INJECTING FAIRNESS INTO THE DOCTRINE OF FORFEITURE BY WRONGDOING

I. INTRODUCTION

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] In the recent case *Crawford v. Washington*,[2] the Supreme Court re-iterated the importance of preserving this constitutional right to confrontation. Interestingly, in dicta, the *Crawford* Court asserted that the forfeiture by wrongdoing doctrine remains valid.[3] Under forfeiture by wrongdoing, the defendant forfeits the right to confront the witness if the defendant procured the absence of the witness through wrongdoing.[4] The tension that exists between confrontation and forfeiture by wrongdoing is significant because personal freedom is at stake. In order to accommodate the policy concerns of both the confrontation clause and the forfeiture doctrine, courts must exercise heightened scrutiny to any claim that warrants the application of the forfeiture doctrine.

The murder of a witness before he can testify at trial is always a popular film topic, but it is also a regular phenomenon throughout the United States.[5] Other less dramatic scenarios often result in the same dilemma for prosecutors: a witness refuses to testify because of fear of retaliation by the defendant,[6] a witness refuses to testify because of fear of embarrassment as a result of giving public testimony, a witness hides from the prosecution with the help of the defendant, or, in an even more innocuous situation, a witness is unavailable due to severe injury or distance.[7] The logical question that arises in cases such as these—where

1. U.S. CONST. amend. VI.
2. 541 U.S. 36 (2004).
3. 541 U.S. at 62 ("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.").
4. Fed. R. Evid. 804(b)(6).
5. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 270–72 (2d Cir. 1982) (witness in a drug distribution conspiracy testified in grand jury, but was murdered before the trial occurred). *See also Anderson Cooper 360 Degrees: Fighting to Stop Witness Intimidation* (CNN television broadcast Apr. 12, 2005) (discussing Baltimore's pervasive problems with witness intimidation, including stabbing and shooting deaths of a potential witness by gang members).
6. *See* United States v. Carlson, 547 F.2d 1346, 1352–53 (8th Cir. 1976) (witness in a cocaine distribution case refused to testify at trial because of threats by one of the defendants).
7. *See infra* notes 44–45.

the witness is unable to testify in court—is whether an out-of-court statement made by the witness can be used during the presentation of the prosecution's case-in-chief. Courts frequently allow these out-of-court statements to be brought in under the doctrine of forfeiture by wrongdoing.[8]

This Note first explains the general evolution of the doctrine of forfeiture by wrongdoing from the common law to its present codification in the Federal Rules of Evidence by examining how court decisions and academic interpretation have shaped the doctrine. Important to this discussion is the reality that the doctrine is not applied uniformly and its present form is far broader than the scope of the original law. In fact, in specific circumstances, the elements necessary for application of the forfeiture doctrine are not precise, resulting in unpredictable outcomes. Next, this Note discusses the *Crawford* decision, which rejected the "indicia of reliability" standard set forth in *Ohio v. Roberts*.[9] The "indicia of reliability" standard allowed courts to admit witness testimony in criminal trials without providing the defendant with the opportunity to confront the witness if the court believed the evidence was "reliable."[10] This Note then examines the *Crawford* ruling and its implications on the waiver of the right to confrontation. Next, this Note considers recent cases applying the forfeiture by wrongdoing doctrine to illustrate the expansion of the forfeiture doctrine post-*Crawford*. Finally, this Note considers how the *Crawford* decision can assist in understanding the purpose of the forfeiture doctrine and how to effectively preserve the rights guaranteed in the Sixth Amendment[11] while balancing the interest in the continued use of the forfeiture by wrongdoing doctrine.

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8. This doctrine is codified in both the Federal Rules of Evidence and some state statutes. *See* FED. R. EVID. 804(b)(6) (Hearsay is admissible if it is "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.").

9. 448 U.S. 56, 66 (1980).

10. *Id.* at 66.

11. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

II. PRE-*CRAWFORD*: THE EVOLUTION OF THE FORFEITURE BY WRONGDOING DOCTRINE

The forfeiture by wrongdoing doctrine was conceived in an effort to accommodate two important interests: on the one hand, the defendant's constitutional right to have an opportunity to confront witnesses; on the other hand, the policy interest in giving a voice to witnesses who are unavailable to testify as a result of the defendant's actions.[12] Inclusion of the Confrontation Clause in the Bill of Rights is indicative of the importance the Framers of the United States Constitution placed on preserving the defendant's right to confront all witnesses against him.[13] Guaranteeing the defendant a right to confront any and all witnesses who testify against him is significant for at least three reasons: first, cross-examination is a highly valued tool for revealing the complete truth;[14] second, the formality and solemnity of the swearing-in process and the presence of the defendant in the courtroom during the presentation of testimony arguably discourage deception;[15] and third, the symbolic importance of requiring confrontation creates the appearance of fairness and justice.[16] The prohibition against hearsay statements in trial[17] will

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12. Although prosecutorial intimidation of witnesses is a concern, this Note looks only at the actions of defendants. *See* James 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, 530–31 (2003).

13. *See supra* note 11.

14. John Henry Wigmore stated that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397 (James H. Chadbourn rev. ed., 1974). "This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk . . . ." WILLIAM BLACKSTONE, 3 COMMENTARIES *373.

15. *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1042 (1998) [hereinafter *Principles*] ("The oath is one of the protections accorded the defendant, providing some assurance that witnesses will not offer testimony without putting themselves at risk for false statement."). Wigmore pointed out two discrete purposes for confrontation:

> The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination* . . . . [The second purpose is] the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*, and a certain subjective moral effect is produced upon the witness.

WIGMORE, *supra* note 14, at 1395.

16. Maryland v. Craig, 497 U.S. 836, 847 (1990) (noting "the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence."). Professor Richard Friedman elaborated:

> It is not only fairness to the accused that is at stake, but also the moral responsibility of witnesses and of society at large, for "requiring confrontation is a way of reminding ourselves that we are, or at least want to see ourselves as, the kind of people who decline to countenance or abet what we see as the cowardly and ignoble practice of hidden accusation."

frequently preclude the same evidence as the Confrontation Clause for analogous reasons.[18]

Naturally, a defendant may choose to voluntarily waive his right to confront a witness.[19] Importantly, for nearly four-hundred years, courts have ruled that certain behavior by the defendant will be construed to constitute a waiver of this right.[20] Although universally accepted, this doctrine has only enjoyed codification in the Federal Rules of Evidence for the past eight years.[21] Although many states follow the Federal Rules of Evidence, few have codified the forfeiture exception.[22]

Like the forfeiture doctrine today, early forfeiture by wrongdoing cases held that when a defendant is directly responsible for the absence of the witness at trial, the defendant waives the right to confront that witness.[23] This waiver was limited originally to prior trial testimony or depositions of the unavailable witness that had already been taken in the presence of the

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Richard Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2003–2004 CATO SUPREME COURT REVIEW 439, 443 (2004) (citing Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003)).

17. *See* FED. R. EVID. 801, 802 (providing the general definition of hearsay and generally prohibiting its use). Exceptions and exemptions to the hearsay rule are found in Rule 803 (providing a list of twenty-three exceptions to the rule against hearsay) and Rule 804 (providing six exceptions where the declarant is unavailable to testify). *See* FED. R. EVID. 803, 804.

18. This Note does not consider whether the hearsay prohibition and the Confrontation Clause requirement are equivalent. *See* White v. Illinois, 502 U.S. 346, 352 (1992) (indicating that the Confrontation Clause and hearsay rules are "generally designed to protect similar values.") (quoting California v. Green, 399 U.S. 149, 155 (1970)). *See also* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 IS.L.R. 506, 513 (1997) [hereinafter *Chutzpa*] (interpreting the Confrontation Clause as providing the right to confrontation only when a statement is made against the accused by a witness to the crime). *But see White*, 502 U.S. 346, 366 (1992) (Thomas, J., concurring) ("Neither the language of the [Confrontation] Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions.").

19. Every case in which a defendant waives his right to a trial and accepts a plea bargain constitutes a waiver of the Confrontation Clause.

20. The Sixth Amendment requires an affirmative waiver of cross-examination. *See* Brookhart v. Janis, 384 U.S. 1, 3–5 (1966). Courts have also held that the doctrine of forfeiture by wrongdoing applies when the defendant disrupts court proceedings. *See* Illinois v. Allen, 397 U.S. 337, 342–43 (1970) (removal of defendant from the courtroom while a witness is testifying does not destroy the defendant's confrontation right where the defendant refuses to remain silent).

21. FED. R. EVID. 804(b)(6).

22. While forty-one states have adopted evidence rules based on the federal rules, only Pennsylvania has adopted the forfeiture by wrongdoing exception. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 807 (2005). *See also* Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)*, 80 NEB. L. REV. 891, 905–06 (2001) (arguing that the adoption of the rule was a direct consequence of Circuit Judge Ralph K. Winter, Jr. becoming the Chairman of the Advisory Committee on Evidence Rules).

