as virtual rights if they are forfeited at the point where they are most needed).

⁷⁴ *Faretta v. California*, 422 U.S. 806, 819, 829-30 (1975) (identifying notice, confrontation, and compulsory process as personal rights). Constitutional rights are not “benefits” of a crime. Defendants do not commit crimes to obtain constitutional rights. They are preexisting and inherent rights accorded defendants in our courts by the Constitution.

⁷⁵ 541 U.S. at 62, 124 S. Ct. 1354 (citing *Reynolds*, 98 U.S. at 158-59).

⁷⁶ *Davis*, 126 S. Ct. at 2280.

⁷⁷ Procure is defined as “to care for, take care of, attend to, look after; to put forth or employ care or effort; to do one’s best; to endeavor, labour, to use means; take measures.” VII Oxford English Dictionary (1989). Coerce is defined as: “to constrain or restrain (a voluntary or moral agent) by the

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those terms describe purposeful acts intended to produce the silence of the witnesses. The words, and the Court's discussion, are inconsistent with any theory that the defendant's intent is irrelevant or that merely being the proximate cause of the witness' unavailability is sufficient grounds to support the loss of confrontation rights.

The paragraph's focus on judicial integrity reflects the particularly heinous nature of witness tampering and its effect on the judicial process. Witness tampering attacks the judicial process because the consequences multiply beyond the original perpetrator and victim to other witnesses against that perpetrator, and its *in terrorum* effect reverberates among all those who might testify against violent criminals. Not only may the defendant be guilty of the original crime, but witness intimidation is an additional violation that makes it more difficult to prosecute the first crime, as well as the subsequent intimidation of the witnesses to that crime. In contrast, an ordinary homicide, while a tragedy for the victim and the family and a crime against society that demands prosecution, is not an attack on the judicial process, which remains available and unhindered in determining if criminal sanctions are appropriate.

By pointing to the judicial process, the Court necessarily limits estoppel by wrongdoing to the defendant's deliberate acts taken after the crime because of the victim's status as a potential witness, and intended to prevent that testimony. The judicial process begins with the crime and includes the investigation that gathers the evidence and introduces it at trial.⁷⁸ Justice Scalia

application of force, or by authority resting on force; to constrain, to compel obedience by forcible means." *Id.* at Vol. III.

⁷⁸ The judicial process includes pre-indictment activity because Constitutional rights, such as the Fourth Amendment, provide constant protection and are enforced later at the trial. *Mapp v. Ohio*, 367 U.S. 643 (1961) (suppressing evidence seized as the result of an illegal search). Likewise, the *Miranda* warnings, and Due Process restrictions against suggestive photographic or lineup identifications, apply before formal charges are instituted. *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring warnings about self-incrimination and right to counsel when questioned in custody); *Simmons v. United States*, 590 U.S.377 (1968) (holding that impermissibly suggestive identifications are subject to the Due Process Clause if made

states that constitutional rights are balanced with responsibilities. The defendant does not have to cooperate with the state in either the investigation or the trial.⁷⁹ The state may not compel self-incrimination,⁸⁰ and at trial the defendant may stand mute⁸¹ and the government has the burden of proving guilt beyond a reasonable doubt.⁸² But neither may the defendant interfere with the state's efforts by making witnesses to the crime unavailable. "One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."⁸³ The Court is clearly speaking of the post-crime activities of the defendant. The estoppel doctrine applies only when the defendant interferes with the judicial process; there is no suggestion that it applies when the defendant's acts toward the victim are unrelated to potential testimony. Any homicide investigation and prosecution by its nature takes place without the decedent, but the commission of that crime has never been considered sufficient to automatically lose any constitutional right, including the right of confrontation.⁸⁴ If it were, it would smack of dispensing with

before counsel appointed). The Sixth Amendment protections of the right of counsel, to proper venue, and to confrontation, are trial rights that are triggered by the formal charges. The estoppel doctrine also applies before arrest or formal charges. It even applies although an investigation is not pending, and there is no indictment, so long as the defendant acts because there is a possibility that the witnesses would testify. *United States v. Miller*, 116 F.3d 641, 668 (2d Cir. 1997) (holding that an ongoing criminal proceeding in which declarant was to testify is not required); *United States v. Houlihan*, 92 F.3d 1271, 1279-80 (1st Cir. 1996) (holding estoppel by wrongdoing applies to potential witnesses). It would be an artificial distinction to suggest that witness intimidation before arrest, arraignment, or indictment is not an attack on the integrity of the judicial system.

⁷⁹ *Davis*, 126 S. Ct. at 2280.

⁸⁰ U.S. Const. amend. V.

⁸¹ *Griffin v. California*, 380 U.S. 609 (1965) (holding that the defendant's right not to testify includes the right not to have comment on that decision).

⁸² *In re Winship*, 397 U.S. 358, 375 (1970) (holding that proof beyond a reasonable doubt is required by the Due Process clause).

⁸³ *Davis*, 126 S. Ct. at 2280.

⁸⁴ The dying declaration exception to the hearsay rule may also be an exception to the testimonial standard established by *Crawford*, 541 U.S. at 56

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constitutional rights because of a defendant's obvious guilt. Even those post-*Crawford* cases that argue for a strict forfeiture rationale do not justify it as an attack on the judicial process. Rather, they maintain that the defendant should not benefit from his own wrongdoing,⁸⁵ that is, the original homicide.

The second paragraph of section IV of the *Davis* opinion provides direct evidence that the estoppel doctrine is limited to deliberate witness intimidation.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard. State courts tend to follow the same practice. Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that 'hearsay evidence, including the unavailable witness's out-of-court statements, may be considered.' The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the 'reliability' of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of the courts to protect the integrity of their proceedings.⁸⁶

That the opinion states that Federal Rule of Evidence 804(b)(6) codifies the constitutional estoppel by wrongdoing doctrine necessarily means that it is aimed at witness tampering, and that it also includes the specific intent requirement found in that rule. The Advisory Committee to the Federal Rules of Evidence concluded early in its discussions that "codifying the

n.6. But it has never been viewed as forfeiture of constitutional rights. The homicide is only one element of the exception, and standing alone, does not lead to the admissibility of the dying declaration. *See infra* notes 105-110 and accompanying text.

