2006

Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions

Andrew King-Ries
Alexander Blewett III School of Law at the University of Montana, andrew.king-ries@umontana.edu

FORFEITURE BY WRONGDOING: A PANACEA FOR VICTIMLESS DOMESTIC VIOLENCE PROSECUTIONS

ANDREW KING-RIES†

I. INTRODUCTION

The United States Supreme Court's decision in *Crawford v. Washington*[1] dramatically impacted the domestic violence community.[2] In *Crawford*, the Court reasserted the supremacy of the Confrontation Clause over the evidentiary rules pertaining to hearsay.[3] In addition, the Court established the rule that testimonial hearsay statements of witnesses will only be admissible if subjected to the opportunity for cross-examination.[4] The *Crawford* decision has the potential to destroy prosecutors' abilities to use victimless domestic violence prosecutions to combat domestic violence.[5] Of recent vintage, victimless prosecution is a highly effective tool against domestic violence, precisely because a victim's statements, admitted through hearsay exceptions, allow the State to proceed even when the victim is unable to participate in the prosecution.[6]

The Court's decision in *Crawford* threw victimless prosecutions into uncertainty, largely due to the Court's refusal to determine whether traditional excited utterances, present sense impressions, and statements to medical personnel constitute "testimonial" statements.[7] This uncertainty surrounding the heart, and thus the future, of victimless prosecutions has sparked considerable discussion as to

---

† Visiting Assistant Professor of Law, Montana University School of Law; A.B., Brown University, 1988; J.D., Washington University in St. Louis, 1993. I owe many thanks to Kristin King-Ries for her wonderful editing assistance and encouragement and to Kim McKelvey for her outstanding research assistance.

1. 541 U.S. 36 (2004).

2. Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, CRIM. JUST., Summer 2005, at 24; Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 749-50 (2005).

3. Crawford v. Washington, 541 U.S. 36, 50-51, 68-69 (2004).

4. *Crawford*, 541 U.S. at 54-56.

5. Lininger, 91 VA. L. REV. at 752, 752 n.26 ("*Crawford* calls into question many of the strategies previously used by prosecutors in domestic violence cases.").

6. Raeder, CRIM. JUST. at 24; Amy Karan & David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington, JUV. & FAM. JUST. TODAY, Summer 2004, at 20, 21. *See also* Lininger, 91 VA. L. REV. at 752 n.31 (discussing state legislative efforts—pre-*Crawford*—to expand the use of hearsay exceptions in domestic violence prosecutions).

7. *Crawford,* 541 U.S. at 68; Lininger, 91 VA. L. REV. at 766.

how best to respond to *Crawford*.[8] Some of this discussion has focused on the rule of forfeiture by wrongdoing.[9] Although incidental to its holding and discussion, the *Crawford* Court expressly recognized the rule of forfeiture by wrongdoing as an exception to the Confrontation Clause.[10] This rule is an exception to the Confrontation Clause rules so potentially devastating to victimless domestic violence prosecutions. Under forfeiture by wrongdoing—codified as Federal Rule of Evidence 804(b)(6)—the defendant forfeits his right to confront a witness against him when he engages in conduct that makes it "impossible or infeasible for the witness" to testify at the trial.[11] The *Crawford* Court recognized that the rule of forfeiture by wrongdoing "extinguishes Confrontation claims on essentially equitable grounds."[12]

Many defendants charged with crimes of domestic violence engage in wrongdoing designed to make it impossible for their victims to testify against them.[13] Through threats, intimidation, financial control, and violence, domestic violence defendants prevent victims from

8. *See, e.g.*, Donna D. Bloom, *"Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecution Will Survive* Crawford v. Washington, 36 ST. MARY'S L.J. 717 (2005); Lininger, 91 VA. L. REV. 747.

9. Lininger, 91 VA. L. REV. at 807-11; Paul W. Grimm and Jerome E. Deise, Jr., *Hearsay, Confrontation, and Forfeiture by Wrongdoing:* Crawford v. Washington, *a Reassessment of the Confrontation Clause,* 35 U. BALT. L.F. 5 (2004); Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Revamps Two Decades of Confrontation Clause Precedent in* Crawford v. Washington, 50 S.D. L. REV. 41, 71-72 (2005). *See also* the following domestic violence cases in which prosecutors have sought to use forfeiture by wrongdoing: People v. Jiles, 18 Cal. Rptr. 3d 790, 796 (Cal. Ct. App. 2004); People v. Baca, No. E032929, 2004 WL 2750083, at *10-12 (Cal. Ct. App. Dec. 2, 2004); Gonzalez v. State, 155 S.W.3d 603, 609-11 (Tex. Crim. App. 2004).

10. *Crawford,* 541 U.S. at 62. Interestingly, the Court recognized forfeiture by wrongdoing but did not cite to Federal Rule of Evidence 804(b)(6) which states the following:

> Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Instead, the Court cited to *Reynolds v. United States*, 98 U.S. 145 (1878). For a more detailed discussion of *Reynolds* and the possible significance of the Court's election not to cite FED. R. EVID. 804(b)(6), see *infra* note 152. While recognizing the importance of this distinction, this Article will largely focus on FED. R. EVID. 804(b)(6).

11. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 516 (1997). *See also supra* note 10.

12. *Crawford*, 541 U.S. at 62.

13. Lininger, 91 VA. L. REV. at 768-69 (discussing research indicating that between 80% and 90% of domestic violence victims recant or refuse to participate in the prosecution and stating "[t]he reasons why victims refuse to cooperate with the prosecution are manifold, but chief among them is the risk of reprisals by the batterers."); Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse, in* WOMAN BATTERING: POLICY RESPONSES 102 (Michael Steinman ed., 1991) (stating "[m]any victims who become witnesses in criminal cases against their abusers are subject to threats, retaliation, and intimidation to coerce their noncooperation with prosecutors."); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic*

testifying in a significant number of domestic violence prosecutions.[14] In fact, it was the success of these efforts—preventing victims from participating in prosecutions—that spawned the victimless prosecution in the first instance.[15] Ironically, *Crawford* may have placed victimless prosecutions in jeopardy and provided the solution at the same time.[16]

In this Article, I explore whether the rule of forfeiture by wrongdoing is the post-*Crawford* panacea for victimless domestic violence prosecutions. In Section II, I briefly discuss the *Crawford* decision and the revitalization of the Confrontation Clause. I also highlight *Crawford*'s recognition of the rule of forfeiture by wrongdoing and the traditional concept of forfeiture by wrongdoing. In Section III, I present difficulties with the rule of forfeiture by wrongdoing in the domestic violence context. In section IV, I propose solutions to these difficulties along with additional requirements that are necessary when applying the rule in domestic violence cases being tried without the victim testifying in court.

Violence, 8 YALE J.L. & FEMINISM 359, 367 (1996) (stating victims do not cooperate with the prosecution in 80% to 90% of domestic violence cases).

14. Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases*, PROSECUTOR, Dec. 2004, at 14, 15 (stating "[t]he Quincy Probation Project, which tracked court-restrained male abusers, found that close to half of the victims reported that their abusers had threatened physical violence if they continued to cooperate with prosecution efforts. Threats from abusers to their victims are not limited to physical harm. Forty-two percent of victims reported economic threats and 25 percent were threatened with the loss of their children, either through kidnapping or exaggerated claims of unfitness made to child protective services."); Randal Fritzler & Leonore Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, CT. REV., Spring 2000, at 28, 33 (stating batterers threaten retaliatory violence in nearly 50% of domestic violence cases and 30% of batterers assault their victims while awaiting trial on a prior violent incident); Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE & VICTIMS 251, 252 (1998) (stating "[m]any battered women who attempt to use the system face a significant threat of retaliation. Often the victim is in more danger when she chooses to leave the relationship or when she participates in the criminal prosecution."); MATTHEW J. WIESE, THE NON-PARTICIPATING VICTIM: PROVING THE CASE WITHOUT THE VICTIM'S TESTIMONY 5 (Battered Women's Justice Project ed., 1998).

15. KRISTIN LITTLE ET AL., ASSESSING JUSTICE SYSTEM RESPONSE TO VIOLENCE AGAINST WOMEN 42 (1998) (noting the U.S. Department of Justice advocating prosecution of domestic violence cases through use of hearsay rules instead of reliance on victim testimony). Efforts like these resulted in great numbers of domestic violence cases being tried without the testimony of the victim. DONALD J. REBOVICH, PROSECUTION RESPONSE TO DOMESTIC VIOLENCE: RESULTS OF A SURVEY OF LARGE JURISDICTIONS 176 (Eve S. Buzawa et al. eds., 1996).

16. State v. Hale, 691 N.W.2d 637, 652 (Wis. 2005) (Prosser, J., concurring) (reasoning "[b]ecause the effect of the *Crawford* decision is to exclude certain testimonial hearsay that heretofore was thought to be admissible, it is vital for courts to enforce [forfeiture by wrongdoing] to assure the integrity of criminal trials."). See also Lininger, 91 VA. L. REV. at 750 (discussing how the *Crawford* decision impeded domestic violence prosecutors in Washington, California, and Oregon).