23. *See The Trial of the Lord Morley for Murder before the House of Lords: 18 Charles II. A.D. 1666*, *in* 6 CABBOT'S COMPLETE COLLECTION OF STATE TRIALS 770 (London, R. Bagshaw 1810).

defendant.[24] In the late nineteenth century, the Supreme Court, in *Reynolds v. United States*,[25] confronted such a situation and admitted testimony procured during an earlier criminal trial against the defendant.[26] In this type of case, concerns about the defendant's confrontation rights were mitigated because the defendant had the opportunity to confront the witness during a deposition or previous trial.[27]

Since those incipient cases, courts have expanded their application of the doctrine. In *United States v. Carlson*,[28] grand jury testimony was admitted after the court held that the defendant had procured the absence of the witness.[29] The Court held that the grand jury testimony had "circumstantial guarantees of trustworthiness"; however, it refused to decide whether such evidence possessed the "indicia of reliability" normally required to admit out-of-court testimony.[30] Instead, the court admitted the testimony under the theory that the defendant had voluntarily forfeited his constitutional right to confront the witness.[31]

More recent court decisions have applied the forfeiture by wrongdoing doctrine to admit witness statements made to law enforcement agents. In *United States v. Ochoa*,[32] statements made to an FBI agent by an accomplice to the conspiracy were introduced during trial after the court concluded that the witness was unavailable.[33] The First Circuit reached a similar result in *United States v. Houlihan*,[34] applying the forfeiture doctrine to reach statements made to the police by a snitch.[35] *Houlihan* is

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24. *See id.* (frequently cited as an early example of wavier of confrontation because of witness unavailability: a deposition taken before a coroner was entered into evidence after the court found the defendant caused the absence of the witness); 5 WIGMORE, *supra* note 14, § 1405, *quoted in* Flanagan, *supra* note 12, at 463–64.

25. 98 U.S. 145 (1878).

26. *Id*. at 158 ("The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.").

27. *See* WIGMORE, *supra* note 14, § 1405 ("If the witness has been by the *opponent procured* to absent himself, this ought of itself to justify the use of his deposition or former testimony.").

28. 547 F.2d 1346 (8th Cir. 1976).

29. *Id*. at 1353.

30. *Id.* at 1357. The court reached this conclusion after analysis of Dutton v. Evans, 400 U.S. 74 (1970), *cited with approval in* Crawford v. Washington, 541 U.S. 36, 57 (2004).

31. *Carlson*, 547 F.2d at 1360.

32. 229 F.3d 631 (7th Cir. 2000).

33. *Id*. at 639–41 (On appeal the court determined that the evidence was insufficient to prove unavailability of the witness due to wrongdoing by the defendant; however, admission of the evidence was harmless error).

34. 92 F.3d 1271 (1st Cir. 1996).

35. *Id*. at 1278–30 (voluntary statements were made by the snitch to police after he was arrested on drug trafficking charges).

significant because it indicates the potential breadth of the forfeiture doctrine: immediately after police arrested the snitch on drug-trafficking charges, the snitch made the statements incriminating Houlihan.[36] Those statements were made during the investigation, before the government brought any charges against Houlihan.[37] When the snitch spoke to the police, Houlihan had no knowledge of the content of the statements or their intended use in his future prosecution.[38] In addition, the statements were made in a less-than-formal setting, increasing the likelihood that the statements were unreliable, and thus inadmissible.[39] The *Houlihan* Court rejected the defense's claim, that the statements were unreliable, because the court interpreted the forfeiture doctrine as eliminating the need to establish reliability.[40] Whether admission of these statements is correct, this type of decision is a direct result of the judicial desire to minimize the incentives the law provides for eliminating potential future witnesses.[41]

III. REQUISITES FOR FINDING FORFEITURE BY WRONGDOING OF THE CONFRONTATION CLAUSE: UNAVAILABILITY AND WRONGDOING

A. Unavailability of the Witness

In order to introduce a prior witness statement on the premise that the defendant has forfeited the right to confront that witness, the court must first conclude that the witness is unavailable.[42] The simplest case of unavailability occurs when the witness is no longer alive.[43] Similarly, a

36. *Id*. at 1278.

37. *Id.* at 1279.

38. *Id*.

39. *Id.* (statements admitted in the Houlihan trial included oral testimony from a police officer who was present during the first statement, and a tape recording of portions of the second statement). *See also* United States v. White, 116 F.3d 903, 909–13 (D.C. Cir. 1997) (admitting statements made by a drug informant during a debriefing by police because the informant was killed before testifying at trial).

40. "Houlihan's and Nardone's misconduct waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous." *Houlihan*, 92 F.3d at 1281.

41. *Id.* at 1279–80.

42. The Federal Rules of Evidence describe five types of witnesses who are unavailable for purposes of testifying. Unavailability may be found (1) "on the ground of privilege," (2) if the witness "persists in refusing to testify . . . despite an order of the court," (3) if the witness "testifies to a lack of memory," (4) if the witness is "unable to be present . . . because of death, or illness or infirmity," or (5) if the proponent of the testimony is "unable to procure the declarant's attendance . . . by process or other reasonable means." FED. R. EVID. 804(a)(1–5).

43. *See, e.g.*, United States v. Dhinsa, 243 F.3d 635, 651–52 (2d Cir. 2001); United States v. Emery, 186 F.3d 921, 926–27 (8th Cir. 1999); *Houlihan*, 92 F.3d at 1279; *White*, 116 F.3d at 911; United States v. Miller, 116 F.3d 641, 667–68 (2d Cir. 1997); *Mastrangelo*, 693 F.2d at 269, 271–72.

witness is unavailable when he or she is out of the relevant jurisdiction and the court is unable to compel the presence of the witness, or it would be a significant burden to compel the presence of the witness.[44] Complex issues arise when the witness is alive and available but cannot recall the events about which he or she is required to testify.[45] Perhaps the most difficult and contentious issues regarding witness availability pertain to whether refusal to testify out of fear or embarrassment is sufficient to establish that a witness is unavailable.

Frequently, the witness is afraid of retaliation by the defendant and thus refuses to testify. In *United States v. Carlson*,[46] the witness testified before a grand jury; however, at trial he refused to testify because the defendant feared for his life.[47] The court failed to coerce or persuade the witness to testify, even after holding him in contempt.[48] This refusal to testify, due to fear of retaliation, led the court to conclude that the defendant's wrongdoing made the witness unavailable.[49] Resultantly, the court admitted the grand jury testimony.[50] Similarly, in *People v. Geraci*,[51] the physical availability of the witness did not mandate confrontation.[52] The Court admitted grand jury testimony into evidence because it concluded that the defendant had attempted to bribe and threaten the witness prior to trial.[53]

A final type of witness often considered unavailable for purposes of forfeiture of confrontation is the traumatized victim of sexual assault or abuse. Although refusing to testify under a court order satisfies the

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44. *See* United States v. DeGideo, No. 04-100, 2004 US Dist. LEXIS 12238 (D. Penn. June 22, 2004) (FBI agent who was in Iraq was deposed on video because it was unclear when he would be returning to the United States).

45. *See* United States v. Owens, 484 U.S. 554 (1988) (standing for the proposition that the inability to remember an event does not constitute unavailability). In *Owens*, the witness suffered a head injury but was able to make an out-of-court identification of the defendant. At trial, brain damage from the attack prevented the witness from recalling the assault. He was still able to remember his out-of-court identification. The Court held that the witness was available for cross-examination and therefore his recollection of a prior statement was admissible. In its decision, the Court stated that cross-examination provides the defendant with "the opportunity to bring out such matters as the witness' bias . . . [and] the very fact that he has a bad memory." *Id*. at 559.

46. 547 F.2d 1346 (8th Cir. 1976).

47. *Id*. at 1352–53.

48. *Carlson*, 547 F.2d at 1352–53.

49. *Id*. at 1353.

50. *Id.* at 1353–54. *See also* United States v. Balano, 618 F.2d 624, 630 (10th Cir. 1979) (admitting grand jury testimony of witness after defendant threatened the witness' life prior to trial).

51. 649 N.E.2d 817 (N.Y. 1995).

52. *Id*. at 820.

53. *Id*. at 821. *See also* People v. Cotto, 699 N.E.2d 394 (N.Y. 1998) (After concluding that the witness had been intimidated, the court permitted the witness to testify regarding pre-murder events, and prior statements to police made by the witness were introduced to describe the murder.).

"unavailability" requirement,[54] refusal to testify due to trauma is considered generally insufficient to constitute "unavailability."[55] For example, in *State v. Jarzbek*,[56] the court held that a threat made during the commission of the crime did not automatically procure the absence of the witness such that he was "unavailable" for purposes of testifying in court.[57] In contrast, in *Maryland v. Craig*,[58] the Supreme Court indicated its willingness to look favorably at limited exceptions for young victims of sexual assault if the legislature asserted an interest in protecting children from the trauma of testifying.[59]

B. The Defendant's Procurement of the Witness' Absence

1. A Responsible Share in the Witness' Absence

The second issue a court must consider in a forfeiture by wrongdoing case is the defendant's role in procuring the unavailability of the witness.[60] It is unclear to what extent the defendant must have actual knowledge of, or participate in, the procurement of the witness' absence.[61] Rule 804(b)(6) of the Federal Rules of Evidence requires a showing that the defendant is

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54. *See* FED. R. EVID. 804(a)(2) ("'Unavailability as a witness' includes situations in which the declarant . . . persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.").