⁸⁵ *See supra* note 61.

⁸⁶ *Davis*, 126 S. Ct. at 2280 (citations omitted).

doctrine was desirable as matter of policy in light of the large number of witnesses who are intimidated or incapacitated so they do not testify.”⁸⁷ The rule was a direct response to almost 20 years of federal case law dealing with witness intimidation in organized crime and drug conspiracies. As drafted and as adopted, the Rule always required that the defendant specifically intend to prevent the witness from testifying.⁸⁸ The Advisory Committee thought that the limited application of the Rule was so clear that it rejected a comment to the Rule specifically mentioning witness tampering.⁸⁹ Given the rejection of the windfall argument, the focus on judicial integrity, and the statement that Rule 804(b)(6) codifies that doctrine, the only logical conclusion is that estoppel by wrongdoing is limited to witness tampering just as the Federal Rule is so limited.⁹⁰

⁸⁷ FED. R. EVID. 804 Advisory Committee’s Note (May 4-5, 1995). The Advisory Committee Note to the Rule also identified witness-tampering as its rationale. “This recognizes the need for a prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the justice system itself.’” *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984). *Mastrangelo* involved a witness killed on his way to testify. *Id.*

⁸⁸ Flanagan, *Forfeiture by Wrongdoing*, *supra* note 5, at 477-79. The final Rule differed from the initial draft only in that it referred to “forfeiture” rather than waiver by wrongdoing, and changed the language from “a party who has engaged or acquiesced in wrongdoing,” to “a party that” to clarify that the rule also applied to the government. *Id.* at 478-79.

⁸⁹ Minutes of the Advisory Committee on the Federal Rules of Evidence (Apr. 22, 1996).

⁹⁰ Additional, although limited, circumstantial evidence comes from the cases mentioned in the last paragraph. All involved witness tampering or significant questions of intent. *Reynolds*, of course, was a witness tampering case. The Court also cited *Commonwealth v. Edwards*, 830 N.E.2d 158, 172 (2005), in which the Massachusetts Supreme Court adopted the estoppel doctrine, including the requirement that the defendant must intend to prevent the witness from testifying. *Id.* at 175. Also mentioned was *Scott v. United States*, 284 F.3d 758 (7th Cir. 2002) which applied only Federal Rule 804(b)(6) because the defendant did not assert a confrontation claim. *Id.* at 762. In both cases there was evidence of the defendant’s desire that the witness not testify, and of contact with the witness, but there were difficult questions of whether the witness elected not to testify for independent reasons that were not chargeable to the defendant. Thus, all the estoppel cases cited

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The second paragraph of section IV of the *Davis* opinion discusses procedural issues. The Court notes that both state and federal courts generally require the government to demonstrate the elements of estoppel by a preponderance of the evidence. Furthermore, Justice Scalia states that if a hearing is required on the issue, at least one state supreme court permits the use of hearsay evidence, including the absent declarant's hearsay statements, in determining the hearsay's admissibility. Neither of these issues is particularly controversial and the Court approved of the preponderance standard on questions of the admissibility of evidence in *Bourjaily v. United States*.⁹¹ Similarly, Federal Rule of Evidence 104(a) authorizes courts to consider the statement itself in determining its admissibility, except in cases of privilege. Most courts have thus adopted the preponderance standard,⁹² although some have applied higher standards.⁹³ Generally, trial judges have considered the estoppel issues in a separate hearing.⁹⁴ The proffered victim hearsay is often

in Section IV involved deliberate witness-tampering, which is unlikely to be a coincidence.

⁹¹ 483 U.S. 171, 175 (1987).

⁹² *United States v. White*, 116 F.3d 903, 912 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982); *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982); *State v. Gettings*, 769 P.2d 25, 29 (Kan. 1989); *State v. Magouirk*, 539 So. 2d 50, 64-66 (La. Ct. App. 1989).

⁹³ The Fifth Circuit initially adopted the "clear and convincing" standard in *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. 1982), as did a few other federal courts. *United States v. Houlihan*, 887 F. Supp. 352, 360 (D. Mass. 1995), *aff'd in result but using preponderance standard*, 92 F.3d 1271, 1280 (1st Cir. 1996); *United States v. Smith*, 792 F.2d 441, 442 (4th Cir. 1986). The drafters of Federal Rule 804(b)(6) rejected a higher standard and adopted the preponderance standard which most courts were using. Minutes of the Advisory Committee on the Federal Rules of Evidence (May 4-5, 1995). New York state courts adopted the clear and convincing standard. *People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995).

⁹⁴ *United States v. Price*, 265 F.3d 1097, 1100 (10th Cir. 2001); *United States v. Cherry*, 217 F.3d 811, 813 (10th Cir. 2000); *United States v. Thai*, 29 F.3d 785, 814-15 (2d Cir. 1994); *United States v. Aguiar*, 975 F.2d 45,

important and the testimony and arguments can be a mini-trial of the defendant's responsibility for the act. Some courts, such as the Second Circuit and the high courts of New York and Massachusetts, require a hearing,⁹⁵ while other courts do not.⁹⁶

The discussion of estoppel by wrongdoing in *Davis* supports only the proposition that the Court believes that an intent to tamper with a witness is a prerequisite to the application of the estoppel doctrine, and that acts that have the unintended consequence of making the witness unavailable, as in an ordinary homicide case, do not result in the forfeiture of the right to object to victim hearsay. The Court did not explicitly hold that intent was required, but by finding that Federal Rule 804(b)(6), which contains that element, codifies the doctrine, it came as close to that conclusion as possible. Likewise, the Court's view that the doctrine is aimed at attacks on the judicial integrity of the system implicitly excludes ordinary criminal acts against individuals that unintentionally make the person unavailable as a witness. This result is consistent with the prior case law on estoppel, and with the Court's view that Confrontation rights must be waived, whether explicitly or

47 (2d Cir. 1992); *United States v. Smith*, 792 F.2d 441, 442 (4th Cir. 1986); *United States v. Balano*, 618 F.2d 624, 626 (10th Cir. 1979); *United States v. Carlson*, 547 F.2d 1346, 1353 (8th Cir. 1976); *United States v. Houlihan*, 887 F.2d 352, 356 (D. Mass. 1995); *United States v. White*, 838 F. Supp. 618, 621 (D.C. 1993); *United States v. Papadakis*, 572 F. Supp. 1518 (S.D.N.Y. 1983); *United States v. Mastrangelo*, 533 F. Supp. 389 (E.D.N.Y. 1982); *United States v. Thevis*, 84 F.R.D. 57, 61 (N.D. Ga. 1979).