Specifically, I propose that, when the victim refuses to testify, the prosecution be required to meet two procedural safeguards. First, the State must establish by a preponderance of the evidence the wrongdoing creating the forfeiture by demonstrating either (1) specific evidence of threats if the victim were to report the violence to authorities or testify at trial or (2) the existence of a battering relationship built on power and control dynamics.[17] Second, after establishing the wrongdoing creating the forfeiture, the statements the State seeks to introduce from the absent victim must satisfy a reliability determination, essentially a hearsay exception or other indicia of reliability.[18] In this way, I suggest that the criminal justice system can strike the appropriate balance between preserving the critical tool of victimless domestic violence prosecutions and maintaining confidence in verdicts reached in those prosecutions.

II. *CRAWFORD V. WASHINGTON* AND THE REVITALIZATION OF THE CONFRONTATION CLAUSE

In *Crawford v. Washington*, the Supreme Court dramatically revitalized the Confrontation Clause and restored it to a place of prominence in criminal prosecutions.[19] For the twenty-four years prior to *Crawford*, starting with *Ohio v. Roberts*,[20] the Supreme Court had largely collapsed the Confrontation Clause into the hearsay rules.[21] The *Crawford* Court separated the Confrontation Clause from the rules regarding hearsay and elevated a Confrontation Clause analysis above a hearsay analysis.[22]

In *Ohio v. Roberts*, the Court held that statements of unavailable witnesses could be admitted at trial—and satisfy the Confrontation Clause—if they were reliable.[23] According to the Court, statements were reliable if they either met a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness."[24] The "firmly rooted hearsay exception" largely became synonymous with portions

17. *See infra* notes 148, 150, 181 and accompanying text.
18. *See infra* notes 23-28 and accompanying text.
19. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 755 (2005).
20. 448 U.S. 56 (1980).
21. Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, CRIM. JUST., Summer 2005, at 24; Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 509 (1997) (stating "[i]n recent years, the Supreme Court has shown a tendency to construe [the Confrontation Clause] nearly in conformity with the hearsay sections of the Federal Rules of Evidence."); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 697 (1996) (referring to the marriage of hearsay rules and the Confrontation Clause as a "shotgun wedding").
22. Lininger, 91 VA. L. REV. at 765.
23. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
24. *Roberts*, 448 U.S. at 66.

of Rules 803[25] and 804[26] of the Federal Rules of Evidence.[27] The "particular guarantees of trustworthiness" issue was largely equated with the residual hearsay exception codified as Rule 807[28] of the Federal Rules of Evidence. In essence, the Court found that the Confrontation Clause posed no additional obstacle to the admission of an out-of-court statement by an unavailable witness other than the satisfaction of particular hearsay rules.[29] For twenty-four years, the *Ohio v. Roberts* test governed the admissibility of statements from witnesses who did not testify at trial.[30]

Many in the academic and legal community criticized the *Ohio v. Roberts* decision.[31] The criticism largely focused on three areas.

---

25. FED. R. EVID. 803 identifies exceptions to the hearsay rule of FED. R. EVID. 802 in which the availability of the declarant is immaterial. *See, e.g.*, White v. Illinois, 502 U.S. 346, 356 (1992); Leavitt v. Arave, 383 F.3d 809, 830 (9th Cir. 2004).

26. FED. R. EVID. 804 creates limited exceptions to the hearsay rule when the declarant is unavailable. *See e.g.*, State v. Small, 830 A.2d 423, 431-32 (Me. 2003); People v. Meredith, 586 N.W.2d 538, 541-42 (Mich. 1998).

27. United States v. Carlson, 547 F.2d 1346, 1356 (8th Cir. 1976) (stating "existing decisional authority recognizes that the accused's right of confrontation is not violated by the admission of hearsay statements as dying declarations, prior recorded testimony of an unavailable witness, a declaration by a co-conspirator in furtherance of the conspiracy, recorded past recollection and spontaneous exclamations.") (citations omitted). *See also* Lininger, 91 VA. L. REV. at 757-58 (discussing Supreme Court decisions).

28. FED. R. EVID. 807 replaced FED. R. EVID. 803(24) and 804(b)(5). FED. R. EVID. 807 states the following:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 807.

See e.g., United States v. Rodriguez, 218 F.3d 1243, 1246 (11th Cir. 2000); United States v. Bryce, 208 F.3d 346, 350-51 (2d Cir. 1999).

29. Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1054-58 (2003) (arguing the Confrontation Clause poses no "meaningful barrier to admission of hearsay evidence" except to prior testimony of the witness); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 558 (1988) (stating "[t]he confrontation clause is no longer a constitutional right protecting the accused, but essentially a minor adjunct to evidence law.").

30. Raeder, CRIM. JUST., Summer 2005, at 24.

31. Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles, in* FIRST PRINCIPLES OF CONSTITUTIONAL CRIMINAL PROCEDURE : A MISTAKE? 125-31 (Yale University Press 1997); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1013 (1998); Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN L. REV. 665 (1986); Myrna S. Raeder, *Hot Topics in Confrontation Clause Cases and Creat-*

First, commentators found difficult the Court's equating a portion of the Constitution with statutory evidentiary rules.[32] Second, many commentators and courts struggled with the uncertainty surrounding the *Roberts* test, especially the "particular guarantees of trustworthiness" portion.[33] Courts often reached divergent results on the same facts; circuits split on the weight and significance of various factors in assessing reliability.[34] Finally, critics contended that the *Roberts* test was both overbroad and underinclusive.[35] As to overbreadth, commentators argued that the test's grounding in the hearsay rules meant every hearsay statement implicated the Confrontation Clause, even when the particular hearsay statement did not raise a core confrontation concern.[36] Regarding underinclusiveness, many raised the concern that admitting statements on a finding of reliability did not adequately protect the central issue of confrontation of witnesses.[37] Despite this criticism, the Supreme Court did not readdress the *Roberts* test until *Crawford v. Washington*.[38]

In *Crawford*, the Supreme Court was confronted with a case that highlighted most of the difficulties with the *Roberts* test. In the summer of 1999, Sylvia Crawford, the defendant's wife, led the defendant to the residence of Kenneth Lee.[39] The defendant accused Lee of attempting to rape Sylvia.[40] During the ensuing altercation—witnessed by Sylvia—the defendant stabbed Lee.[41] The State charged Crawford with assaulting Lee,[42] and he argued self-defense.[43] When the prose-

---

ing a More Workable Confrontation Clause Framework Without Starting Over, 21 QUINNIPIAC L. REV. 1013, 1014 (2002); Chase, 40 HOUS. L. REV. at 1054.

32. Friedman, 86 GEO. L.J. at 1014-1022. Members of the Court also expressed this idea. *See* Justice Thomas's concurrence in *White v. Illinois*, 502 U.S. 346 (1992) (Thomas, J., concurring).

33. Kirkpatrick, 70 MINN. L. REV. at 682; Lininger, 91 VA. L. REV. at 760.

34. The progression of the *Crawford* case is a telling example of this difficulty with the *Roberts* test. *See infra* text accompanying note 56. Justice Scalia strongly criticized *Roberts* on this point. *Crawford*, 541 U.S. at 62 (arguing "[t]he framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.").

35. Richard D. Friedman, *Adjusting to Crawford*, CRIM. JUST., Summer 2004, at 4, 5. Justice Scalia also identified this concern in the *Crawford* decision. According to Justice Scalia, the *Roberts* test was both overinclusive and underinclusive. *Crawford*, 541 U.S. at 60.

36. Friedman, CRIM. JUST., Summer 2004, at 5.

37. Friedman, 86 GEO L.J. at 1022.

38. That is not to say that individual members did not try. Justice Thomas, with Justice Scalia, raised the issue in his concurrence in *White*. *White*, 502 U.S. 346, 358-66 (Thomas, J., concurring). Justices Breyer, Thomas, and Scalia also challenged *Roberts* in *Lilly v. Virginia*, 527 U.S. 116, 140-44 (1999) (concurring opinions).

39. *Crawford*, 541 U.S. at 38.

40. *Id.* at 38.

41. *Id.*

42. *Id.* at 40.