55. Friedman suggests that the forfeiture doctrine may be correctly applied where a child victim "has been intimidated, either by the abusive conduct itself or by a threatening statement—'Don't tell anyone!'—that accompanied or followed the conduct." Friedman, *Chutzpa*, *supra* note 18, at 533–34.

56. 529 A.2d 1245 (Conn. 1987), *cert. denied*, 484 U.S. 1061 (1988).

57. *Id*. at 1253 ("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.").

58. 497 U.S. 836 (1990).

59. *Id*. at 855 (closed-circuit television provided the child victim's testimony during the trial). Justice Scalia's dissenting opinion in *Craig* disagreed with the majority opinion that denying face-to-face confrontation does not violate the Confrontation Clause "because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation." *Id.* at 862 (emphasis in original). *See also* White v. Illinois, 502 U.S. 346 (1991). Commentators question the purpose of cross-examination of child witnesses: "we may suspect that cross-examination is so likely to be fruitless that the invocation of the confrontation right is little more than an attempt to intimidate the child into not testifying." Friedman, *Principles*, *supra* note 15, at 1037–38. Even so, Friedman still has "grave qualms" about not requiring the prosecution to produce the witness. *Id*. at 1038.

60. The Federal Rules of Evidence uses the phrase "engaged or acquiesced," therefore broadening the scope of the role a defendant must have in procuring a witness's inavailability by including both passive and active forms of participation. FED. R. EVID. 804(b)(6).

61. *See* Friedman, *supra* note 16, at 465 ("And how is participation or acquiescence to be determined; is the mere fact that the accused benefited from the murder enough to raise a presumption that the accused acquiesced in it?").

responsible in some fashion for the absence of the witness.[62] As a result, courts interpreting the forfeiture doctrine have assumed that the objective of the doctrine is to deter interference with trial witnesses by holding wrongdoing against those witnesses as a forfeiture of the confrontation right.[63] By focusing on the defendant's role in procuring the absence of the witness, the court places the waiver of the confrontation right in the defendant's hands.

At present, discouraging witnesses from coming forward is a systemic problem, visible nationwide.[64] Witness testimony against others is discouraged frequently and snitches are frowned upon.[65] In contrast, punishment for criminal behavior requires autonomous activity by the defendant, not generalized societal pressures. Assertions that a witness possesses a generalized fear of retaliation are insufficient to apply the forfeiture by wrongdoing exception. Only actions directly attributable to the defendant, or in which the defendant acquiesced,[66] and that result in the absence of the witness, will suffice.[67] One scholar, Richard Friedman, suggests that the doctrine of forfeiture by wrongdoing should reach all wrongful acts committed by the defendant that result in the witness' unavailability at trial.[68]

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62. Friedman generated an extensive but not exclusive list of ways in which a defendant may procure the absence of the witness: "murder, intimidation, improper payment, or chicanery, or by concealing the declarant or persuading her to absent herself . . . ." Friedman, *Chutzpa*, *supra* note 18, at 518–19.

63. *See* United States v. Thompson, 286 F.3d 950, 962 (7th Cir. 2002) ("The primary reasoning behind this rule is obvious—to deter criminals from intimidating or "taking care of" potential witnesses against them."); United States v. Mastrangelo, 693 F.2d 269, 272–73 (2d Cir. 1982).

64. *See Anderson Cooper 360 Degrees*, *supra* note 5.

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> Whether it's at school, at work or on the street, people often turn a blind eye to social injustice rather than snitch. "There has always been a part of humanity that does not want to come forward to report wrongs," Jennifer Connolly, a psychology professor at York University, said yesterday. "It's something we learn at an early age. If teachers and adults say don't snitch and don't tattle-tale, then kids learn that."

Scott Roberts, *Why Witnesses Turn a Blind Eye to Injustice*, TORONTO STAR, Aug. 25, 2005, at A23. Prosecutors often note the "increasing difficulty of persuading witnesses to identify those who commit crimes. Relentless threats of bodily harm, or even death, silence many, officials say. Others have a deep-seated distrust of police or are afraid of being labeled a 'snitch.' Robert E. Pierre, *In D.C., Many Eyes But Few Witnesses*, WASH. POST, Sept. 25, 1996, at D1.

66. *See supra* note 60.

67. This limits problems where a parent refuses to allow a child to testify. In that case it is the parent, not the defendant, who has procured the absence of the witness. See *Jarzbek*, 529 A.2d at 1245.

68. *See* Friedman, *Chutzpah*, *supra* note 18, at 518 n.25 ("One can conceive of situations in which it is merely fortuitous that the defendant's conduct, even if wrongful, caused the declarant's unavailability to testify: Suppose the defendant drives negligently on the way to court, and happens to run over the declarant, who was on her way to testify."). While compelling, the issue raised by *Jarzbek* is beyond the scope of this Note. Assuming that a single threat uttered during the crime is not enough

2. The Burden of Proof

To prevent defendants from benefiting from their wrongdoing, courts are willing to make inferential jumps to find wrongdoing. In *United States v. West*,[69] the government did not show any direct connection between the witness and the defendant; nonetheless, the court found forfeiture by wrongdoing because the witness appeared to have died from a professional hit, and because the hit was most likely the result of the defendant's actions.[70]

There is a general consensus that the wrongdoing must be established by a preponderance of the evidence; however, this is not a uniform standard. A majority of circuit courts have ruled that a showing by a preponderance of the evidence is sufficient.[71] In contrast, the Fifth Circuit, as well as the New York State Rules of Evidence, both apply the more stringent clear and convincing evidence standard before admitting any hearsay evidence.[72]

Regardless of the standard of proof, the decision is an issue of law for the judge to decide.[73] Some courts require an evidentiary hearing to

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to invoke the forfeiture doctrine, the question becomes, "[s]hould a witness who is present, but refuses to testify out of fear, be considered unavailable but not by wrongdoing by the defendant?" Or alternatively, should the witness be considered available, meaning the prosecution must deal with the witness' refusal to testify?

69. 574 F.2d 1131 (4th Cir. 1978).

70. *Id*. at 1134 (applying the residual exception to hearsay evidence, rather than the doctrine of forfeiture by wrongdoing).

71. *See* United v. Ochoa, 229 F.3d 631, 639 n.2 (7th Cir. 2000) (applying the preponderance of the evidence standard because defendant did not object; and, also holding that there was no forfeiture because the government's only evidence of wrongdoing was seven phone calls made from the defendant's residence to the witness' employer); United States v. Emery, 186 F.3d 921, 926–27 (8th Cir. 1999) (following the preponderance of the evidence standard used to admit co-conspirator hearsay); United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997) (citing Bourjaily v. United States, 483 U.S. 171, 175–76 (1987) (discussing constitutional cases liberally in selecting the preponderance standard); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996) (applying the co-conspirator preponderance of the evidence standard); United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (applying a preponderance of the evidence standard because "[s]uch a claim of waiver is not one which is either unusually subject to deception or disfavored by the law").

72. The Supreme Court's concern with the reliability of evidence motivated the Fifth Circuit to apply a clear and convincing evidence standard in *United States v. Thieves*, 665 F.2d 616 (5th Cir. 1982). The court noted that in-court identification following tainted identification requires proof of reliability by clear and convincing evidence. The government was required to prove not only that the defendant caused the witness' unavailability but also that the purpose of the defendant's actions was to prevent the witness from testifying at trial. *Id*. at 631 n.17. *See also* People v. Geraci, 625 N.Y.S.2d 469, 473 (N.Y. 1995); Friedman, *Chutzpa*, *supra* note 18, at 519–20 (expressing the opinion that the significance of waiving the confrontation right creates a colorable argument for applying a higher standard of proof).

73. FED. R. EVID. 104(a) (Instructing that "admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).").

determine whether the defendant waived his confrontation rights.[74] Other courts admit the evidence conditioned upon the prosecution meeting its burden of proof during the trial.[75] The Minnesota Court of Appeals, in *State v. Keeton*,[76] held that the defendant had the right to be present at any pre-trial hearing where the court determined whether the defendant's actions procured the absence of the witness.[77] However, in *People v. Perkins*,[78] the New York Supreme Court allowed a witness to testify *in camera* without the defendant or defense counsel present to determine whether the defendant intimidated the witness.[79]

Frequently, procuring the witness' absence is the very crime that the prosecution is charging.[80] For example, the prosecution may wish to admit a statement made by the victim under the forfeiture doctrine. As a preliminary issue, the judge will decide whether the defendant's wrongdoing procured the unavailability of the witness by evaluating the statement of the victim.[81] Bootstrapping in this manner is often a contentious issue.[82] The Supreme Court ostensibly resolved the debate in *Bourjaily v. United States*.[83] In *Bourjaily*, the Court concluded that the statements the prosecution wished to admit could be used to prove the existence of wrongdoing sufficient to admit the statements.[84] In many contexts, there is no problem with this policy; however, it does not mitigate concerns regarding the accuracy or validity of the statement.

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74. *See* United States v. Dhinsa, 243 F.3d 635, 653 (2d Cir. 2001); *Mastrangelo*, 693 F.2d at 272 (an evidentiary hearing is necessary); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979) ("[t]he judge must hold an evidentiary hearing in the absence of the jury . . . .").