⁹⁵ *United States v. Dhinsa*, 243 F.3d 635, 656 (2d Cir. 2001); *United States v. Miller*, 116 F.3d 641, 668-69 (2d Cir. 1997) (finding error to admit hearsay evidence without evidentiary hearing, but harmless under the facts of this case); *Commonwealth v. Edwards*, 830 N.E.2d 158, 175 (Mass. 2005); *People v. Johnson*, 711 N.E.2d 967, 968-69 (N.Y. 1999) (holding that hearing required unless overwhelming evidence supports clear and convincing link between defendant and witness' unavailability).

⁹⁶ *See United States v. Johnson*, 219 F.3d 349, 356 (4th Cir. 2000) (using meeting with counsel to discuss proof); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (admitting evidence subject to later proof of witness' murder); *Crutchfield v. United States*, 779 A.2d 307, 329-32 (D.C. 2000) (approving proffer of expected testimony).

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implicitly, to be lost; they cannot be lost simply because there is evidence that the defendant committed a crime.⁹⁷ Completely missing from the discussion is any hint that intent is irrelevant to the estoppel doctrine, or that forfeiture follows automatically from a determination that the defendant is responsible for the witness' unavailability. *Davis* seems to have clearly adopted the intent to prevent testimony element. For the Court to reverse course at this point would require a major reformulation of the rationale and purpose of the estoppel doctrine, and the rejection of the well established historical record that admitted absent witness hearsay only when the defendant intended to prevent the witness from testifying.⁹⁸

Moreover, a rejection of the intent element would also abandon *Crawford's* grounding in the history of the Confrontation Clause. All of the English and early American cases cited in *Reynolds* were witness tampering cases.⁹⁹ Nor does English history provide any basis for the true forfeiture doctrine espoused in some post-*Crawford* cases. At the time the Bill of Rights was drafted, English law provided only two instances in which an unavailable victim's statement could be admitted against a defendant as substantive evidence, neither of which provides any support for a true forfeiture principle.¹⁰⁰ Sworn depositions in felony cases produced in conformity with the Marian statutes could be admitted if the witness was dead or unable to appear, but not merely because the witness was

⁹⁷ Flanagan, *The Misnamed Exception for "Forfeiture" by Wrongdoing*, *supra* note 4 at 1223-29.

⁹⁸ The Court is speaking with one voice on this issue, as it did when it accepted the estoppel by wrongdoing doctrine in *Crawford*. Chief Justice Rehnquist and Justice O'Connor concurred in *Crawford*, 541 U.S. at 69-76, and Justice Thomas concurred only in *Davis*, 126 S. Ct. at 2280-85. Both opinions discussed the estoppel doctrine using the collective "we" and the concurring justices did not comment on the estoppel doctrine in either case.

⁹⁹ Flanagan, *Forfeiture by Wrongdoing*, *supra* note 5 at 462-66.

¹⁰⁰ Thomas Y. Davies, *Not "The Framers' Design:" How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349 (2007).

unavailable.¹⁰¹ *Crawford*, however, squarely held that the Confrontation Clause was directed against the Marian statutes, and particularly the creation of uncross-examined evidence by the government.¹⁰²

The dying declaration provided the other means to admit absent victim hearsay as substantive evidence. As a principle of evidence, the dying declaration is based on the declarant's knowledge of impending death.

The principle of this exception to the general rule is founded partly on the awful situation of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath, and partly on the supposed absence of interest on the verge of the next world, which dispenses with the necessity of cross-examination. But before such declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved, that the deceased, at the time of making them, was conscious of his danger, and had given up all hope of recovery.¹⁰³

As Professor Davies has noted, English law treated the statements by one full of awe at approaching death as the functional equivalent of a statement taken under oath.¹⁰⁴ Thus, the dying declaration and the Marian statutes were sufficient to take these statements out of the rule that prohibited the admission of unsworn statements.¹⁰⁵ Courts in America accepted dying declarations,¹⁰⁶ and the Supreme Court recognized this

¹⁰¹ *Id.* (discussing the Marian statutes, 1 & 2 Phil. & M. c. 13 (1554);, 2 & 3 *id.*, c 10 (1555) that were adopted during the reign of Mary Tudor and permitted use of hearsay without confrontation); *Crawford*, 541 U.S. at 43-44 (same).

¹⁰² *Crawford*, 541 U.S. at 50-51.

¹⁰³ JOHN F. ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES; WITH PRECEDENTS OF INDICTMENTS, &C. AND THE EVIDENCE NECESSARY TO SUPPORT THEM 200-01 (1824).

¹⁰⁴ Davies, *supra*, note 100.

¹⁰⁵ *Id.* at 95.