43. *Id.*

cution subpoenaed his wife, the defendant invoked his marital privilege and precluded Sylvia from testifying in court.[44] The prosecution sought to admit the custodial tape-recorded statement Sylvia gave to the police implicating the defendant.[45] Applying the *Roberts* test, the trial court found that the tape-recorded statement did not satisfy a firmly rooted hearsay exception.[46] Rather, the trial court admitted the taped statement after determining that it had "particular guarantees of trustworthiness."[47] The trial court found the statement was trustworthy for several reasons: the statement corroborated Crawford's self-defense, Sylvia was an eyewitness to the assault, she described recent events, and she was questioned by a "neutral" police officer.[48]

The Washington Court of Appeals, in a two-to-one decision, reached a contrary conclusion as to the trustworthiness of Sylvia's statement.[49] The Appellate Court applied a nine-part test to determine "particular guarantees of trustworthiness": (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.[50] Looking at the same facts as the trial court and attempting to identify whether the statement was reliable, the majority of the Appeals Court found Sylvia's statement was unreliable: she had a clear motive to lie; she gave several different versions of the same statement; her statement recounted past facts in response to police questions, was often evasive, and was not spontaneous; and she claimed to have shut her eyes during the attack.[51]

The Washington Supreme Court reversed the appellate court's decision, determining that Sylvia's statement was sufficiently trustwor-

44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 41.
50. *Id.*
51. *Id.* The Court of Appeals did find that Sylvia's statement was taken on the same day as the assault and could be considered trustworthy in that respect. *Id.*

thy to satisfy the Confrontation Clause.[52] Instead of applying the nine-factor test, the Washington Supreme Court adopted the appellate court's dissent and applied an alternative test for determining reliability.[53] According to Washington law, an "interlocking" confession is deemed reliable and is an alternative to the nine-factor test.[54] The Washington Supreme Court determined Sylvia's statement was "interlocking" with her husband's statement. The court, therefore, reinstated defendant's conviction.[55]

In *Crawford*, the United States Supreme Court faced three different applications of the *Roberts* test, which on the same facts produced three different results. Interestingly, the Court acknowledged that, even withstanding the lower courts' competing readings of reliability, the Court could have reached the result of reversing the conviction using the *Roberts* test.[56] Instead of pursuing this course, the Court elected to jettison the *Roberts* test and revitalize the Confrontation Clause. Holding that hearsay rules and reliability no longer determined Confrontation Clause issues, the Court elevated the constitutional confrontation issues analysis above the hearsay analysis.[57] The Court held that the sole question for purposes of the Confrontation Clause is whether the defendant has an opportunity to cross-examine the declarant's testimonial statement.[58]

In making this dramatic departure from prior Confrontation Clause case law, the Court left unanswered many important questions, such as what constitutes a "testimonial" statement, what qualifies as "prior cross examination," and what governs admissibility of non-testimonial statements.[59] The scope and impact of the *Crawford* decision will not be fully resolved until courts, particularly the Supreme Court, have answered these questions. For the purposes of this Article, it will be assumed that when the full impact of the *Crawford* decision has been realized, domestic violence prosecutors will not be able to introduce absent victims' statements, and, therefore, will be unable to pursue victimless prosecutions in a pre-*Crawford* fashion.

---

52. *Id.*
53. *Id.* at 41-42.
54. *Id.* at 42.
55. *Id.*
56. *Id.* at 67.
57. *Id.* at 61. *See also* Lininger, 91 VA. L. REV. at 765.
58. *Crawford*, 541 U.S. at 61.
59. Many of these questions have been identified and pursued elsewhere and are beyond the scope of this Article. *See, e.g.*, Amber Allred Furbee, *Legal Crossroads: The Hearsay Rule Meets the Sixth Amendment Confrontation Clause in* Crawford v. Washington, 38 CREIGHTON L. REV. 999, 1061-62 (2005) (asserting the writers of the 6th Amendment wanted to exclude information given under oath, not the broad category of testimony); Lininger, 91 VA. L. REV. at 762-63 (discussing the failure of *Crawford* to define "testimonial").

In preparation for such a result, the other unanswered question that must be explored is the extent to which *Crawford* countenances exceptions to the Confrontation Clause. The Court seemed to identify two: dying declarations[60] and forfeiture by wrongdoing.[61] Forfeiture by wrongdoing may present an opportunity for domestic violence prosecutors to combat domestic violence under the worst of circumstances: namely, when the victim is unable to participate in the prosecution.

III. FORFEITURE BY WRONGDOING

A. *CRAWFORD*'S "RECOGNITION" OF FORFEITURE BY WRONGDOING

In revitalizing the Confrontation Clause, the *Crawford* Court also recognized forfeiture by wrongdoing as an exception to the Confrontation Clause. Given the uncertainty of the true parameters of the *Crawford* decision and its potential impact on domestic violence prosecutions, the Court's "acceptance" of forfeiture by wrongdoing is significant. Prosecutors and law-makers across the country are already looking for solutions to *Crawford*'s revitalization of the Confrontation Clause's stringent testimonial requirements.[62]

The *Crawford* Court mentioned forfeiture by wrongdoing only briefly and indicated its acceptance only parenthetically.[63] In its discussion of the *Roberts* test, the Court determined that the test had an inherent failing: it created a "surrogate" means of determining reliability.[64] The Court held that this conflicted with the means mandated by the Confrontation Clause: cross-examination.[65] The Court distin-

60. The Court did not decide if dying declarations are an exception to the Confrontation Clause. Rather, the Court in a footnote discussed that the dying declaration hearsay exception might survive even after *Crawford*. *Crawford*, 541 U.S. at 56 n.6. Although the Court's discussion was clearly dicta, it has been adopted by several lower courts. *See, e.g.*, People v. Gilmore, 356 Ill. App. 3d 1023, 1031 (Ill. App. Ct. 2005); People v. Monterroso, 101 P.3d 956, 971-72 (Cal. 2004).

61. *Crawford*, 541 U.S. at 62.

62. Several jurisdictions have adopted an equivalent to FED. R. EVID. 804(b)(6) since 1997: Delaware (DEL. R. EVID. 804(b)(6)); Hawaii (HAW. R. EVID. 804(b)(7)); Michigan (MICH. R. EVID. 804(b)(6)); North Dakota (N.D. R. EVID. 804(b)(6)); Ohio (OHIO EVID. R. 804(b)(6)); Pennsylvania (PA. R. EVID. 804(b)(6)); South Dakota (S.D. R. EVID. 804(b)(6)); Tennessee (TENN. R. EVID. 804(b)(6)); Virgin Islands (FED. R. EVID. 804(b)(6)); Virginia (FED. R. EVID. 804(b)(6)); and West Virginia (W.VA. FED. EVID. R. 804(b)(6)). Since the *Crawford* decision, two additional states have adopted forfeiture by wrongdoing statutes: Kentucky and Vermont (VT. R. EVID. 804(b)(6)). In addition, prosecutors are beginning to use forfeiture by wrongdoing in domestic violence cases. *See, e.g.*, People v. Giles, 102 P.3d 930 (Cal. 2004); People v. Jiles, 18 Cal. Rptr. 3d 790, 796 (Ct. App. 2004); United States v. Mayhew, No.2:03-cr-165, 2005 WL 1847239, at *6 (S.D. Ohio Aug. 5, 2005). *See also* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 807-11 (2005) (arguing states should adopt equivalent statutes to FED. R. EVID. 804(b)(6) to aid in prosecuting defendants who manipulate witnesses).

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

64. *Crawford*, 541 U.S. at 62.

65. *Id.*

guished the *Roberts* test from an exception to the Confrontation Clause, which does not "purport to be an alternative means of determining reliability."[66] The Court placed forfeiture by wrongdoing in this category and stated, "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds."[67]

Significantly, the Court's discussion of forfeiture was merely by way of contrasting example. The Court did not provide any discussion of forfeiture or provide guidance on the parameters of its "acceptance" of the rule. As with much of the *Crawford* decision, the Court's dramatic transformation of the landscape appears persuasively simple and yet is extraordinary in its unexplored complexity. To begin to understand the levels of complexity, it is essential to delve more fully into the doctrine of forfeiture by wrongdoing.

B. The Historical Beginnings of Forfeiture by Wrongdoing

In its brief mention of forfeiture by wrongdoing, the *Crawford* Court references a single case: the Supreme Court's 1879 decision in *Reynolds v. United States*.[68] *Reynolds* represents the first time the Supreme Court recognized the concept of forfeiture by wrongdoing.