75. *See Emery*, 186 F.3d at 926 (conditionally admitting the evidence). *Cf. Houlihan*, 92 F.3d at 1281 n.5 (1st Cir. 1996) (holding that lower court did not "outstrip the bounds of its discretion in declining to convene a special mid-trial evidentiary hearing." in allowing thirty-seven days of testimony in an evidentiary hearing).

76. 573 N.W.2d 378 (Minn. Ct. App. 1998).

77. The appellate court found error in the trial court's decision to exclude the defendant from any pretrial hearing, but overturned the conviction on another basis. *Id.* at 383.

78. 691 N.Y.S.2d 273 (N.Y. App. Div. 1999).

79. *Id*. at 277 (the court subsequently admitted the witness' grand jury testimony and out-of-court statements).

80. *See* Friedman, *Chutzpa*, *supra* note 18, at 521–22.

81. *See id.* at 522 (explaining that the court must conclude that the defendant committed the act which the prosecution is bringing to a jury).

82. *See* Friedman, *Chutzpa*, *supra* note 18, at 523 (defending the use of bootstrapping).

83. 483 U.S. 171, 176 (1987) (considering whether evidence to prove a conspiracy existed must be independent from "the statements sought to be admitted.").

84. *Id.* at 181. The Court opinion notes that its holding does not mean that the prosecution could rely completely on the statements in finding a conspiracy. "It may, however, use its own bootstraps, together with other support, to overcome the objection." *Id.* at 185 (Stevens J., concurring).

3. Further Consequences of Wrongful Behavior

The forfeiture by wrongdoing doctrine is not the only law working to protect witness statements. There are two additional arrows in the prosecution's quiver designed to deter wrongful behavior by a defendant: first, the wrongful act may be a chargeable crime such as murder, assault, or harassment; and second, the wrongful act may constitute the chargeable crime of tampering with a witness, victim, or informant.[85] Frequently, the forfeiture by wrongdoing exception to the Confrontation Clause is a more attractive option for two reasons: the burden of proof is much lower,[86] and the original crime charged may have more significance to the prosecution.

IV. *CRAWFORD V. WASHINGTON*[87]

In March 2004, the Supreme Court re-examined its position regarding the constitutional right to confrontation.[88] The Court reversed the defendant's conviction[89] because the prosecution had introduced out-of-court testimony in violation of the defendant's Sixth Amendment right to confront any witness testifying against the interests of the defendant.[90] In reaching this conclusion, the Court revisited and subsequently overruled its oft-cited 1980 decision in *Ohio v. Roberts*,[91] which permitted admission of hearsay testimony when the witness was unavailable and the statement was deemed to contain sufficient "indicia of reliability."[92]

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85. Punishment for witness tampering depends upon a variety of factors, including the action constituting witness tampering and the type of crime originally charged. 18 U.S.C. § 1512 (2000) provides that:

> If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

Id. § 1512(j).

86. In contrast to the preponderance of the evidence standard used by most courts, the prosecution must prove beyond a reasonable doubt that the defendant committed the crime against the witness. *See supra* note 71.

87. 541 U.S. 36 (2004).

88. 541 U.S. 36 (2004).

89. During the initial appeal, the Washington Court of Appeals reversed the conviction because the statement by the defendant's wife appeared untrustworthy. "The statement contradicted one she had previously given" and "she admitted she had shut her eyes during the stabbing." *Id.* at 41. The Washington Supreme Court took the case on appeal and reversed the appellate court, concluding that the testimony was trustworthy. *Id.* at 41–42.

90. *Id*. at 68 ("[T]he Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

91. 448 U.S. 56 (1980).

92. *Id*. at 66 (A statement is considered to contain indicia of reliability if it "falls within a firmly

In *Crawford*, the prosecution introduced a previously recorded statement made to police by the defendant's wife, Sylvia.[93] The state's marital-privilege law[94] prevented the defendant's wife from testifying in court, therefore preventing the defendant, Michael Crawford, from cross-examining his wife.[95] In arriving at its decision to admit the out-of-court statement, the trial court concluded that the statements bore "particularized guarantees of trustworthiness," thus eliminating the necessity of providing the opportunity for cross-examination.[96]

In its decision to reverse the conviction, the Court focused on the purpose of the Sixth Amendment's Confrontation Clause and the protections it affords defendants.[97] *Crawford* requires that the right to confrontation be applied to all witnesses who "bear testimony" against the accused.[98] *Crawford* focuses on a specific type of evidence—testimonial statements made by a witness under circumstances that prevent the defendant from cross-examining that witness. These statements are the sort the *Crawford* decision ensures are subject to cross-examination.[99] Although the exact definition of testimonial evidence is left for the lower courts to hash out, the broadest definition given by the *Crawford* Court is any statement that a reasonable person would believe would be available for use in a future trial.[100]

The concerns addressed in *Crawford* are clear. Its failure is the considerable uncertainty that attaches to the undefined term "testimonial,"

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rooted hearsay exception [or bears] particularized guarantees of trustworthiness.").

93. *Crawford*, 541 U.S. at 38–39. Sylvia's statement to the police was different from the defendant's in that her statement suggested that when the defendant attacked the victim, there was nothing in the victim's hand to justify use of a deadly weapon. *Id*. at 41.

94. One criticism arising out of the *Crawford* decision is that the marital-privilege law was invoked by the defendant Michael Crawford, who then refused to waive the privilege yet objected to being unable to cross examine the witness. Lininger, *supra* note 22, at 23.

95. WASH. REV. CODE § 5.60.060(1) (1994).

96. The Court determined that "Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or 'justified reprisal'; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a 'neutral' law enforcement officer." *Crawford*, 541 U.S. at 40.

97. *Id.* at 50 ("[T]he principal evil at which the Confrontation Clause was directed was the . . . use of *ex parte* examinations as evidence against the accused.").

98. *Id.* at 52, *citing with approval* Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410) 3 ("[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.").

99. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement. *Crawford*, 541 U.S. at 51.

100. *Id*. at 52.

which the Court intentionally left unclear.[101] Instead, the Court satisfied itself with disposing of the *Roberts* test[102] and setting forth guidelines that protect a defendant's right to confrontation: if a witness is unavailable[103] to testify in court, then any out-of-court "testimonial" statements made by that witness are admissible only if the defendant has a prior opportunity to cross-examine the witness regarding those statements.[104]

In *Crawford*, Justice Scalia recognized that the goal of the *Roberts* test was to ensure that reliable evidence is presented at trial. Of course, the right to cross-examine and to explore the accuracy and reliability of the statements of a witness is mandated by the Confrontation Clause.[105] *Crawford* provides limited circumstances in which the right to admit out-of-court testimony will be permitted: when the evidence is non-testimonial,[106] or when the witness is unavailable and the defense has had a prior opportunity to cross-examine.[107] Within this final category, the Court looked approvingly at the forfeiture by wrongdoing doctrine as a rule that does not raise concerns regarding the reliability of evidence.[108] For further clarification, the Court referred to *Reynolds v. United States*.[109]

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101. *Id.* at 68 (footnote omitted) ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."). In addition to these clarifications, Justice Scalia's opinion explains dying declarations as "the one deviation" from the definition of testimonial that should remain admissible without confrontation. *Id*. at 56 n.6. "If this exception must be accepted on historical grounds, it is *sui generis*." *Id.* This hints at a drastic shift in hearsay exceptions. Neil Cohen and Donald Paine suggest that excited utterances and certain medical diagnosis and treatment may be testimonial under certain circumstances. Neil P. Cohen & Donald F. Paine, Crawford v. Washington: *Confrontation Revolution*, 40 TENN. B.J. 22, 23 (2004).

102. The *Crawford* Court dismissed the *Roberts* test after concluding that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Crawford*, 541 U.S. at 61.

103. "Unavailability" is another term that is not explained in the *Crawford* decision. The Court's sparse discussion of the unavailability element includes positive treatment of *Barber v. Page*, 390 U.S. 719, 722–25 (1968) (requiring a good faith effort by the prosecution to procure the availability of the witness) and *Motes v. United States*, 178 U.S. 458, 470–72 (1900) (explaining that the government's failure to guard a witness who had been arrested was error on the part of the government). *Crawford*, 541 U.S. at 57. This Note does not argue that the *Crawford* decision changed the meaning of the term "unavailable" for purposes of Confrontation Clause doctrine.

104. *Crawford*, 541 U.S. at 59.

105. Although reliability is the end, the means to that end must be through cross-examination, not the conclusions of a judge: the Confrontation Clause requires "not that evidence be reliable, but that reliability be assessed in a particular manner." *Id.* at 61.

106. *Id.* at 68. ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." The Court points to business records and statements in furtherance of a conspiracy as examples of nontestimonial statements. *Id.* at 56.

107. *Id*. at 59.