¹⁰⁶ The early evidence texts refer to it. ARCHBOLD, *supra* note 103 ("the

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exception to the Confrontation Clause based on its history. The Court referred to the admissibility of dying declarations from “time immemorial,” asserting that “no one would have the hardihood at this day to question their admissibility.”¹⁰⁷

The dying declaration is not a precursor to the forfeiture doctrine. It is based on the inherent reliability of the dying declarant’s statement, and not upon the defendant’s intent to prevent testimony found in *Reynolds*, or on the forfeiture analysis that emerged after *Crawford*. At most, the dying declaration exception supports the proposition that some limited victim hearsay as to the cause of death could be deemed consistent with the Confrontation Clause. To transmogrify it into a justification for the forfeiture principle shifts its rationale from the mental state of the declarant to the act of the defendant (regardless of the mental state) and expands a narrow exception for explaining the cause of death in only homicide prosecutions to a general rule which would admit all victim statements for any purpose. These structural changes are far beyond the history and precedent of the dying declaration.¹⁰⁸ Despite the rise of the

dying declarations of the deceased are receivable in evidence, if it appear that he was conscious of his being in a dying state at the time he made them”); CHITTY, Vol. 1 A PRACTICAL TREATISE ON THE CRIMINAL LAW 569 (1841) (stating that the dying declaration is the “one great and important exception” to the hearsay rule); PEAKE, COMPENDIUM ON THE LAW OF EVIDENCE 14-16 (3rd ed. 1812) (dying declaration admissible “for murder where the deceased, while in the declared apprehension of death, or in such imminent danger of it as must necessarily have raised that apprehension in his mind”); PHILLIPPS, TREATISE ON THE LAW OF EVIDENCE 275-200 (1816) (“The dying declarations of a person who has received a mortal injury, are constantly admitted in criminal prosecutions.”).

¹⁰⁷ *Mattox v. United States*, 156 U.S. 237, 243-44 (1895).

¹⁰⁸ Professor Richard Friedman suggests that dying declarations may be better rationalized as an example of the forfeiture principle. He argues that this approach preserves the clarity and simplicity of the “testimonial” approach, avoids an exception based on history, and accepting the traditional, and unpersuasive, argument for the reliability of dying declarations. Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUSTICE 4, 12 (Summer 2004). Certainly, a true forfeiture principle would subsume dying declarations, but that is using the post-*Crawford* appearance of the true forfeiture argument

forfeiture argument in the 1990s and its adoption by some post-*Crawford* cases, the limited exception of the dying declaration does not provide any historical justification or pedigree for the modern forfeiture doctrine.

III. FORESHADOWING THE FUTURE DEVELOPMENT OF THE CONSTITUTIONAL DOCTRINE ESTOPPEL BY WRONGDOING

A. *The Intent Element and the Link Between the Defendant's Act and the Witness's Refusal to Testify*

Davis answers the most pressing issue about the constitutional doctrine of confrontation estoppel: the intent element. The doctrine requires proof of intent to prevent testimony before a defendant can lose the right to confront a witness or object to a hearsay statement by a victim. However, the nexus between the defendant's acts and the witness' refusal to testify is not well defined in the case law. A few courts have held that the defendant has the intent to prevent testimony if the victim's potential testimony was "a factor" in the decision to act against the witness.¹⁰⁹ Another formulation asks whether witness intimidation was in "any way" a motivation.¹¹⁰ At the same time, the courts have specifically rejected any requirement that witness tampering be the sole motive for intimidation.¹¹¹ The courts do not seem to have addressed the link in the context of

today to rationalize the long history of dying declarations that were admissible under a different theory than forfeiture. It does not establish that forfeiture is derived from the exemption for dying declarations.

¹⁰⁹ *United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001); *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996); *United States v. Johnson*, 219 F.3d 349, 356 (4th Cir. 2000).

¹¹⁰ *State v. Romero*, 133 P.3d 842, 856 (N.M. Ct. App. 2006), *aff'd*. No. 29,690 (N.M. March. 15 2007), http://www.supremecourt.nm.org/slipopinions_cert_granted, 134 P.3d 120 (N.M. 2006).

¹¹¹ *United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001); *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996).

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the witness' decision, perhaps because there was generally strong proof that the defendants caused the witness' unavailability for trial.

Basing a loss of constitutional rights whenever witness tampering was "a" factor in the defendant's decision is a test so flexible and so easily satisfied that it suffers from the same defect that *Crawford* found in the reliability standard of *Ohio v. Roberts*.¹¹² Applied strictly, a minimal test of causation means that intimidation and refusal will produce forfeiture even though the wrongful acts were not a primary or even a significant reason for either the defendant's threats or the witness' refusal to testify. A stronger causal connection between the defendant's act and the witness' response is necessary. Moreover, the issue of intent is so critical that other procedural protections are necessary. A hearing should be required before admitting these statements, and the victim's hearsay statement itself should not be the sole basis for admitting it.¹¹³

*B. The Nexus Between the Defendant's Intention and Act
and the Witness' Refusal to Testify*

The homicide case *Gonzalez v. State* illustrates the potential for the marginalization of the intent element as well as the need for a strong causal connection.¹¹⁴ The Texas Court of Appeals initially held that the intent requirement was unnecessary.¹¹⁵ On appeal to the Texas Court of Criminal Appeals, that court noted the competing arguments regarding the intent element, but avoided the issue by finding that the defendant had the requisite intent when the defendant killed the victims during a burglary

¹¹² *Ohio v. Roberts*, 448 U.S. 56 (1980); *Crawford v. Washington*, 541 U.S. 36, 62-69 (discussing defects of Roberts reliability test).

¹¹³ See, e.g., Deborah Tuerkheimer, *A Relational Approach to Confrontation*, SYMPOSIUM MATERIALS at 202 n.80 (suggesting the need for an evidentiary hearing on the estoppel argument).

¹¹⁴ *Gonzalez v. State*, 195 S.W. 3d 114 (Tex. Crim. App. 2006).

¹¹⁵ *Gonzalez v. State*, 155 S.W. 3d 603 (Tex. App. 2004), *aff'd*, No. PD-0247-05, 2006 WL 1688345 (Tex. Crim. App. 2006).

and theft.¹¹⁶ The facts, fairly interpreted, do not show intent to prevent witness testimony. The defendant entered a home near that of his grandmother and fatally wounded Maria and Baldomero Herrera before stealing their truck.¹¹⁷ Mrs. Herrera identified the defendant to the responding officer by his unusual hair color and his relationship to a neighbor. Gonzalez was arrested the same day driving the pickup truck with Mr. Herrera's address book in his pocket and Mrs. Herrera's blood on his clothes.¹¹⁸ Other than seeing each other in the area, the defendant and his victims apparently had no prior contact, and there was no pending matter about which they would testify against the defendant. Nevertheless, the court found that the killing was intended to prevent testimony simply because the victims could identify him.¹¹⁹

The court's conclusion was based on three elements: (1) the victims could identify the defendant because of his distinctive hair color and relationship to a neighbor; (2) the defendant entered their home without a disguise; and (3) the murders were particularly violent, as both victims were shot at close range.¹²⁰ None of these factors is characteristic of intent to prevent testimony, nor do they distinguish between a murder motivated by expected testimony and one motivated by greed, rage, or revenge. In fact, the same arguments support a finding of intent to prevent testimony in every homicide. Here the victims did have a preexisting basis to identify the defendant, but all surviving crime victims have the potential to identify the perpetrator. Therefore, if these victims are killed in the course of a crime, all defendants can be assumed to have the requisite intent to prevent testimony. Likewise, the defendant's lack of disguise is not a reliable indicator of the defendant's motivation for the crime. Here, the court found the lack of disguise proof of the defendant's awareness of the risk of identification, which

¹¹⁶ *Gonzalez*, 2006 WL 1688345 at *2-7.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *1-3.