In *Reynolds*, the Territory of Utah charged George Reynolds with bigamy for marrying Amelia Jane Schofield while still being married to Mary Ann Tuddenham.[69] At trial, the State introduced evidence of several unsuccessful attempts to serve a subpoena for Amelia Jane Schofield. The police officer testified that he was familiar with Schofield and was aware that she lived with the defendant. The constable stated that he had gone to the defendant's residence and the defendant informed him that Schofield would not appear at the trial. In addition, the officer spoke with defendant's first wife and learned that Schofield had not been residing at the defendant's for two or three weeks.[70] Over the defendant's Confrontation Clause objection, the trial court allowed Schofield's testimony from an earlier trial of the defendant.[71] The jury convicted and the defendant appealed.[72]

On appeal, the Supreme Court acknowledged that while the Constitution guarantees a defendant the right to confront witnesses against him, "if a witness is absent by [the defendant's] own wrongful procurement, [the defendant] cannot complain if competent evidence

66. *Id.*
67. *Id.*
68. Reynolds v. United States, 98 U.S. 145, 158-59 (1879).
69. *Reynolds*, 98 U.S. at 146, 148.
70. *Id.* at 148-49.
71. *Id.* at 150.
72. *Id.* at 150-51.

is admitted to supply the place of that which he has kept away."[73] The Court found that this concept had been recognized in England in 1666[74] and well-established since:

> So that now, in the leading text-books, it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence.[75]

Later in its decision, the Court stated that the subject of unlawful procurement was a matter of fact.[76] On the facts of the case, the Court found the evidence properly established the defendant procured Schofield's absence.[77] The Court held the State had produced sufficient evidence of the defendant's involvement in Schofield's absence to shift the burden to the defendant of showing he "had not been instrumental in concealing or keeping the witness away."[78] The Court then determined the defendant failed to offer any explanation for Schofield's absence.[79] The Court also held that Schofield's prior testimony was properly admitted:

> It was testimony given on a former trial of the same person for the same offence, but under another indictment. It was substantially testimony given at another time in the same cause. The accused was present at the time the testimony was given, and had full opportunity of cross-examination. This brings the case clearly within the well-established rules.[80]

As first recognized by the Supreme Court, therefore, forfeiture by wrongdoing involved three components. First, the State had to produce evidence of the defendant's involvement in the witness's absence. Second, at some point, the burden shifted to the defendant to rebut the accusation of involvement with the missing witness. Third, once the defendant's involvement was established, the absent witness's testimony could be admitted as long as it was "competent" evidence.[81] While "competent" evidence is not explained, the facts of *Reynolds* establish that a witness's prior testimony, subject to cross-examination by the defendant, constituted "competent" evidence.[82]

---

73. *Id.* at 158.
74. Lord Morley's Case, 6 State Trials 770 (1666).
75. *Reynolds*, 98 U.S. at 158-59.
76. *Id.* at 159.
77. *Id.* at 159-60.
78. *Id.* at 160.
79. *Id.*
80. *Id.* at 160-61.
81. *Id.* at 158.
82. *Id.* at 160-61.

C. Evolving Forfeiture Doctrine

As the first Supreme Court case to recognize forfeiture by wrongdoing, *Reynolds* is a good starting point for an examination of forfeiture.[83] The doctrine, however, evolved significantly from 1879 until its codification as Federal Rule of Evidence ("FRE") 804(b)(6) in 1997.[84] The road from *Reynolds* to the evidentiary rule is fascinating.[85] Equally fascinating is the divergence between the definition of forfeiture in *Reynolds* and the current doctrine in FRE 804(b)(6).[86]

The current rule of forfeiture by wrongdoing is set forth in Federal Rule of Evidence 804(b)(6). FRE 804(b) creates exceptions to the hearsay rule[87] for certain statements of unavailable witnesses, such as former testimony, dying declarations, and statements against interest.[88] In addition, FRE 804(b)(6) creates a hearsay exception for forfeiture by wrongdoing:

> A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.[89]

The intent of the Rules Committee in drafting 804(b)(6) was twofold. First, the Rules Committee sought to bring some unity to a principle recognized by the Supreme Court and every circuit court that had encountered it, but applied in differing fashion.[90] Second, the Committee sought to formalize a response to behavior designed to undermine the criminal justice system.[91] Starting in the 1960s and 1970s, the federal government placed greater emphasis on the prosecution of organized crime and drug activity.[92] As many of these com-

---

83. *Id.* at 158.

84. Federal Rule of Evidence 804(b)(6) states the following:

> Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

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

85. *See* James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems With Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459 (2003).

86. For purposes of this Article, I will largely confine my discussion to forfeiture by wrongdoing as set out in FED. R. EVID. 804(b)(6). *See supra* note 10.

87. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802.

88. FED. R. EVID. 804(b)(1), (2), (3).

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

90. FED. R. EVID. 804(b)(6) advisory committee's note, at 322 (citing circuit court cases).

91. *Id.*

92. Flanagan, 51 DRAKE L. REV. at 466; Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The*

plex prosecutions involved reluctant witnesses who experienced great pressure not to testify, forfeiture by wrongdoing became more central to prosecution efforts.[93]

In drafting FRE 804(b)(6), the Rules Committee was particularly influenced by the prosecution in *United States v. Mastrangelo*.[94] Mastrangelo was charged with multiple counts of conspiracy to traffic drugs.[95] Mastrangelo's only connection to the conspiracy was his purchase of four trucks which, when later seized by federal agents, were loaded with drugs.[96] James Bennett testified before a grand jury that he sold Mastrangelo the four trucks.[97] Bennett also cooperated with the FBI to record a conversation with Mastrangelo during which Mastrangelo threatened Bennett not to disclose that Mastrangelo was the purchaser of the trucks.[98] On his way to testify in Mastrangelo's trial, Bennett was murdered.[99] Finding that Mastrangelo was involved with the murder of Bennett, the trial court allowed the jury to hear Bennett's grand jury testimony.[100] The jury convicted Mastrangelo; on appeal he asserted that the admission of Bennett's testimony violated his confrontation right.[101] The Second Circuit adopted the rule of forfeiture by wrongdoing and sought to implement the rule to "[dis]courage behavior which strikes at the heart of the system of justice itself."[102] In its comments to FRE 804(b)(6), the Rules Committee quoted this language from *Mastrangelo,* and emphasized that the rule was designed as a "prophylactic rule to deal with abhorrent behavior."[103]

The adoption of the rule of forfeiture by wrongdoing fulfilled both interests of the Rules Committee. Prosecutors using forfeiture by wrongdoing have been able to "avoid resolution of the difficult legal

---

Waiver Doctrine After Alvarado, 39 SAN DIEGO L. REV. 1165, 1204-08 (2002); Paul T. Markland, *Admission of Hearsay Evidence Where Defendant Misconduct Causes the Unavailability of a Prosecution Witness,* 43 AM. U. L. REV. 995, 995-96 (1994) (collecting examples of witness intimidation); Michael H. Graham, *Witness Intimidation*, 12 FLA. ST. U. L. REV. 239, 241-42 (1984) (discussing studies of the 1960s, 1970s, and 1980s that reported abundance of witness intimidation that caused witnesses not to testify at trial).

93. *See* Graham, 12 FLA. ST. U. L. REV. at 242-43 (discussing witness intimidation in context of organized crime); Comparet-Cassani, 39 SAN DIEGO L. REV. at 1203-04 (discussing statistics demonstrating that the problem of witness intimidation is national in scope).

94. 693 F.2d 269 (2d Cir. 1982). *See* Flanagan, 51 DRAKE L. REV. at 476.

95. United States v. Mastrangelo, 693 F.2d 269, 271 (2d Cir. 1982).

96. *Mastrangelo*, 693 F.2d at 271.

97. *Id.* at 271.

98. *Id.*

99. *Id.*

100. *Id.* at 271-72.

101. *Id.* at 272.

102. *Id.* at 273.

103. FED. R. EVID. 804(b)(6) advisory committee's notes, at 322.

and constitutional issues arising under the confrontation clause and [the hearsay rules]"[104] raised by unavailable witnesses and to pursue cases otherwise beyond their reach.[105] Second, forfeiture has coalesced into a largely consistent doctrine.[106]

D. Current Elements of Forfeiture by Wrongdoing

Since the adoption of FRE 804(b)(6), forfeiture by wrongdoing has evolved into a four-part test. To satisfy the forfeiture by wrongdoing rule, the State must establish the unavailability of the declarant, that the defendant acted with the intent of preventing the declarant from testifying, that the declarant is expected to be a witness, and that the defendant's acts caused the unavailability.[107]

1. Unavailability of the Declarant

Typically, a declarant is seen as unavailable when the declarant dies,[108] refuses to testify,[109] forgets,[110] or is not served properly by the prosecution.[111] If the government relies on its inability to locate a witness, the government must establish diligent good faith efforts to procure the witness.[112] Often, a refusal to testify will only rise to the level of unavailability if the witness refuses to testify after a grant of immunity or contempt order.[113]

---

104. *Mastrangelo*, 693 F.2d at 272.

105. Comparet-Cassani, 39 San Diego L. Rev. at 1194 (stating "[w]itness intimidation has a profound and serious impact on the ability of government to enforce its laws and on society's confidence in the ability of the government to protect its citizens.").

106. *See* Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982) (stating "[t]he theory of the cases appears to be that the disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act.").

107. Flanagan, 51 Drake L. Rev. at 479-89. Interestingly, Hawaii's forfeiture by wrongdoing statute does not have an express intent or purpose requirement. *See* Haw. R. Evid. 804(b)(7).

108. *See, e.g.*, United States v. Emery, 186 F.3d 921 (8th Cir. 1999); United States v. White, 116 F.3d 903 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996).