108. Forfeiture by wrongdoing "make[s] no claim to be a surrogate means of assessing

In *Reynolds*, the trial court concluded that the witness was unavailable as a result of the defendant's actions. The burden was on the defendant to refute this assertion.[110] Although it did not hesitate to affirm the lower court decision to admit the previous statement, the Supreme Court expressed an interest in limiting prior statements to "competent evidence."[111] The statements admitted by the trial court were made in a prior trial of the defendant for the same offense—a full opportunity to cross-examine had occurred in this prior trial.[112] The *Reynolds* Court defended the waiver by wrongdoing doctrine as a rule that enforces fairness: a defendant cannot complain if he is responsible for the witness's absence.[113] This early Supreme Court interpretation of the forfeiture by wrongdoing doctrine did not expressly extend to all statements made by the unavailable witness; instead, the only clear message it evinced was that the forfeiture doctrine could admit evidence considered competent.[114]

V. POST-*CRAWFORD* DECISIONS

Since *Crawford*, attorneys, academics, and courts alike have shown extraordinary concern regarding the proper classification of out-of-court testimony.[115] To avoid the possibility of evidence becoming blocked by the re-invigorated confrontation rule, prosecutors have frequently argued that *Crawford* is distinguishable and therefore irrelevant to the present case.[116] Post-*Crawford*, courts have shown a willingness to consider one of the three exceptions approved of by the *Crawford* Court in order to admit

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reliability." *Id.* at 62.

109. 98 U.S. 145 (1879).

110. *Id.* at 160–61 (holding that it was the defendant's choice to not take the stand and swear that he had played no part in the witness' absence; the burden had been satisfied by the prosecution and therefore shifted to the defendant).

111. *Id.* at 158.

112. *Id.* at 159, 161 (the prior testimony that was admitted was for the same defendant for the same offense, and the defendant had the opportunity to cross-examine the witness).

113. *Id.* at 158. *See* Friedman, *Chutzpa*, *supra* note 18, at 517–18.

114. *Reynolds*, 98 U.S. at 158.

115. *See* J. Wayne Capp, *Recent Keynote Affecting the Montana Practitioners*, 65 MONT L. REV. 411, 424 (2004); Cohen & Payne, *supra* note 101; Gerald Uelmen, *Preserving Crawford Objections*, 28 CHAMPION 46 (July 2004).

116. *See* United States v. Lee, 374 F.3d 637, 644 (8th Cir. 2004) (holding that a confession made to a relative who later testifies on behalf of the prosecution is considered only a casual statement to an acquaintance and therefore not testimonial); People v. Moore, 117 P.3d 1, 5 (Colo. Ct. App. 2004) (a statement by a stabbing victim in which she accused her boyfriend of domestic assault was an excited utterance, and the defendant forfeited the confrontation right by later killing her).

out-of-court statements in trial: the dying declaration exception,[117] the forfeiture exception,[118] and the non-testimonial exception.[119]

Although *Crawford* indicated that statements made during police interrogations are "testimonial," even the phrase "police interrogation" is vague and subject to dispute.[120] In *Hammon v. Indiana*,[121] police at the scene questioned a victim of domestic abuse immediately after an incident.[122] Because questioning occurred at the scene, the court ruled that the statement was not testimonial[123] in nature, and that therefore the Constitution did not mandate confrontation.[124] In *Rogers v. State*,[125] the Indiana Court of Appeals held that preliminary investigations at the scene of the crime were not police investigations.[126] Courts that do not classify all statements to police as "testimonial" apply a strict interpretation of the *Crawford* decision.[127] By focusing on the formality of the interrogations,[128] numerous courts have admitted evidence as non-testimonial.[129]

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117. *Crawford*, 541 U.S. at 56 n.6 (claiming that this exception to the hearsay rule is *sui generis*).

118. *Id*.

119. *Id*. at 68 ("[W]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . .").

120. If all statements to police officers are considered testimonial, strange outcomes may result. While an excited utterance to police may be testimonial, "if the bystander makes the same excited utterance to another bystander at the scene, it is arguable that the statement is not testimonial." Cohen & Paine, *supra* note 101, at 23.

121. 809 N.E.2d 945 (Ind. Ct. App. 2004), *vacated* 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 126 S.Ct. 552 (2005). For purposes of this Note, all references to this case refer to the case as heard and decided by the Court of Appeals of Indiana in 2004.

122. When police arrived, they noted that the victim was "timid and frightened" and when the defendant approached, the victim "became quiet and seemed afraid." 809 N.E.2d at 947–48.

123. The court held that the police interview was "informal" and encompassed only "preliminary investigatory questions . . . . Such interaction with witnesses on the scene does not fit within a lay conception of police 'interrogation,' bolstered by television, as encompassing an 'interview' in a room at the stationhouse. It also does not bear the hallmarks of an improper 'inquisitorial practice.'" *Id*. at 952.

124. The court admitted the statement under the excited utterance exception to the hearsay prohibition. *Id*. at 949.

125. 814 N.E.2d 695 (Ind. Ct. App. 2004).

126. *Id*. at 701 (citing *Hammon*, 809 N.E.2d 945).

127. *See supra* note 96; Crawford v. Washington, 541 U.S. 36, 54 (2004); United States v. Morgan, 385 F.3d 196, 209 (2d Cir. 2004) (a letter to a boyfriend, which the author "had no reason to expect . . . would ever find its way into the hands of the police" was nontestimonial). *But see* United States v. Hendricks, 2004 U.S. Dist. LEXIS 8854, at *3 (D.V.I. Apr. 27, 2004) (interpreting the *Crawford* decision as "barring all out-of-court statements . . . whom a defendant has not had the chance to cross-examine, with the exceptions only for dying declarations and forfeiture by wrongdoing.").

128. *See Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.").

129. *See, e.g.*, State v. Barnes, 854 A.2d 208, 210 (Me. 2004) (finding that a voluntary statement where the police did not engage in "structured" questioning was not testimonial). *But see* People v.

In contrast, other courts have reached the opposite conclusion regarding the testimonial nature of statements made to police. For example, in *State v. Meeks*,[130] the Supreme Court of Kansas considered a case wherein the victim made a statement to police and bystanders implicating the defendant. The victim subsequently lost consciousness and, soon thereafter, died.[131] The court indicated that it believed that the victim's statement at the scene was testimonial in nature, because the statement was made to a police officer interrogating the victim.[132] Nevertheless, the Kansas Supreme Court held that the statement was admissible under the rule of forfeiture by wrongdoing.[133] The defendant had no opportunity to cross-examine or confront the witness about those statements because the witness died less than two hours after the shooting. The police officer's questioning was the closest the defendant got to cross-examining the victim.[134]

After *Crawford*, forfeiture by wrongdoing has become a more reliable tool for introducing out-of-court statements against defendants.[135] Additionally, the Supreme Court of Kansas held that a waiver of the confrontation right also constituted a waiver of the right to object to any hearsay evidence.[136] In *People v. Jiles*,[137] the California Court of Appeals admitted a victim's statement under the forfeiture doctrine rather than the

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Pantoja, 18 Cal. Rptr. 3d 492, 498 (Cal. Ct. App. 2004) (victim had filed an application for a restraining order which was considered an *ex parte* declaration and therefore testimonial and inadmissible unless the defense had the opportunity to cross-examine); Lee v. State, 143 S.W.3d 565 (Tex. App. 2004) (police investigation at the side of the road is interrogation and therefore testimonial because *Crawford* intended to protect a colloquial meaning of investigation).

130. 88 P.3d 789 (Kan. 2004).

131. *Id*. at 792.

132. *Id*. at 793. There were also at least four witnesses around the victim at the time of the accusation. *Id.* at 794.

133. *Id.* at 793–94 ("We need not determine whether the response was testimonial or not, however, because we hold that Meeks forfeited his right to confrontation by killing the witness . . . ."). Applying the forfeiture by wrongdoing rule required the court to bootstrap, finding the defendant guilty by a preponderance of the evidence of murder in order to introduce the out of court statement to the jury for the same charge. This technique was advocated in amicus briefs for *Crawford*, 541 U.S. 36.

134. *Meeks*, 88 P.3d at 792.

135. *See Crawford*, 541 U.S. at 58 n.8 (acknowledging the tension between *Crawford* and *White v. Illinois*, 502 U.S. 346 (1992), which allowed the admission of a spontaneous declaration to a police officer by a child victim). Likewise, the fate of the dying declaration exception is unclear. *Crawford*, 541 U.S. at 56 n.6.

136. *Meeks*, 88 P.3d at 794 ("[A] waiver of the right to confrontation based upon the procurement of the absence of the witness also constitutes a waiver of any hearsay objections to prior statements of the absent witness.").

137. 18 Cal. Rptr. 3d 790 (Cal. Ct. App. 2004) (depublished).

dying declaration exception.[138] The victim had been beaten and stabbed severely; when the police arrived at the scene, the victim gave the name of the defendant as her attacker, and within the next hour she died.[139] In order to admit the evidence, the court referred to the *Crawford* dictum regarding the defendant's capacity to forfeit the right to confrontation.[140]

VI. ANALYSIS OF FORFEITURE BY WRONGDOING

Expansion of the forfeiture by wrongdoing doctrine has occurred gradually.[141] A primary justification for this expansion is the perception that the "culture of intimidation,"[142] which the forfeiture doctrine is designed to discourage, has accelerated. For instance, it is now more likely that before any deposition, grand jury, or preliminary hearing occurs, the defendant may attempt to prevent a witness from testifying.[143] In an effort to limit the efficacy of a campaign of intimidation, courts have admitted out-of-court statements gathered earlier in the process, before any formalized proceedings have begun. Further expansion of the doctrine is evinced by the low burden of proof required to establish that a witness is unavailable and that the defendant played a role in the absence of that witness.[144] This shift in the doctrine's application has two important effects: first, an increase in the incentive to apply the doctrine, and second, a decrease in the reliability of any evidence admitted under the doctrine.[145]

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138. *Id*. at 796 ("Regardless of whether her statement qualified as a dying declaration, 'the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds.'"). *But see* United States v. Hendricks, 2004 U.S. Dist. LEXIS 8854, at *5 (D.V.I. Apr. 27, 2004) (discussing that the court did not admit statements of the government informant because there was insufficient proof to link the defendant to the death of the witness.).