¹¹⁹ *Id.* at *7.

¹²⁰ *Id.*

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supplied a motive to satisfy the estoppel rule. However, a defendant's decision to wear a disguise would reflect greater concern about possible identification, and arguably an even greater motive to silence the witness. Intent, then, can be found regardless of the presence or absence of a disguise. Finally, and unfortunately, murders, particularly first-degree double murders by gunshot, are inevitably violent acts. Characterizing a murder as a violent act is not an adequate premise for a finding of intent to prevent the victims from testifying. The court clearly assumed the intent element by an extremely tenuous causal chain that will supply the requisite intent for estoppel by wrongdoing in any violent homicide.

The Texas Court of Criminal Appeals, Texas' highest criminal court, had obvious reasons for its specious reasoning. The assumption of witness tampering intent allowed the court to avoid both speaking on an issue the Supreme Court had yet to address and reversing a conviction for a heinous crime when there was little doubt of the defendant's guilt. Even assuming that these are legitimate motives, the case also illustrates the pressures that courts face in ruling on proof of intent and the strong desire to find a way to admit evidence that is clearly testimonial. Routine acceptance of such reasoning will leave the intent element with little meaning or effect, and estoppel by wrongdoing will swallow *Crawford's* revitalized Confrontation Clause in domestic violence cases. Similarly, a standard of causation that requires only that potential testimony be a factor in the defendant's act eliminates the causation element even when there are other, much more likely reasons for the act.

The more common and more difficult question of causation arises when the witness could testify but does not, leaving the court to determine whether the witness' refusal is due to defendant's acts or the witness' own unrelated reasons. The witness' motivation is always an issue, even if the Court ultimately concludes that estoppel by wrongdoing does not require the defendant to intend to prevent the witness from testifying. In every claim of confrontation estoppel there must always be proof that the defendant's act was the procuring cause of the witness' refusal to testify. Estoppel cannot be applied if

the defendant's threats were made well before the crime against the potential witness¹²¹ or were not received by the victim.¹²² Likewise, when the witness refuses to testify for his own reasons, the defendant cannot be estopped to object to the hearsay.¹²³

Domestic violence prosecutions are the most problematic because many victims—by some accounts 80 to 90 percent—do not cooperate with the prosecution.¹²⁴ Consequently, some have

¹²¹ *State v. Romero*, 133 P.3d 842, 856 (N.M. Ct. App. 2006), *aff'd*, No. 29,690 (N.M. March 15, 2007), <http://www.supremecourt.nm.org/> The slip opinion presents these facts because the defendant's threats were made three months before the couple met during the holidays. Despite the fact that the defendant had threatened her about going to the police three months before, it strains logic to conclude that the homicide involved in the case was related to these threats in any way. The New Mexico Supreme Court remanded the case for a determination of the defendant's intent while noting that it was unlikely that he had the intent to prevent her from testifying. *Id.* at 15.

¹²² *State v. Washington*, 521 N.W.2d 21, 42 (Minn. 1994) (finding no proof that declarant heard threats).

¹²³ *United States v. Williamson*, 792 F. Supp. 805, 810 (M.D. Ga. 1992) (noting that evidence that defendant paid witness' attorneys fees insufficient to show that defendant had procured witness' unavailability through witness' assertion of Fifth Amendment because he had independent reason to refuse to testify because testimony could affect pending appeal), *aff'd*, 981 F.2d 1262 (11th Cir. 1992), *rev'd on other grounds*, 512 U.S. 594 (1994).

¹²⁴ While it is uncontested that many domestic violence victims do not cooperate, the authorities do not define what cooperation means or indicate what percentage may be attributed to the defendant or to the election of the victim. *See, e.g.*, *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004) (noting that an expert testified that 80-85 percent of victims recant at some point); *People v. Gomez*, 85 Cal. Rptr. 2d 101, 105 (Cal. Ct. App. 1999) (noting that an expert witness testified that 80 percent of domestic violence witnesses recant, change, or minimize the incident); Douglas E. Beloof & Joel Shapiro, *Let the Truth be Told; Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements As Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3-4 (2002) (citing expert testimony); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J. L. & FEMINISM 359, 367 (1996) (citing interview with prosecutor in contact with expert witnesses throughout the country)

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argued that a battering relationship should be sufficient to conclude that the defendant was the cause of the witness' decision, and consequently he has no right of confrontation regarding that victim's hearsay.¹²⁵ This argument is wrong in theory and in practice because it necessarily requires evidence that every battering relationship produces unavailability. Without a precise one-to-one relationship between abuse and unavailability, an unknown number of defendants would arbitrarily lose their Sixth Amendment rights. There is no dispute that a large number of victims in battering relationships do not testify, but correlation is not causation.

Logically, there are three potential causes for a witness' failure to testify when available: (1) the defendant's actions; (2) the witness's independent decision; and (3) actions of third parties or other intervening events, including the state's failure to bring the witness to court.¹²⁶ Commentators recognize that defendants are not the only cause of the failure of witnesses to testify and that witnesses often refuse to testify because of legitimate concerns about privacy, possible self-incrimination, prior inconsistent statements, or the desirability of preserving pre-existing relationships.¹²⁷ Mere reluctance to testify¹²⁸ should

¹²⁵ Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 469-70 (2006); Adam M. Krischer, *Though Justice May be Blind, It Is Not Stupid*, 38 PROSECUTOR 14 (Nov. Dec. 2004).