109. *See, e.g.*, United States v. Aguiar, 975 F.2d 45 (2d Cir. 1992); State v. Hallum, 606 N.W.2d 351, 355-57 (Iowa 2000).

110. *See, e.g.*, United States v. Amaya, 533 F.2d 188, 190-91 (5th Cir. 1976); United States v. Torrez-Ortega, 184 F.3d 1128, 1134 n.3 (10th Cir. 1999).

111. *See generally* Milton Roberts, Annotation, *Sufficiency of Efforts to Procure Missing Witness' Attendance to Justify Admission of His Former Testimony*, 3 A.L.R. 4th 87 (2005) (collecting cases).

112. Roberts, Annotation, 3 A.L.R. 4th 87.

113. Flanagan, 51 Drake L. Rev. at 481.

2. Intent to Prevent Testimony

For the forfeiture rule to apply, the defendant must have acted with the appropriate mental state: the defendant must have intended to prevent the declarant from testifying. Importantly, the intent element can be satisfied even when the intent to prevent the witness from testifying was merely one of the defendant's motivations.[114] As stated by the Second Circuit in *United States v. Dhinsa*:

> The government need not, however, show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant "was motivated *in part* by a desire to silence the witness."[115]

3. Declarant is Expected to be a Witness

This element is easily satisfied when the declarant is listed as a government witness. However, courts have also found that "witness" can include those people who have the potential to testify against the defendant at some future time.[116]

4. The Defendant's Acts Caused the Declarant's Unavailability

Federal Rule of Evidence 804(b)(6) states that the defendant's misconduct must "procure the witness's absence."[117] The government is required to establish the link between the defendant's actions and the witness's absence.[118]

5. Unsettled Areas of Forfeiture by Wrongdoing

While courts are largely in agreement about the above four basic elements of the forfeiture by wrongdoing rule, several issues remain in dispute. First, the rule of forfeiture by wrongdoing has not traditionally required any reliability considerations.[119] Rather, satisfying the elements of forfeiture have been deemed to satisfy both hearsay and confrontation concerns.[120] However, some courts and commentators

114. United States v. Gray, 405 F.3d 227, 242 (4th Cir. 2005) (citing United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000)).

115. United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001) (quoting *Houlihan*, 92 F.3d at 1279).

116. Flanagan, 51 DRAKE L. REV. at 484.

117. *See supra* note 89 and accompanying text.

118. Flanagan, 51 DRAKE L. REV. at 484-87.

119. *Id.* at 461 (reasoning "[u]nlike other hearsay exceptions, the misconduct exception expressed in Rule 804(b)(6) is not based on any argument that the circumstances in which the statements were made make them reliable.").

120. Lininger, 91 VA. L. REV. at 810 (arguing for states to adopt 804(b)(6) so that the rule "could serve as both a statutory hearsay exception and an exception to the constitutional confrontation requirement."); *see also Aguiar*, 975 F.2d at 47 (affirming the district court's admission of hearsay testimony to prove witness tampering as well as an

have expressed uneasiness about the apparent limitlessness of admissible testimony given an established forfeiture by wrongdoing.[121]

Second, a majority of courts require the government establish the link between the defendant's conduct and the witness's unavailability by a preponderance of the evidence.[122] For the most part, courts have settled on this level of proof because of their cognizance of, and efforts to fulfill, the policy considerations behind the rule itself.[123] The Fifth Circuit, however, has applied the clear and convincing evidence standard.[124]

Third, there is disagreement in the courts as to the issue of "bootstrapping,"[125] or whether the statement itself can establish the wrongdoing.[126] The primary concern is the judge considers the statement itself in determining the admissibility of the statement.[127] Several courts require the wrongdoing be established without reference to

---

underlying drug conspiracy, and stating that "[a] defendant who procures a witness's absence waives the right of confrontation for all purposes with regard to that witness.").

121. *See* Lininger, 91 VA. L. REV. at 811 (stating "[t]o be sure, prosecutors must not become carried away with the notion that forfeiture by wrongdoing can circumvent the Confrontation Clause in every domestic violence prosecution."); State v. Ivy, No. W2003-00786-CCA-R3-DD, 2004 WL 3021146, at *14 (Tenn. Crim. App. Dec. 30, 2004) (finding the trial court abused its discretion in admitting hearsay statements under forfeiture by wrongdoing because of a concern that a "broad application of the Rule would lead to wide-spread abuse by parties seeking admission of out-of-court statements of an unavailable declarant."); People v. Giles, 19 Cal. Rptr. 3d 843, 850 (2004) (noting the government needed a statutory hearsay exception in addition to the doctrine of forfeiture by wrongdoing).

122. Cotto v. Herbert, 331 F.3d 217, 235 (2d Cir. 2003); United States v. Scott, 284 F.3d 758, 762 (7th Cir. 1992), *cert. denied*, 537 U.S. 1031 (2002); United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001), *cert. denied*, 535 U.S. 946 (2002); United States v. Cherry, 217 F.3d 811, 820-21 (10th Cir. 2000); United States v. Emery, 186 F.3d 921, 926-27 (8th Cir. 1999), *cert. denied*, 528 U.S. 1130 (2000); United States v. White, 116 F.3d 903, 911-12 (D.C. Cir.), *cert. denied*, 522 U.S. 960 (1997); Steele v. Taylor, 684 F.2d 1193, 1202-03 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983); State v. Hallum, 606 N.W.2d 351, 355-56 (Iowa 2000); State v. Meeks, 88 P.3d 789, 794 (Kan. 2004); State v. Alvarez-Lopez, 98 P.3d 699, 704 (N.M. 2004), *cert. denied*, 543 U.S. 1177 (2005).

123. FED. R. EVID. 804(b)(6) advisory committee's notes at p. 322.

124. *See* United States v. Thevis, 665 F.2d 616, 631 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

125. "Bootstrapping" in the forfeiture context is when the charged crime itself provides the factual basis for the finding of forfeiture by wrongdoing. Lininger, 91 VA. L. REV. at 808.

126. *Compare* United States v. Mikos, No. 02 CR 137-1, 2004 WL 1631675, at *5 (N.D. Ill. 2004) (reasoning "[a]llowing otherwise inadmissible evidence to prove a defendant's guilt in a capital case based upon a judge's pretrial conclusion that the defendant is in fact guilty of that very crime appears to us to be a slippery slope."), *with* People v. Jiles, 18 Cal. Rptr. 3d 790, 796 (Ct. App. 2004); People v. Giles, 19 Cal. Rptr. 3d 843, 849-50 (Ct. App. 2004); State v. Meeks, 88 P.3d 789, 793-94 (Kan. 2004).

127. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 522 (1997).

the statement whose admission is being sought.[128] Other courts, however, have determined that "bootstrapping" merely calls upon the judge to consider the same evidence for two different purposes.[129]

As to whether the act for which the defendant is on trial can also be the misconduct that forms the basis for the application of the forfeiture by wrongdoing rule, Professor Richard Friedman, an expert on the Confrontation Clause, argues persuasively that forfeiture by wrongdoing should apply "reflexively."[130] According to Friedman, a "reflexive" forfeiture principle applies "even when the act that rendered the declarant-victim unable to testify was the same criminal act for which the accused in now on trial."[131]

Friedman acknowledges the primary argument against a "reflexive" application of forfeiture is that the judge would be required to conclude—when determining admissibility of the unavailable witness's statements—that the defendant is guilty of the offense with which he is charged.[132] According to Friedman, however, this difficulty does not undermine the principles underlying forfeiture by wrongdoing; rather, it highlights the need for sufficient procedural safeguards to ensure "a high probability that the principle is invoked only when appropriate."[133]

Friedman contends that the reality of the trial largely addresses the need for procedural safeguards and resolves any concerns with "reflexive" application of the forfeiture by wrongdoing principle.[134] Typically, the judge determines the evidentiary issue outside the presence of the jury, and the jury—unaware of the court's evidentiary ruling—determines whether the prosecution has carried its burden.[135] In the vast number of forfeiture cases, therefore, there are two separate fact-finders resolving separate issues. In the bench trial situation in which the judge determines both evidentiary issues and guilt, Friedman contends that judges are often called upon to make similarly linked decisions and are quite familiar with applying two different standards of proof to factually similar issues.[136] According to

128. This is the issue that is before the California Supreme Court in *People v. Giles*, 19 Cal. Rptr. 3d 843, *review granted*, 102 P.3d 930 (Cal. Dec 22, 2004) (No. S129852) (stating "[d]oes the doctrine apply where the alleged "wrongdoing" is the same as the offense for which defendant was on trial?").

129. State v. Meeks, 88 P.3d 789, 793-94 (Kan. 2004); United States v. Emery, 186 F.3d 921, 926-27 (8th Cir. 1999) (analogizing to procedure for co-conspirator statements).

130. Friedman, 31 ISR. L. REV. at 521-24.

131. *Id.* at 508.