139. *Jiles*, 18 Cal. Rptr. 3d at 793.

140. *Id*. at 795.

141. Early cases like *Reynolds v. United States*, 98 U.S. 145 (1978), applied the rule to ensure the admission of former testimony against the defendant. Recent court decisions have allowed conversations with police even before any criminal charges have been filed. *See supra* notes 36–39 and accompanying text.

142. *See* Editorial, *Conspiracy of Silence*, BALT. SUN, Feb. 16, 2004, at 18A.

143. *See supra* notes 35–39 and accompanying text.

144. See *supra* note 77 (discussing that the defendant in *State v. Keeton*, 573 N.W.2d 378 (Minn. Ct. App. 1998), was not allowed to be present at the hearing to determine unavailability of the witness.).

145. Compare statements introduced in *Reynolds v. United States*, 98 U.S. 145 (1879) where prior cross-examination occurred, with statements introduced in *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996), where the statements introduced at trial were made to police during a drug investigation.

A. Burden of Proof and its Effect

Due to the importance the confrontation right plays in ensuring a fair trial, waiver of that right must be monitored closely.[146] The decision to move for a waiver of the confrontation right, instead of charging the defendant with witness tampering, reveals important information regarding the prosecution's evidence and case strategy.[147] Application of the forfeiture doctrine indicates either insufficient evidence to charge the defendant with the asserted wrongdoing, or alternatively, it may show that the prosecution places more value on a conviction under the original charge rather than on a new charge.[148] By removing hurdles to the admission of evidence, the incentive for the prosecutor to push forward in the original case becomes magnified.

A majority of courts currently apply the preponderance of the evidence standard rather than the clear and convincing standard in determining forfeiture by wrongdoing.[149] When selecting a standard of proof in a criminal case, it is important to mind the significance of an incorrect conclusion by the court.[150] Requiring a preliminary hearing to determine waiver has the potential to force the prosecution to disclose its theory of the case and would consume additional court time. These detractions must be balanced against the defendant's interest in a fair trial and the protections afforded by the Constitution.[151]

After *Crawford*, the breadth of the term "unavailable" remains unclear.[152] By preluding the admission of testimony under the *Roberts* "indicia of reliability standard," *Crawford* creates an incentive for prosecutors to expand their use of the term "unavailable" to avoid having to place a witness on the stand in trial.[153] More importantly, *Crawford* creates an incentive for prosecutors to assert that the witness is unavailable as a result of the defendant's wrongdoing, therefore also eliminating the

146. *See supra* notes 70–84 and accompanying text.

147. *See supra* notes 85–86 and accompanying text.

148. *See id*. The time and effort required to bring a new charge, balanced with the time and effort already exerted in a current trial at which a witness is no longer available, may influence the prosecution's decision.

149. *See supra* notes 71–72 and accompanying text.

150. *See* Friedman, *Chutzpa*, *supra* note 18, at 520 n.33 ("If the court errs in either direction on the predicate question of whether the defendant wrongfully rendered the declarant unavailable, the negative consequences are substantial.").

151. *See supra* notes 72–74.

152. *See* Cohen & Paine, *supra* note 101, at 24 ("[T]he prosecution must make some effort to get the declarant to testify, but how heroic do those efforts have to be?").

153. In this situation, *Crawford* guarantees the defendant the opportunity to cross-examine the witness, but not at trial. Crawford v. Washington, 541 U.S. 36, 68 (2004).

prior cross-examination requirement.[154] In the first scenario, the defendant's confrontation right ostensibly remains intact because of the prior opportunity to cross-examine the witness. Without clear boundaries, the second situation creates a potential loophole to circumvent the Confrontation Clause.[155] Both the uncertainty of the term "unavailable," and the uncertainty regarding the responsible share required to apply the forfeiture doctrine, encourage testing the limits of these terms to admit statements without the opportunity for cross examination.

B. Forfeiture and Reliability

Courts explain the doctrine of forfeiture by wrongdoing as an equitable solution to a serious problem.[156] In some ways, the effectiveness of the doctrine is underestimated; in other ways, it is overestimated. Richard Friedman explains that as an attempt to promote fairness, the doctrine is successful not because it prevents a defendant from benefiting from his wrongdoing, but because the defendant has chosen to keep a witness from testifying in court and should not be allowed to complain about that witness' statements when they are admitted during trial.[157] The *Crawford* Court recognized the difficulty in making an objective determination about the reliability of an out-of-court statement.[158] Resultantly, the *Crawford* Court reached the conclusion that the reliability of a statement is irrelevant in forfeiture cases.[159] Arguably, then, the weight of any statement admitted under the forfeiture by wrongdoing doctrine is magnified because those statements are labeled implicitly as trustworthy.

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154. *Id.* at 1370.

155. *Crawford* gives no indication of future changes to the Federal Rules of Evidence definition of an unavailable witness. *See supra* notes 42–59 and accompanying text.

156. *See* United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982) (quoting Falk v. United States, 15 App. D.C. 446, 460 (D.C. 1899) ("Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong."). Friedman argues that courts are incorrect in suggesting that the doctrine is intended only to ensure that "no one should profit by his own wrong;" instead, the law merely eliminates the right "to *complain* about the consequences of his own conduct." Friedman, *Chutzpa*, *supra* note 18, at 516–17. Therefore, the doctrine should apply even when the defendant would not benefit by his wrongdoing because the wrong he committed is worse than the crime for which he is currently on trial. *Id.*

157. *See* Friedman, *Chutzpa*, *supra* note 18, at 517. The absence of a witness from court does not ensure that the defendant will be better off because the defendant may still be convicted of the crime. Alternately, the absence of a witness is not necessarily essential for the defendant to be acquitted of the crime. *Id.* at 516–17.

158. *Crawford*, 541 U.S. at 63 ("Reliability is an amorphous, if not entirely subjective, concept.").

159. After the Court rejected the *Roberts* test because it required a judge to determine reliability, the *Crawford* Court maintained that the forfeiture by wrongdoing doctrine "does not purport to be an alternative means of determining reliability." *Id.* at 62.

The assertion that application of the forfeiture doctrine eliminates concerns about the reliability of witness statements is overly broad.[160] In cases where an individual is subject to criminal liability and restraint of freedom, accuracy must always be an objective. The forfeiture doctrine should not be indifferent to the reliability of the statement; instead, forfeiture should be interpreted as an indication that the witness statement is more likely to be reliable because the defendant prevented the witness from testifying—admitting statements under the forfeiture doctrine that are clearly inaccurate or false only impedes the judicial process. Thus, the forfeiture by wrongdoing doctrine may waive the constitutional right to confrontation,[161] but any statement admitted must possess at least a modicum of credibility.[162]

There is currently a limit on the admissibility of out-of-court statements, but it merely provides a weak and distant backstop to the forfeiture doctrine. Rule 403 of the Federal Rules of Evidence balances the probative value against the potential prejudice of admitting the evidence.[163] Although Rule 403 appears to provide a sufficient degree of protection against outlandish and prejudicial testimony,[164] the defendant's burden of establishing prejudice is difficult to meet.[165] As a general rule, courts are more inclined to admit evidence, especially after a finding of wrongdoing.[166]

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160. *See infra* note 161 and accompanying text. "The Sixth Amendment right of confrontation is, by its language and historical underpinnings, a personal right of the accused and is intended for his benefit. As such, this right, like other federally guaranteed rights, can be waived by the accused." United States v. Carlson, 547 F.2d 1346, 1357–58 (8th Cir. 1976) (citation omitted).

161. *See Crawford*, 541 U.S. at 62; United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982).

162. It is noteworthy that the Supreme Court has left in place the distinction between hearsay and the confrontation right: "[N]ot all hearsay implicates the Sixth Amendment's core concerns." *Crawford*, 541 U.S. at 51.

163. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

164. *See* Enrico B. Valdez & Shelley A. Nieto Dahlberg, *Tales From the Crypt: An Examination of Forfeiture by Misconduct and its Applicability to the Texas Legal System*, 31 ST. MARY'S L.J. 99, 132 (1999).

165. *See* United States v. Terzado-Madruga, 897 F.2d 1099, 1117 (11th Cir. 1990) ("The balance under the Rule, therefore, should be struck in favor of admissibility.").