¹²⁶ *United States v. Olivares*, 1997 WL 257479, at *2 (S.D.N.Y. 2004) (holding that the government is responsible for absconding witness' absence when it ignored statute requiring potential witness awaiting sentencing to be held pending sentence and released him).

¹²⁷ Tom Lininger, *Yes, Virginia, There is a Confrontation Clause*, 71 BROOK. L. REV. 401, 407 (2005); Deborah Tuerkheimer, *A Relational Approach to Confrontation*, SYMPOSIUM MATERIALS, 177, 202 n.80 (2006) (citing Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 361-62 (2005)).

¹²⁸ *Maryland v. Craig*, 497 U.S. 836, 856 (1990) (finding that special protections for child witness are not available solely because of the normal anxiety of testifying); *Contreras v. State*, 910 So. 2d 901 (Fla. Dis. Ct. App. 2005) (holding that child witness is not unavailable because of generalized claims of trauma and mental anguish from testifying).

not be chargeable to the defendant under any reasonable theory of causation. The advocates for automatic loss of confrontation rights must establish this strong causal link to support that proposition.¹²⁹

As argued above, a causation test that is satisfied only by proof that the defendant's act was "a" factor for the witness' unavailability is too easily satisfied. There are great pressures to minimize the causal link because of the perceived need for the testimony, so it is necessary to clearly articulate this link if the intent element is to be meaningful. Proper application of the burden of proof standard requires articulating how it should be applied in this context. The preponderance standard is often viewed as requiring that the critical fact be "more likely than not" or "more probably true than not."¹³⁰ If the defendant's conduct is more likely than not the cause of the witness' unavailability, then other potential causes are by definition less likely, and vice versa. I suggest that courts articulate and apply a "but for" test when evaluating both the defendant's motivation for acting against a person and the witness' failure to testify. This test asks whether the defendant would have acted against the witness but for the potential for testimony against him. Similarly, it asks whether the witness would have testified but for the defendant's intimidation. By articulating a test that focuses on the predominant factor, rather than just "a" factor,

¹²⁹ Distinguishable from the argument that the battering relationship is per se proof of causation for witness unavailability, is the proposition that evidence of the nature of the battering relationship may be part of the proof that establishes the defendant's responsibility for the witness' refusal to testify. Professor Tuerkheimer argues persuasively that an understanding of the domestic relationship is essential to a proper evaluation of the evidence about the cause of a refusal to testify, and places in context acts that otherwise might seem benign or unrelated to the potential testimony. Deborah Tuerkheimer, *A Relational Approach to Confrontation*, SYMPOSIUM MATERIALS at 177. Professor Tuerkheimer makes clear that specific causation must be established between the defendant and the victim's refusal to testify, and as I understand her position, views evidence of the battering relationship as necessary to understand the evidence, but not sufficient in itself to establish the cause of the witness' refusal to testify. *Id.* at 202.

¹³⁰ Mueller & Kirkpatrick, EVIDENCE, §3.3 at 109 (3d ed. 2003).

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the courts can directly address the causal link and will be less likely to marginalize the intent element, and more likely to seek evidence to support the conclusion.¹³¹

Of course, issues of proximate cause are difficult to capture completely in words, many issues of fact are difficult to quantify, and any language is likely to be somewhat imprecise. However, such language is important because it provides guidance to the court in close cases. Articulating a test that emphasizes the causal link between the defendant and the witness is particularly important with confrontation estoppel because admissibility issues are subject to review under the abuse of discretion standard, which is highly deferential to the trial judge.¹³² For all but the rare case, the trial judge's decision on questions of causation will survive on appeal, and words that convey more than a minimal connection are necessary to prevent an over-broad estoppel by wrongdoing doctrine.

Another reason for a clearly articulated causation test is the state's role in the trial process. The Sixth Amendment places the obligation on the government to produce the witnesses at trial.¹³³ Although the constitutional standard is low and requires only a good faith effort to obtain the presence of the witness,¹³⁴ a minimal causation element for estoppel by wrongdoing further reduces the government's obligation, and has the perverse incentive of undermining the government's desire to search out and find the witness when testimonial hearsay is available. Officers and prosecutors need not further investigate the crime, and the trial may be easier because the prosecution introduces

¹³¹ See *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982) (remanding for hearing to determine if defendant in custody was responsible for murder of witness), *on remand*, 561 F. Supp. 1114 (E.D.N.Y. 1983) (ruling that evidence of prior statements and acts supported waiver of hearsay and constitutional rights) *aff'd*, 722 F.2d 13 (2d Cir. 1983) (affirming after remand).

¹³² Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978).

¹³³ *Barber v. Paige*, 390 U.S. 719 (1968) (noting that the government was required to produce witness whose location was known).

¹³⁴ *Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

testimonial hearsay through law enforcement personnel who may be perceived to be neutral and more credible than the declarant, and the hearsay cannot be modified or recanted by the absent declarant.¹³⁵ Several commentators at the *Crawford* symposium noted the desirability of an enhanced standard for determining the unavailability of a witness. A strong causal requirement for confrontation estoppel advances this goal and emphasizes the need for sufficient proof to support confrontation estoppel.

C. Declarant Hearsay as the Foundation for Admissibility of Victim Hearsay

Justice Scalia noted in *Davis* that other courts have considered hearsay, including victims' statements, in determining the elements of confrontation estoppel.¹³⁶ In many cases, the declarant's own statements are the only proof establishing the defendant's responsibility for the witness' absence and in particular the fact that the defendant's act was motivated by a desire to prevent testimony.¹³⁷ Unresolved is whether the declarant's hearsay statements can be the sole

¹³⁵ Muller & Kirpatrick opine the following:

Of course a prosecutor who has useful hearsay might prefer to offer it, since bringing the speaker to court may be hard or costly or time-consuming. Disappointing as well: The speaker may be frightened or reluctant, and testifying visibly on the record under oath and subject to cross may persuade him to back away from what was more easily said in private to a sympathetic audience of prosecutors and agents. Hence prosecutors sometimes prefer to offer statements rather than produce the speaker, and it is not always easy to distinguish between the effort one might make to find and produce a speaker and an effort to show he cannot be produced.