132. *Id.*

133. *Id.*

134. *Id.* at 523.

135. *Id.*

136. *Id.*

Friedman, "[i]t is not a charade, therefore, to say that, although the two questions may be identical, they are tried separately for separate purposes."[137]

IV. DOES FORFEITURE BY WRONGDOING WORK IN THE DOMESTIC VIOLENCE PROSECUTION?

The Supreme Court's decision in *Crawford* created great uncertainty surrounding the future of victimless domestic violence prosecutions. Since that decision, several commentators have made passing suggestion that forfeiture by wrongdoing is the post-*Crawford* panacea for victimless domestic violence prosecutions.[138] Given our understanding that domestic violence batterers pressure, threaten, coerce, and assault victims in order to prevent their testimony,[139] along with our awareness that domestic violence defendants are often successful in these efforts,[140] forfeiture by wrongdoing does appear to be the perfect avenue for admitting victims' statements at trial when the defendant has prevented the victims from testifying. As it stands, however, the forfeiture rule does not adequately resolve two concerns: first, the frequent need to proceed in prosecutions without the victim-witness; and second, the need to inspire public confidence in jury verdicts.

A. THE DOMESTIC VIOLENCE BATTERER ENGAGES IN FORFEITURE BY WRONGDOING

There is no question that defendants often procure victim-witnesses' unavailability in domestic violence trials.[141] Studies indicate that 80% of domestic violence victims refuse to testify or recant their earlier statements to the police about the violent incident for which the defendant is charged.[142] Victims report that their refusal to testify stems from fear of additional violence, concern over present or prior threats not to disclose to police or prosecutors, economic coercion, and anxiety about the safety of their children or family members.[143]

---

137. *Id.*

138. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 806-12 (2005); Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases*, PROSECUTOR, Dec. 2004, at 14, 15-16; Chris Hutton, *Sir Walter Raleigh Revised: The Supreme Court Revamps Two Decades of Confrontation Clause Precedent in* Crawford v. Washington, 50 S.D. L. REV. 41, 71 (2005).

139. *See supra* notes 13-14 and accompanying text.

140. *See supra* note 13 and accompanying text.

141. *See supra* notes 13-14 and accompanying text.

142. *See supra* note 13 and accompanying text.

143. *See supra* note 14.

As a result, domestic violence prosecutions are more challenging and convictions are harder to obtain.[144] Domestic violence tends to occur in private and with few, if any, witnesses other than the victim.[145] In fact, the majority of domestic violence cases are dependant on the testimony of the victim. Without the victim's testimony, many prosecutions are unable to proceed and charges are dismissed.[146] Due to the batterer's efforts at preventing the victim from testifying, the State is often unable to present the question of accountability for the defendant's conduct to a neutral fact-finder. Domestic violence defendants, as with all defendants who engage in wrongdoing to procure witnesses' absences, are engaged in behavior designed to disrupt and undermine the criminal justice system, the very system society created to hold people accountable for their antisocial behavior.[147]

In a similar fashion to charged defendants, many domestic violence batterers seek to avoid responsibility for their behavior. The batterer employs the same behaviors as the domestic violence defendant.

> The battering relationship is not about conflict between two people; rather, it is about one person exercising power and control over the other. Battering is a pattern of verbal and physical abuse, but the batterer's behavior can take many forms. Common manifestations of that behavior include imposing economic or financial restrictions, enforcing physical and emotional isolation, repeatedly invading the victim's privacy, supervising the victim's behavior, terminating support from family or friends, threatening violence toward the victim, threatening suicide, getting the victim addicted to drugs or alcohol, and physically or sexually assaulting the victim. The purpose of the abusive behavior is to subjugate the victim and establish the batterer's superiority.[148]

The result of the batterer's behavior is that the victim has great difficulty safely leaving the relationship and does not disclose the true nature of the relationship to friends, family, police, or prosecutors.[149]

---

144. DONALD J. REBOVICH, PROSECUTION RESPONSE TO DOMESTIC VIOLENCE: RESULTS OF A SURVEY OF LARGE JURISDICTIONS 59 (Eve S. Buzawa et al. eds., 1996).

145. Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 741 (2003).

146. Lininger, 91 VA. L. REV. at 749-50; Robert C. Davis, *Victim/Witness Noncooperation: A Second Look at a Persistent Phenomenon*, 11 J. CRIM. JUST. 287, 288 (1983) (indicating that 60% of domestic violence cases are dismissed due to non-participation of the victims).

147. Krischer, PROSECUTOR, Dec. 2004, at 14 (stating "domestic violence almost always involves forfeiture.").

148. Andrew J. King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301 (2005) (citations omitted).

149. King-Ries, 28 SEATTLE U. L. REV. at 304, 333.

There is congruence between behaviors by defendants to prevent testimony and behaviors of batterers to prevent disclosure about the true nature of the relationship. At bottom, batterers and defendants often seek the same thing: to avoid responsibility for their criminal conduct. Defendants want to avoid conviction. Batterers want to preserve the relationship, by definition a relationship established and maintained by criminal conduct.[150] Therefore, it is possible to describe a battering relationship as a form of forfeiture by wrongdoing: a fundamental pillar of many battering relationships is procuring the absence (inability to disclose) of the recipient of the criminal conduct and the primary witness to the true nature of the relationship.

In a broad sense, then, it seems appropriate to assert defendants' forfeiture by wrongdoing in domestic violence prosecutions. As Friedman says, forfeiture by wrongdoing should apply to "conduct by a defendant that prevents his confrontation with a prosecution witness by making it impossible or infeasible for the witness . . . to be at the trial."[151] Friedman's definition fits the majority of domestic violence relationships and prosecutions. A closer examination of the elements of forfeiture as applied to domestic violence prosecutions is critical to accurately assess the usefulness of forfeiture as a solution to *Crawford*'s potential elimination of victimless prosecutions.

B. The Elements of Forfeiture in a Domestic Violence Context

To be a solution to *Crawford*[152]—or to replicate the functional utility of victimless prosecutions—forfeiture by wrongdoing must be

150. Kathleen Finley Duthu, *Why Do You Need to Know About Domestic Violence? How Attorneys Can Recognize and Address the Problem*, 53 La. B. J. 20, 21 (2005) (explaining "[c]olloquially, the term 'domestic violence' is used synonymously with 'battering' and refers to intentional acts of physical, sexual, emotional and/or psychological abuse perpetrated against a current or former intimate or dating partner."); Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. Pitt. L. Rev. 757, 762 (1996) (explaining "[w]hen [physical] violence becomes a recurring part of [intimate adult] relationships, and especially when it gives rise to reported or otherwise known injury, the violence is now known as battering.").

151. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 Isr. L. Rev. 506, 516 (1997).

152. For purposes of the following discussion, I will focus on forfeiture by wrongdoing as delineated in Fed. R. Evid. 804(b)(6). It is possible to read Justice Scalia's recognition of forfeiture in *Crawford* to be far more restricted than Fed. R. Evid. 804(b)(6). Recall that while Justice Scalia used the term forfeiture by wrongdoing, he cited not to Fed. R. Evid. 804(b)(6) but to *Reynolds v. United States*, 98 U.S. 145 (1879). *See supra* notes 10, 86. From this, it is possible Justice Scalia is envisioning a forfeiture doctrine that would track closely to *Reynolds*, particularly the requirement that the evidence be "competent." The evidence was deemed "competent" in *Reynolds* because the witness had testified in a prior trial and been subjected to cross-examination by the defendant. Since it is more difficult to envision the need for such a restricted forfeiture rule to be

applicable in at least the same spread of cases. Victimless prosecutions are available when there is competent evidence supporting the charged crime and the absent victim's statements can be deemed to be excited utterances, present sense impressions, or statements to medical personnel.[153] The primary utility of victimless prosecutions is that they are not limited by degree of injury. Rather, they can address misdemeanors or felonies and allow prosecutors to attack a wide variety of criminal conduct.[154]

In addition, to come close to reaching the functional utility of victimless prosecutions, it is essential that forfeiture by wrongdoing be available in the cases in which the very act the defendant is charged with is also the basis for the forfeiture. In other words, the reflexive forfeiture principle must be applicable.[155] The reason for this is the fact that the majority of domestic violence cases are not reported. Statistics indicate, on average, victims endure five to seven violent incidents before they involve police.[156] Victimless prosecutions can apply even in the "initial" report to the police. The prosecution is able to admit the absent victim's hearsay statement about the incident forming the basis of the charge. Absent application of the reflexive forfeiture principle, the State would not be able to introduce the victim's statements regarding the charged incident. Instead, the defendant would have one free bite at the apple and society would be unable to address a significant portion of domestic violence.