166. *See* United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001) (quoting United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997)) ("[i]n order to avoid the admission of facially unreliable hearsay, the district court should undertake a balancing of probative value against prejudicial effect in accordance with Fed. R. Evid. 403."); United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997); United States v. Thai, 29 F.3d 785, 814 (2d Cir. 1994) (the court recommended looking for "facially unreliable hearsay" under FED. R. EVID. 403). *See also* Flanagan, *supra* note 12, at 526 (After wrongdoing by the defendant, the Sixth Amendment is not available to the defendant; it leaves "any

VII. *CRAWFORD* DEFINES THE CONFRONTATION RIGHT, BUT IT IS THE MEANING OF "TESTIMONIAL," "UNAVAILABILITY," AND "RESPONSIBILITY" THAT WILL SHAPE THE FORFEITURE DOCTRINE

An unavoidable consequence of handing down a decision as novel as *Crawford* is the legal community's resistance to change.[167] Justice Scalia's opinion is simple and incontrovertible: the Confrontation Clause is susceptible to infringements and must be protected.[168] The Court's holding broadens the confrontation rights of the accused by eliminating a judge's ability to waive those rights.[169] Unfortunately, this interpretation of the Confrontation Clause is formless without defining the term "testimonial."[170] By applying a broad definition of "testimonial," the doctrine of forfeiture by wrongdoing becomes an escape device for prosecutors who are otherwise limited by the confrontation rights of the defendant.[171]

A. Crawford, *Confrontation, and the Reliability of Out-of-Court Witness Statements*

Crawford provides four forms of witness statements that must be "testimonial" for purposes of the Confrontation Clause.[172] The Court goes no further in defining "testimonial," but emphasizes that its chief concern

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constitutional question of the reliability of the evidence to other parts of the Constitution, including the Due Process Clause, which does bar evidence that is 'totally lacking in reliability.'"). But Rule 403 is used infrequently. *See* United States v. Thevis, 665 F.2d 616, 633 (5th Cir. 1982) ("Rule 403 is an extraordinary remedy which should be used sparingly.").

167. *See Crawford*, 541 U.S. at 75 (Rehnquist, J., concurring) ("*Stare decisis* is . . . by and large . . . the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.") (citation omitted).

168. *Id*. at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

169. Justice Scalia praises the "Framers' wisdom in rejecting a general reliability exception" because "[t]he framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Id*. at 62–63. *See also supra* note 102.

170. *See supra* note 101 and accompanying text.

171. In *State v. Meeks*, 88 P.3d 789 (Kan. 2004), "[o]fficer Hall was arguably conducting an interrogation when he asked Green if he knew who shot him"; however, the court remained unconcerned: "[w]e need not determine whether the response was testimonial or not, however, because we hold that Meeks forfeited his right to confrontation by killing the witness." *Id*. at 793–94. *Cf*. People v. Jiles, 18 Cal. Rptr. 3d 790, 796 (Cal. Ct. App. 2004) (concluding that the witness statement was not testimonial, however, the court applied the forfeiture doctrine).

172. *Crawford*, 541 U.S. at 68 ("[I]t applies at a minimum to prior testimony at a preliminary hearing, before a grand jury or at a former trial; and to police interrogations.").

regards the testimony of witnesses who have been subjected to an *ex parte* examination.[173] The *Crawford* Court's concern about these forms of testimonial evidence is appropriate because they are formalized statements and therefore inherently more persuasive to a jury.[174]

Forfeiture by wrongdoing should distinguish between *ex parte* formalized statements and off-hand remarks by a witness. Making an official statement indicates to the witness that the statement will be relied on in the investigation and potentially the prosecution of the accused.[175] A finding by the court that the defendant forfeited the right to confrontation should not mitigate the underlying goal of presenting accurate testimony.[176] Pursuant to the forfeiture doctrine, all witness statements, regardless of the formality of the statements, enjoy the same deference and respect from the court (although the fact-finder enjoys final discretion regarding the amount of weight to give to a statement).[177]

B. The Forfeiture Doctrine Before and After Crawford *is Pushed to its Furthest Limits*

Legitimate concerns about the reliability of testimonial evidence served as the impetus for both the "indicia of reliability" standard, as well as the *Crawford* decision.[178] Although confrontation does not ensure that evidence will be accurate, it affords the defendant the opportunity to show the jury any weaknesses in the testimony.[179] In *Crawford's* wake, some

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173. *Id*. at 50 ("[T]he principal evil at which the Confrontation Clause was directed was . . . [the] use of *ex parte* examinations as evidence against the accused."). *Cf*. White v. Illinois, 502 U.S. 346, 364 (1992) (Thomas J. concurring) (demonstrating concern that statements to an investigating police officer may be "the functional equivalent of in-court testimony because the statements arguably were made in contemplation of legal proceedings.").

174. *See Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). Because of this substantive difference, the *Crawford* Court rejected a reliability standard that "applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause." *Id*. at 60.

175. *See supra* note 98.

176. *See supra* note 161 and accompanying text.

177. *See* State v. Meeks, 88 P.3d 789, 792 (Kan. 2004) (the statement to police immediately before dying was admitted under the forfeiture doctrine).

178. Mattox v. United States, 156 U.S. 237 (1895) describes the Clause's core concern:

> The primary object of the constitutional provision in question was . . . not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242.

179. *Crawford*, 541 U.S. at 61 ("[I]t is a procedural rather than a substantive guarantee.").

courts have found ways around the limits established in *Crawford* when considering whether a statement is testimonial.[180]

Hammon v. Indiana illustrates a strict application of the *Crawford* decision.[181] The *Hammon* court construed *Crawford* to distinguish between police interrogations and police questioning at the scene of the crime, holding that the latter is not "testimonial."[182] Defining "testimonial" statements should not be such a narrow and precise exercise.[183] *Hammon* focused incorrectly on the meaning of "interrogation." Alternatively, it should have considered the expectations a witness may have in making accusatory statements to the police.[184] Unlike statements to an acquaintance,[185] when talking to a police officer, a witness likely has the impression that his statement may be used in furtherance of the investigation and prosecution of an individual.[186] The court should also consider the Supreme Court's aversion towards *ex parte* statements and the ultimate objective of providing the defendant with the opportunity to confront those witnesses in trial.[187]

In contrast to *Hammond*, in *United States v. Savier*, the United States District Court for the Southern District of Indiana appropriately refused to consider the formality of the interrogation in determining the statement's testimonial quality.[188] The court concluded that Justice Scalia's distinction between legal and colloquial interrogations[189] indicated a broader interpretation than the *Miranda* definition of "interrogation."[190] Likewise in *State v. Meeks*, the Kansas Supreme Court also applied a less stringent interpretation of the term "interrogation."[191] In this case, the court

180. *See supra* notes 115–40 and accompanying text.

181. *See supra* notes 122–24 and accompanying text.

182. *See supra* note 123 and accompanying text.

183. The Indiana court focused on the Supreme Court's use of the phrase "police interrogation" and concluded a "police 'interrogation' is not the same as, and is much narrower than, police 'questioning.'" Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004).

184. *See supra* note 128 and accompanying text.

185. The Hammon court asserts that an excited utterance "by definition, has not been made in contemplation of its use in a future trial." *Hammon*, 809 N.E.2d at 953.

186. *See supra* note 99.

187. *See supra* note 97.

188. United States v. Saner, 313 F. Supp. 2d 896, 901 (S.D. Ind. 2004) (The fact that the defendant in this case was "not in custody when he made the statements to the prosecutor . . . does not appear to be a meaningful distinction under *Crawford*.").

189. The *Crawford* Court was careful to note that it was using the "term 'interrogation' in its colloquial, rather than any technical, legal sense." *Crawford*, 541 U.S. at 53 n.4.

190. *See Saner*, 313 F. Supp. 2d at 901 ("If the Court wanted to limit *Crawford* to statements given in the custodial setting, it could have simply borrowed the familiar definition of interrogation from the *Miranda* context.").

191. *See* State v. Meeks, 88 P.3d 789 (Kan. 2004).

classified the questioning of the victim by the police officer as testimonial.[192]

VIII. PROPOSAL

It is inevitable that some form of the forfeiture doctrine will continue to play an important role in the criminal justice process. This Note does not question the constitutionality of the forfeiture by wrongdoing doctrine as an exception to the Confrontation Clause. This Note acknowledges that it is well-established that even without a codified version of the forfeiture doctrine, state courts employ the rule to admit evidence.[193] Generally speaking, this Note supports the use of the doctrine, but argues that standards for the doctrine's application, as well as limits on its use, must be employed to ensure that it is not abused, specifically in the criminal justice process.

Crawford places the right to confrontation on a pedestal for at least two reasons: an interest in finding the truth[194] and an interest in promoting fairness.[195] In *Crawford*, Justice Scalia asserts that forfeiture is an equitable solution, and is not concerned with reliability. In contrast, the *Crawford* decision is based on the importance of providing confrontation and the risks associated with granting judges the discretion and authority to waive that right.[196] Adoption of a set of proposals will help ensure that in the context of criminal trials, confrontation and forfeiture are more fairly balanced.

This Note suggests that statements admitted under the forfeiture by wrongdoing doctrine fall into three categories: statements in which there is a prior opportunity for cross-examination, formalized *ex parte* statements, and informal *ex parte* statements. This Note urges limiting the application of the forfeiture doctrine when the statement at issue falls in the third category. Moreover, this Note recommends that courts adopt a broad definition of "testimonial." As a means of ensuring accurate testimony in forfeiture by wrongdoing cases, only "testimonial" statements should be

192. *Id*. at 793. In its analysis, the court showed hesitancy in its conclusion. It applied the forfeiture by wrongdoing doctrine and refused to hold that the statement was testimonial. *See supra* note 171.