Mueller & Kirkpatrick, EVIDENCE, § 8.87 at 977 (3d ed. 2003).

¹³⁶ *Davis*, 126 S. Ct. at 2273; FED. R. EVID. 104(a).

¹³⁷ *United States v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982); *United States v. Balano*, 618 F.2d 624, 628-29 (10th Cir. 1979); *United States v. Carlson*, 547 F.2d 1346, 1353 (8th Cir. 1976).

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foundation for their admissibility.¹³⁸ Requiring independent evidence avoids the circular argument that inadmissible hearsay can be the foundation for admitting the otherwise inadmissible hearsay. More importantly, independent evidence enhances the reliability of the admissibility decision and of the evidence admitted, and becomes particularly important with confrontation estoppel because this exception is not founded on any claim that the hearsay is reliable, or that the circumstances in which the statements were made are inherently reliable. In fact, these testimonial statements are often made by witnesses with conflicting interests.¹³⁹ These arguments supported the amendment of Federal Rule 801(d)(2) in 1997 to provide that the hearsay statement of a co-conspirator, agent, or employee was not sufficient to establish the relationship necessary for admission against the principal.¹⁴⁰

¹³⁸ Compare *U.S. v. Emery*, 186 F.3d 921, 927 (8th Cir. 1999) (expressing doubt that foundation requires evidence independent of the hearsay and finding sufficient independent evidence) with *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997) (leaving undecided whether foundation can rest exclusively on hearsay). The testimony sometimes includes double hearsay. See *Steele v. Taylor*, 684 F.2d 1193, 1207 (6th Cir. 1982) (Taylor, J., dissenting) (noting that declarant's statements were of what she had heard other defendants say); *Cotto v. Herbert*, 331 F.3d 217, 226 (2d Cir. 2003) (noting that officers testified to the defendant's statements that he had heard that his family was threatened and to the statements of the defendant's mother and sister about threats they received).

¹³⁹ Many declarants in drug and organized crime cases are co-conspirators who have their own reasons for cooperating with the government that may affect the reliability of their statements. Flanagan, *Forfeiture by Wrongdoing*, *supra* note 5 at 471 n. 71-72. See *State v. Romero*, 133 P.3d 842, 863-64 (N.M. 2006), *cert. denied* 134 P.3d 120 (N.M. 2006) (noting that untrue and self-serving statements are made in domestic violence prosecutions and citing cases).

¹⁴⁰ The Advisory Committee on the Federal Rules recommended adopting the amendment to Rule 801(d)(2) and Rule 804(b)(6) at the same meeting but in separate discussions without any mention or indication in the minutes that the members saw the topics as related. Certainly there is no indication that the Committee rejected a requirement in Rule 804(b)(6) that there be some independent evidence of the predicate facts that support admitting the hearsay statements. Advisory Committee on Evidence Rules, Minutes of the Meeting of May 4-5 1995.

The need for a clear articulation of the nexus between act and unavailability of the witness, and the need for a foundation based on more than hearsay itself, also suggests that a pre-trial hearing on the issue of confrontation estoppel is necessary. The Court highlighted, but did not decide the issue in *Davis*.¹⁴¹ While an absolute rule requiring a hearing may generate problems in isolated cases, the arguments in favor of a hearing are persuasive. The major problems in the application of confrontation estoppel revolve around proof of the appropriate connection between the defendant's acts and the witness' unavailability. In every case there must be proof of intent to prevent testimony, and likewise, if the victim refuses to testify that it was the result of that intimidation. The case law suggests that when hearings are held and the issues addressed directly, sufficient evidence to support the forfeiture doctrine is available.¹⁴²

D. Estoppel by Wrongdoing and Rule 804(a)

The finding that the defendant procured the witness' absence bars any objection to victim hearsay, and also precludes the defendant from introducing other hearsay statements of the unavailable victim under Rule 804(a).¹⁴³ Even victim testimony

¹⁴¹ *Davis*, 126 S. Ct. at 2279-80.

¹⁴² Flanagan, *Forfeiture by Wrongdoing*, *supra* note 5, at 506 (reviewing evidence of Mastrangelo's involvement developed on remand).

¹⁴³ FED. R. EVID. 804(a)(5) (detailing that a witness is not unavailable if absence is procured by proponent of hearsay). The defendant may offer victim hearsay admissible under Rules 801, 803, or 807 because those rules do not have an unavailability requirement. Rule 106 allows the defendant to offer other portions of a written or recorded hearsay statement that are necessary to place the previously offered testimony in context. This is apparently so even if the latter statements are otherwise inadmissible. *United States v. Houlihan*, 92 F.3d 1271, 1283 (1st Cir. 1996); *See also* Dale A. Nance, *Verbal Completeness and Exclusionary Rules under the Federal Rules of Evidence*, 75 TEX. L. REV. 51 (1996). It does not authorize the admission of other parts of the statements that are neither explanatory nor relevant to the previously admitted portions of the testimony. *United States v. Marin*, 669 F.2d 73, 84-85 (2d Cir. 1982); *United States v. Houlihan*, 887 F. Supp.

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that exculpates the defendant is barred because the prosecution retains its rights to object to hearsay proffered by the defendant.¹⁴⁴ *Holmes v. South Carolina*¹⁴⁵ suggests that this evidentiary limitation is unconstitutional. There, the Court held arbitrary and unconstitutional South Carolina's rule barring the defendant from introducing evidence of a third party's responsibility for the crime when the prosecution's evidence of guilt was strong. The rule was justified on relevance grounds, but as the Court recognized, the fact that the prosecution's evidence of guilt, if *credited*, was strong, does not mean that the defense evidence was not relevant and probative; in fact, when considered by a trier of fact, it might undermine the perceived strength of the government's case.¹⁴⁶

The restriction in Rule 804(a) serves a legitimate function when the wrongdoer proffers the absent witness testimony first. At the time, it prevents that party from creating and then taking advantage of a witness's absence to introduce hearsay, a less reliable form of evidence, and arguably provides some deterrence against such wrongdoing by others contemplating similar action. When applied after the prosecution has admitted victim hearsay under the estoppel rationale, the rule suffers the same defects found in *Holmes*. First, exclusion is not based on relevance or other Rule 403 grounds, but on the preliminary finding (by a preponderance of the evidence) that the defendant is responsible for the witness's absence. Second, as in *Holmes*, it is arbitrary to argue that the strength of the government's case justifies excluding the victim's exculpatory statements when offered by the defendant. The strength of the government's case can only be evaluated by considering all of the evidence, and the defense evidence might significantly undercut that finding. Even

352, 366 (D. Mass. 1995).