1. Unavailability of Declarant

Courts traditionally apply forfeiture by wrongdoing to situations in which the declarant has been murdered.[157] Clearly, for these types of domestic violence incidents, the declarant is unavailable to testify. Given the fact that nearly 2000 people are killed every year by their

---

construed as an "exception" to a Confrontation Clause rule that requires an opportunity for prior cross-examination, I am focusing my discussion on the broader forfeiture rule expressed in FED. R. EVID. 804(b)(6).

153. King-Ries, 28 SEATTLE U. L. REV. at 308-11.

154. Lininger, 91 VA. L. REV. at 771 (citing study that indicates that half of all domestic violence prosecutions in California, Washington, and Oregon were victimless prosecutions relying on absent victims' hearsay statements).

155. *See supra* notes 131-34 and accompanying text.

156. Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 285 (1996) (stating "[a] Kansas City study of spousal homicides found that in 90% of the cases the police had been called to the home a median of 5 times in response to 'domestic disturbance' calls.").

157. *See supra* note 108.

domestic partners, this element will be satisfied in a significant number of cases.[158]

However, millions of female Americans experience domestic violence assaults every year.[159] The vast majority of domestic violence cases result in minor or no permanent, visible injury.[160] In fact, the greatest incidence of domestic violence involves misdemeanor level assaults.[161] Most felony-level offenses involve risk of death or serious bodily injury.[162] In the vast majority of domestic violence cases, therefore, the victim-declarants are neither dead nor physically incapacitated. While they are physically able to appear and to recount details about the charged incident, the majority of victims do not testify.[163] The victims are not, therefore, unavailable in the manner traditionally encountered with forfeiture by wrongdoing. In this way, successful application of forfeiture seems to be limited to the most hei-

158. 1,958 murder victims were killed by members of their family in 2002. U.S. Dep't of Just., *Bureau of Justice Statistics, Family Violence Statistics*, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf (revised June 12, 2005).

159. Joan Zorza, *Women Battering: High Costs and the State of the Law*, *in* DOMESTIC VIOLENCE LAW 11, 15 (Nancy K.D. Lemon ed., 2001). Estimates range from one to four million women a year who will experience an assault by an intimate partner. *Compare* U.S. Dep't of Just., *Bureau of Justice Statistics, Special Report: Violence Against Women: Estimates from the Redesigned Survey* (Aug. 1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/femvied.pdf (estimating one million women will suffer a non-fatal assault from an intimate partner), *with* Am. Psychol. Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family*, at 10 (1996) (copy on file with author) (estimating four million women will suffer a serious assault from an intimate partner in a twelve month period).

160. Between 1993 and 1998, 1/3 of victims of intimate partner crime were victims of threats or attempted violence. U.S. Dep't of Just., *Bureau of Justice Statistics, Special Report: Intimate Partner Violence* (May 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf. Minor injuries or no injuries account for 92.8% of intimate partner violence. U.S. Dep't of Just., *Bureau of Justice Statistics, Family Violence Statistics*, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf (revised June 12, 2005).

161. Aggravated assault accounts for 15.5% of family violence arrests, and simple assaults for 77.4%. U.S. Dep't of Just., *Bureau of Justice Statistics, Family Violence Statistics*, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf (revised June 12, 2005).

162. *See, e.g.*, WASH. REV. CODE ANN. § 9A.36.021 (West 2006). Section 9A.36.021 states the following:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or (c) Assaults another with a deadly weapon; or (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or (e) With intent to commit a felony, assaults another; or (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

§ 9A.36.021.

163. See *supra* note 13 and accompanying text.

nous offenses that produce the most serious consequences for the victims.

However, the victim's refusal to testify is often a direct result of the defendant's violence and threats against the victim.[164] The victims may "choose" to honor their interests in safety and bodily integrity and absent themselves from the trial. In these situations, the victim's unavailability is more in line with the traditional notions of unavailability, and it seems appropriate to extend the definition of unavailability.[165]

The situation becomes more complex when the victim's refusal to testify is a result of more subtle expressions of the defendant's power and control over the victim. For instance, if the victim has been economically isolated and is dependent upon the defendant's income, his or her decision not to testify likely falls outside the current purview of unavailability. While creating a small incentive for batterers not to employ more violent forms of control, limiting unavailability to threats of violence or use of violence will exclude a significant portion of domestic violence victims from being "unavailable." It will also deny the greater reality of domestic violence power and control.

2. *Intent to Prevent Declarant from Testifying*

The question of the defendant's intent when battering is one not infrequently encountered in domestic violence prosecutions. The defendant's intent can be conceived in a variety of ways. Is the defendant simply trying to hurt the victim in this instance, is the defendant attempting to establish or reaffirm the power and control dynamic of the battering relationship, or is the defendant trying to prevent the witness from testifying?

Satisfying this element of forfeiture will depend upon how broadly the defendant's intent is construed. Several courts have held that the wrongdoing must be done solely for the purpose of preventing testimony.[166] Limiting the misconduct to causing the victim pain to prevent his or her testifying in an impending trial will preclude application of forfeiture. Since the power and control dynamic is designed to subjugate the victim and to prevent disclosure of the abuse, it seems appropriate to infer that a portion of the defendant's intent is to prevent the victim from testifying about the nature of the relationship.

164. See *supra* notes 13-14 and accompanying text.

165. *See, e.g.*, Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982) (finding a witness was unavailable because of being under the control of the defendant).

166. State v. Ivy, No. W2003-00786-CCA-R3-DD, 2004 WL 3021146, at *14 (Tenn. Crim. App. Dec. 30, 2004).

3. Declarant is Expected to be a Witness

The major difficulty with this element is the breadth of the reading of "witness." Several courts have taken a narrow reading of "witness" and have required that the defendant be trying to prevent the person from appearing at an actual, initiated hearing.[167] Requiring two separate acts of violence—one preceding arrest and one preceding testifying at an initiated hearing pertaining to the first act of violence that led to arrest—negates the application of reflexive forfeiture by wrongdoing.[168] Avoiding reflexive forfeiture has the potential to eliminate a large portion of forfeiture by wrongdoing's effectiveness in the domestic violence context.

If "witness" is read broadly—allowing for potential witnesses at a future uninitiated hearing—this element should easily be satisfied in most domestic violence situations. Since the victim is often the only witness to the violence, the defendant is acutely aware of the inculpatory potential of the victim.[169] This awareness exists prior to the involvement of the police or prosecution. It is the very potential of disclosure that the batterer seeks to avoid through the use of the violence. Therefore, under a broad reading, this element will nearly always be met in the domestic violence context.

4. Defendant's Conduct Caused Unavailability of Declarant

Application of the forfeiture principle requires the prosecution to establish by some degree of proof that the defendant's conduct is the reason the victim-declarant is not available to testify. Clearly this poses significant problems in a prosecution in which the State is unable to procure the victim's participation at trial.

The first issue is one of attempting to meet the burden of proof. In the typical non-domestic violence application of the forfeiture by wrongdoing rules, the link between the defendant's conduct and the victim's unavailability is established through evidence independent of the unavailable witness. As the court in *Mastrangelo* stated, "such misconduct is invariably accompanied by tangible evidence such as the disappearance of the defendant, disruption in the courtroom or the murder of a key witness . . . ."[170]

However, in the typical domestic violence incident, the link between the defendant's conduct and the witness's unavailability is more difficult to establish. Often, there is little or no independent evi-

167. *Id.*
168. *See supra* note 156 and accompanying text.
169. *See supra* notes 155-56 and accompanying text.
170. United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

dence of the defendant's conduct that is not dependent on the victim for admission.[171]

Aside from the practical problems, which by themselves are not substantial enough to deem the defendant's constitutional right to confront witnesses forfeited, the situation raises a far more serious issue of bootstrapping than generally confronted when addressing forfeiture by wrongdoing. In victimless prosecutions, the prosecution seeks to admit the victim's statements to responding police officers about the violent incident. Often, the victim also relayed information to officers about the nature of his or her abusive relationship with the defendant, including past threats and violent incidents.[172] In other words, the very police contact that produced the statement the prosecution seeks to admit is the source of the information regarding the defendant's conduct that could create the basis for an assertion of forfeiture by wrongdoing. In addition, due to the nature of the domestic violence relationship, generally the police and the victim are the only individuals able to testify about how the defendant is preventing the victim from testifying. It seems particularly problematic to establish a defendant's wrongdoing for forfeiture through a victim's statement regarding his or her relationship to the police investigating an allegation of violence within his or her relationship.

An additional complexity arises from what testimony is permissible at trial. Often, prosecutors will elicit expert testimony regarding domestic violence dynamics to help the jury understand the actions of the domestic violence victim, including a refusal to participate in the trial.[173] Is the State permitted to use this type of testimony to establish forfeiture in the first instance?