193. *See supra* note 22. *See also* State v. Fields, 679 N.W. 2d 341, 347–48 (Minn. 2004); Linninger *supra* note 22, at 807 (recommending that all states adopt some form of the forfeiture doctrine to ensure that the prosecution does "not overlook an opportunity to apply this doctrine.").

194. Crawford v. Washington, 541 U.S. 36, 61 (2004) ("The [Confrontation] Clause's ultimate goal is to ensure reliability of evidence.").

195. *See supra* note 99.

196. *See supra* note 102.

admissible. Finally, before admitting statements under the forfeiture doctrine, the prosecution should demonstrate to the court that good faith efforts were made to obtain the presence of the witness at trial.

Adopting a broad definition of "testimonial" will help protect the forfeiture doctrine from abuse. Questioning conducted by police officers in most contexts should be considered testimonial evidence.[197] When a witness speaks with the police, his statements are not off-hand or casual. Statements to police fit easily in the category of statements that a reasonable person would believe would be available for use in a future trial.[198] Adopting this interpretation of testimonial statements resolves concerns that Justice Scalia had regarding *ex parte* accusatory statements[199]—specifically those statements that a declarant believes may be used prosecutorially.[200] While refusing to define "interrogation" or "testimonial," Justice Scalia's decision seems to favor a definition that is broad enough to include most statements to police officers.[201]

Next, the forfeiture by wrongdoing doctrine should be applied only when prosecutors wish to introduce testimonial evidence.[202] While treating the rule of forfeiture by wrongdoing favorably,[203] Justice Scalia's reference to *Reynolds v. United States*[204] supports a limited admissibility standard.[205] A testimonial statement that may be admissible under the forfeiture doctrine likely satisfies the desire for competent evidence in two unique ways: the statement is made under the impression that it will be used in the investigation and prosecution of the defendant,[206] and the

197. Friedman's conception of the Confrontation Clause covers any occurrence where "the declarant makes a statement, either directly to a law enforcement officer or through an intermediary, that she realizes will likely aid in the investigation or prosecution of a crime." Friedman, *Chutzpa*, *supra* note 18, at 514. This Note does not consider other types of evidence that may or may not be testimonial. Professor Lininger presents a broad discussion of some alternate theories on the scope of testimonial statements. *See* Lininger, *supra* note 22, at 773–81 (presenting arguments about how the "testimonial statements" requirement extends to 911 calls and excited utterances to police officers). *See also* Cohen & Paine, *supra* note 101, at 23 (considering whether information gathered in a "rape kit" is testimonial).

198. *See supra* notes 97–104 and accompanying text.

199. *See supra* note 98.

200. The *Crawford* Court acknowledged that police statements are "not *sworn* testimony, but the absence of oath was not dispositive." Crawford v. Washington, 541 U.S. 36, 52 (2004).

201. *See supra* notes 188–90.

202. *See supra* notes 97–101, 120–34 and accompanying text.

203. *See supra* notes 108–09 and accompanying text.

204. The *Reynolds* Court discerned no violation of the Confrontation Clause where "competent evidence is admitted to supply the place of that which he has kept away." *Reynolds*, 98 U.S. 145, 158 (1878).

205. *Id.*

206. *See supra* note 161 and accompanying text.

statement is preserved in a more formal condition for future use.[207] Statements made to the police possess at least a modicum of credibility, satisfying a low standard for competent evidence.[208] Limiting application of the doctrine to "testimonial" statements ensures that prosecutors have flexibility to use the forfeiture doctrine. It precludes use of the doctrine, however, unless the statement is made with the belief that it could be used in a future prosecution of the defendant.

Of course, the initial concern remains: certain types of testimonial statements are more reliable and more credible than others.[209] When considering whether to admit any testimonial statements without the opportunity to cross-examine the witness, courts should separate testimony into three categories: first, testimony where the defendant had the opportunity to cross-examine, which is admissible merely by showing unavailability;[210] second, testimony made under oath but without the opportunity for cross-examination;[211] and third, *ex parte* statements not made under oath and with no opportunity for cross-examination.[212] The difference between these types of statements should be reflected in the scrutiny with which the forfeiture doctrine is applied (the third category of statement should rarely be admitted).

As stated previously, the two essential elements of any forfeiture by wrongdoing case are unavailability and the defendant's wrongful procurement of the witness. These issues are for the judge to determine, and may be ruled on at any time before the end of the trial; however, the conditional admission of an out-of-court statement made during trial, under the forfeiture doctrine, remains too prejudicial.[213] In addition, concerns raised about judicial economy ignore the importance of the confrontation right as well as the infrequency with which this issue will be raised.

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207. At a minimum, the statement would be in a written police report, made shortly after the incident occurred. David Feige opposes admission of any out-of-court records. He sees domestic abuse cases as prime examples of "the paternalistic philosophy of prosecution that the *Roberts* rule enabled" by introducing victim statements even if they are uninterested in testifying against their current or former intimate partners. David Feige, *Domestic Silence: The Supreme Court Kills Evidence Based Prosecution*, SLATE, Mar. 12, 2004, http://www.slate.com/id/2097041. Professor Lininger responds that the "so-called 'autonomy' of the accuser is illusory in many domestic violence cases." Lininger, *supra* note 22, at 783.

208. *See supra* note 70–72 and accompanying text (discussing the "culture of intimidation" that has encouraged the lowering of the standards).

209. *See supra* note 145 and accompanying text.

210. *See supra* note 90 and accompanying text.

211. *See supra* note 101 and accompanying text.

212. *See id.*

213. *See supra* note 75 and accompanying text.

In all cases of forfeiture by wrongdoing, the prosecution should have the burden of showing that a good-faith effort was made to obtain the witness' presence.[214] Because this is testimony made against the accused, courts must expect that a good-faith effort constitutes a higher than usual standard.[215] If a witness refuses to testify, the judge may issue a court order compelling the witness to testify or be subject to arrest.[216] Of course, courts are typically unwilling to criminalize a victim's reticence because it discourages the utilization of the legal system out of fear of legal reprisal.[217]

If a statement falls in the third category because it is made to police officers, but not under oath, the court should be wary about waiving the defendant's confrontation rights. This decision must be made on a case-by-case basis. Under these circumstances, before admitting the testimony, the judge should be able to point to specific evidence that the government made good faith efforts to produce the witness in court, that the statements made are credible, and that the witness' absence is a result of the defendant's actions. Heightened scrutiny will protect the Confrontation Clause,[218] while encouraging police and prosecutors to take formal statements and depositions of witnesses whenever they suspect the possibility that a witness will later become unavailable to testify as a result of wrongdoing by the defendant.[219]

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214. *See* Barber v. Page, 390 U.S. 719, 724–25 (1968) ("In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.").

215. *See* State v. Scholz, 432 A.2d 763, 765 (Me. 1981) (citing MCCORMICK, EVIDENCE § 253 (2d ed. 1972)) ("[I]t has been said that where, as in the instant case, former testimony is sought to be offered *against* the accused, the degree of effort constituting 'good faith' and 'due diligence' is greater than the degree required in other situations."). Friedman agrees with a policy requiring substantial efforts be made to ensure confrontation of some form: "The prosecution should bear the burden of taking all reasonable steps to protect whatever aspects of confrontation are possible given the defendant's conduct . . . ." Friedman, *Chutzpa*, *supra* note 18, at 525.

216. *See* FED. R. EVID. 804(a)(2).

217. *See* Feige, *supra* note 207 ("Though not unheard of, dragging the alleged victim into court in handcuffs and forcing her to testify is generally considered unseemly. It is also often counterproductive, since a witness hellbent on avoiding testifying will rarely provide the kind of performance prosecutors can rely on for a conviction.").

218. *See supra* note 180 and accompanying text.

219. *See* Lininger, *supra* note 22, at 783–84 ("[L]egislatures should expand opportunities for pretrial cross-examination of hearsay declarants," but whatever prior cross-examination is provided "need not have been skillful or zealous in order to be minimally adequate under *Crawford*.").

IX. CONCLUSION

Crawford v. Washington indicates the Supreme Court's renewed concern with the right to confrontation. The decision is a drastic change from the *Roberts* era "particularized guarantees of trustworthiness standard,"[220] and it will take time to determine the meaning of the Court's decision. Justice Scalia's opinion for the majority provides a roadmap for future interpretation and should be followed carefully.

Stronger confrontation rights should not be seen merely as obstacles to be circumnavigated. The doctrine of forfeiture by wrongdoing serves an important purpose in ensuring that the defendant does not succeed in procuring the absence of a witness prior to trial. Assertions that a witness has been tampered with do not provide carte blanche forfeiture of confrontation rights. Courts must consider the manner in which any witness statement is made. Only statements made with the expectation that they will be used later in the investigation and prosecution of a defendant should be admissible under the forfeiture doctrine. Admission of other statements under the forfeiture doctrine will have little deterrent effect on the actions of the defendant because the defendant will have no reason to believe that the witness will testify against him, and thus, no reason to influence the witness because those statements lack credibility and accuracy.

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220. *See supra* note 96 and accompanying text.

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