¹⁴⁴ *United States v. White*, 838 F. Supp. 618, 625 n.10 (D.D.C. 1993) (finding that only defendant waived right); *Sweet v. United States*, 756 A.2d 366, 379 (D.C. Cir. 2000) (holding that a defendant responsible for witness's absence may not admit absent witness, exculpatory statement); *Wisconsin v. Frambs*, 460 N.W.2d 811 (Wisc. 1990) (same).

¹⁴⁵ 126 S. Ct. 1727 (2006).

¹⁴⁶ *Id.* at 1734-35.

if the judge considered all of the victim's statements in deciding the estoppel issue, the trier of fact must make the ultimate decision of guilt and innocence (beyond a reasonable doubt) and the rule prevents the jury from hearing admittedly relevant, probative, and exculpatory evidence that undercuts the government's case. This infringes on the defendant's right to present a defense, whether found in the Due Process Clause or the Sixth Amendment.¹⁴⁷ The exclusion of exculpatory victim statements cannot be sustained by arguing that the rule retains a legitimate purpose at this point. The purpose of the rule has been served because the defendant was not able to proffer the victim's statements first. As for deterrence, it strains logic to argue that the exclusion of evidence some months after the alleged wrongdoing serves any deterrence function for the defendant, nor does it genuinely serve a deterrent function for others who are unlikely to be deterred by the better known and more severe criminal law sanctions. Whatever shreds of justification survive the introduction of a victim's testimony cannot outweigh the constitutional right to present a defense that includes other relevant, and potentially contradictory or exculpatory statements of the absent witness.

Holmes, as applied to the last sentence of Rule 804(a), means that the defendant is not barred from asserting that the declarant is unavailable under that Rule. Admissibility of the absent victim's statement depends upon satisfying one of the Rule 804 exceptions. Prior testimony, dying declarations, and statements against interest are now available to the defendant, and may be the basis of admitting other victim hearsay. The exception for prior testimony may be particularly useful because many prior victim statements might have been made in earlier proceedings, including preliminary hearings and grand juries.¹⁴⁸

¹⁴⁷ *Id.* at 1731.

¹⁴⁸ Rule 804(b)(1) requires that the testimony be in a proceeding in which the party against whom the testimony is offered "had an opportunity or similar motive to develop the testimony by direct, cross or redirect examination." *United States v. Foster*, 128 F.3d 949, 954 (6th Cir. 1997). There is case authority that grand jury testimony can be admitted against the government. *Id.* at 954-56.

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Similarly, many victim statements arise in circumstances where the exculpatory value to the defendant exposes the declarant to potential criminal or civil prosecution.

This issue also throws some light on the so-called “reflexive” use of victim hearsay in cases in which the defendant is charged with the crime that produced the witness’ unavailability.¹⁴⁹ The concern is that the pre-trial ruling on the defendant’s responsibility for the crime will affect the trial of the case. The usual response is that the evidence decision is made by the judge, and the finding of guilt is made by the jury so that one does not affect the other.¹⁵⁰ Rule 804 provides one instance in which the pre-trial finding does affect the jury by excluding exculpatory evidence offered by the defendant under that Rule, and where the judge would be aware of evidence favorable to the defendant but the jury would not. The solution is not to bar the reflexive use of the victim’s statements, but to admit all such victim statements that satisfy the rule regardless of the limitation in Rule 804(a).

CONCLUSION

Justice Scalia’s decision to leave the key issues of the definition of testimonial and the scope of estoppel by wrongdoing to future opinions has led to great uncertainty about *Crawford’s* application in many circumstances. *Davis* provides a strong indication on the scope of estoppel by wrongdoing and all but holds that it is aimed at witness tampering and cannot be expanded to apply when the defendant’s actions have the

¹⁴⁹ Friedman, *Chutzpa*, *supra* note 5, at 521-25.

¹⁵⁰ *Id.* at 23-24. Courts have had little problem with the reflexive use of victim hearsay. *See e.g.*, *United States v. Thai*, 29 F.3d 785, 814 (2d Cir. 1994) (murder as part of extortion); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) (showing conspiracy to import heroin and witness tampering); *United States v. Houlihan*, 887 F. Supp. 352, 355-56 (D. Mass. 1995) (showing drug conspiracy and murder in furtherance of racketeering); *United States v. White*, 838 F. Supp. 618, 625 (D.D.C. 1993) (noting that declarant’s statement were admissible as if declarant was testifying in court). Generally the jury would be aware of the reasons for the declarant’s absence in those cases.

unintended effect of making a witness unavailable. This will be controversial because *Crawford* has its greatest impact on domestic violence prosecutions and there is great pressure to admit the absent victim testimony. At the same time, confrontation is a core value of the Constitution. *Crawford* has made the Confrontation Clause meaningful as to testimonial statements. Moreover, the Court seems to have rejected an argument based solely on the need for the testimony. The need argument was raised, but as Justice Scalia noted in *Davis*: “We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”¹⁵¹ Constitutional rights that provide no protection have no meaning. As the constitutional doctrine of estoppel by wrongdoing develops, the courts will have to address this intent element, and the nexus between the defendant’s acts and the witness’ decision not to appear or testify. Proper proof of this link, as well as the procedural protections of a pretrial hearing and a requirement of evidence in addition to the hearsay statement itself to support admissibility appear necessary to the proper operation of estoppel by wrongdoing.

¹⁵¹ *Davis*, 126 S. Ct. at 2280 (citation omitted).