V. A CALL FOR AN EXPANDED FORFEITURE BY WRONGDOING RULE FOR DOMESTIC VIOLENCE CASES

The current forfeiture by wrongdoing rule may not apply broadly to domestic violence cases. This, however, runs contrary to our understanding of the incredible pressure exerted on domestic violence victims not to testify and contrary to the underlying principle of forfeiture by wrongdoing of creating a disincentive for behavior de-

171. Krischer, PROSECUTOR, Dec. 2004, at 15. Krischer does identify the possibility of proving forfeiture through jailhouse phone calls from domestic violence defendants. In addition, he suggests looking to emails, letters, caller ID logs, and voicemails. *Id.* While these are excellent suggestions, many still require some participation from the victim to be admitted into court.

172. *See* Lininger, 91 VA. L. REV. at 808 (discussing how police officers can obtain information about threats to retaliate for cooperating with law enforcement).

173. Krischer, PROSECUTOR, Dec. 2004, at 16.

signed to disrupt our criminal justice system.[174] Bridging this gap requires a reconceptualization of forfeiture by wrongdoing in the domestic violence context to allow far greater application of forfeiture to domestic violence prosecutions. However, the reconceptualization of forfeiture must be done with concurrent cognizance of three vital concerns. First and foremost, society demands continued confidence in the ability of our criminal justice system to render just verdicts. This confidence can be maintained only if verdicts are based upon competent and reliable evidence and fair procedural rules. Second, the societal epidemic of domestic violence is best addressed when the State maintains its ability to pursue victimless prosecutions despite potential narrow readings of *Crawford*. Third, the State, in pursuing victimless prosecutions, must recognize a central concern of *Crawford*: namely abuse of the system by witnesses who do not testify in court. Keeping these concerns in mind, it is possible to create an expanded domestic violence forfeiture by wrongdoing rule that is consistent with *Crawford* and advances the dual goals of attacking domestic violence and ensuring confidence in our criminal justice system.

A. Broad Reading of the Forfeiture Elements

The first step in a reconceptualization of forfeiture by wrongdoing requires a broad reading of the four primary elements of the rule. A broad reading of these elements will address the issues identified earlier and ensure application of forfeiture to the greatest possible number of domestic violence cases.

1. Unavailability of the Declarant

If the State has charged the defendant with a crime of domestic violence and the victim fails to appear for trial, a rebuttable presumption that the victim is unavailable should attach. This presumption stems from our understanding that domestic violence relationships are built on the defendant's power and control over the victim. The demonstrated pressure that domestic violence defendants exert on their victims not to testify additionally supports such a presumption.

In order to move from presumption to a finding of unavailability, the State must demonstrate two additional requirements. First, the State must demonstrate diligent efforts to obtain the presence of the

174. Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 4 (2002) (citing studies indicating eighty percent of domestic violence victims refuse to participate in prosecutions because "[b]atterers put hydraulic pressures on domestic violence victims to recant, drop the case, or fail to appear at trial.").

victim for court, including service of process or a demonstrated inability to accomplish service. Second, the State must satisfy the fourth element of forfeiture by wrongdoing: the defendant caused the victim's unavailability. The defense will have the opportunity to rebut the presumption either by demonstrating that the State did not make sufficient efforts to procure the witness or that the State has not met the fourth element.

2. *Intent to Prevent Declarant from Testifying*

Courts should recognize that violence between intimate partners is designed to establish or maintain power and control in abusive relationships. Abusive relationships are, by definition, criminal. As such, one of the batterer's primary purposes in establishing or maintaining the power and control dynamic is to preserve the illegal relationship through preventing disclosure of the criminal nature of the relationship.

Therefore, defendants perpetrate intimate partner violence with the intent to prevent the declarants from testifying later. Since the battering relationship is illegal, the defendant's intent to prevent testimony exists from the moment of the first violent act against the victim. Therefore, the intent element is satisfied in any battering relationship.

In addition, conceiving of domestic violence relationships in this way allows for the reflexive application of the forfeiture by wrongdoing doctrine. Since the defendant intended the violence to silence the victim—including silencing her testimony at a later trial—the same act can be the basis of the criminal charge and forfeiture by wrongdoing. This reflexive application of the forfeiture doctrine greatly expands the reach of forfeiture by wrongdoing and significantly increases its utility in combating domestic violence.

Richard Friedman contends that courts have been too limited in requiring that the defendant intend to prevent the witness from testifying. Rather, Friedman argues that a broad reading of the defendant's intent is appropriate under the forfeiture principle. According to Friedman, "[t]his principle applies most obviously when that conduct is wrongful, but arguably it applies even when it is not, so long as a natural and desired consequence of the conduct was the declarant's inability to testify."[175] Friedman goes on to state, "it is [not] necessary, for the principle to apply, that rendering the declarant unavaila-

175. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 518 (1997).

ble to testify have been the motivating, or the principal, purpose of the defendant's conduct."[176]

Friedman's broad reading of the intent requirement clearly covers the domestic violence situation. Since the power and control dynamic is designed to subjugate the victim and to prevent disclosure of the abuse—and it does so—it seems appropriate to infer that a portion of the defendant's intent is to prevent the victim from testifying about the nature of the relationship.

3. *Declarant is Expected to be a Witness*

Interpreting the third element of forfeiture broadly appropriately places the burden on the defendant for his or her violence. In the same way that the defendant's intent to prevent the victim from testifying arises at the moment of violence against the victim, the violence also establishes the expectation that the victim will be a witness. Similarly, the fact that the defendant is acutely aware of—and trying actively to prevent—the victim's potential to testify about the criminal nature of the relationship eliminates the need for an actual prosecution to have been initiated prior to the act of violence forming the basis of the forfeiture.

In contrast, a narrow reading of the third element that requires that the violence be perpetrated after the initiation of the prosecution denies the reality of the patterned violence within the relationship, does not adequately address the policy concerns of the forfeiture by wrongdoing doctrine, and punishes the prosecution. It allows the defendant to rely on the violence to keep the victim from court and then assert his or her confrontation rights.[177] At the same time, the State is prevented from establishing that the defendant understood at the time of the abuse, regardless of when it occurred—because of the nature of the violent relationship—that the victim could testify in the future. This seems particularly unfair because it is not proportional to a broad reading of "testimonial." If the courts assume a broad reading of "testimonial," under which the victim will have been deemed to have acted for purposes of developing testimony, then courts should adopt a broad reading of the defendant's behavior as well.

176. Friedman, 31 ISR. L. REV. at 518 n.25.

177. Tom Lininger, 91 VA. L. REV. 747, 811 (2005) (stating "[c]onfrontation rights should be a shield, not a sword. The defendant should not be able to frighten away witnesses against him, and then protest their absence when the prosecution seeks to admit their out-of-court statements.").

4. Defendant's Conduct Caused the Declarant's Unavailability

The fourth element is the most important in the reconceptualization of the forfeiture by wrongdoing for domestic violence prosecutions. As discussed above, there are significant problems of proof with this element. These difficulties, however, should not trump the defendant's constitutional confrontation rights. Therefore, while a broad reading of forfeiture is appropriate for domestic violence, the fourth element will limit the reach of forfeiture in domestic violence cases and help ensure that the constitutional issues are adequately addressed.

In this regard, the State can establish the fourth element in one of two ways. First, the State can establish, by a preponderance of the evidence,[178] that the defendant expressly used or threatened to use violence to prevent the victim from either reporting the incident or participating in the prosecution. The specific evidence can come from statements to the responding police officer, medical personnel, or other witnesses, or from other evidence such as prior police reports or court documents. This is consistent with developed forfeiture by wrongdoing case law and is not a dramatic departure.

If the State has no evidence of the defendant expressly preventing the victim from testifying, alternatively the State can satisfy the fourth element by establishing that the defendant and victim were involved in a battering relationship.[179] A battering relationship is one in which there is a pattern of violence repeated over time.[180] In addition to violence, other tactics are commonly employed by batterers to accomplish their power and control over the victim, such as threats of violence to the victim or family members, intimidation, financial and familial isolation, rigid adherence to sex role stereotypes, stalking, surveillance, repeated invasions of privacy, or involving the victim in criminal activity.[181] If the State can establish that the victim and the defendant were involved in a battering relationship, the State will have also established a fundamental aspect of that relationship: the batterer seeks to prevent the victim from disclosing the true nature of

178. For purposes of this discussion, the preponderance of the evidence standard, as followed by the majority of circuits, will be applied. Whether the standard is by a preponderance of the evidence or by clear and convincing evidence, the same issues apply.

179. Jo Ann Merica, *The Lawyer's Basic Guide to Domestic Violence,* 62 TEX. B. J. 915, 915 (1999) (stating "[d]omestic violence is a pattern of interaction that includes the use of physical violence, coercion, intimidation, isolation, and/or emotional, economic, or sexual abuse by one intimate partner to maintain power and control over the other intimate partner.")

180. *See supra* note 150.

181. Merica, 62 TEX. B. J. at 915; National Center for Domestic and Sexual Violence, *Power and Control Wheel, available at* http://www.ncdsv.org/images/Power_and_Control_wheel_NCDSV.pdf (last visited Apr. 2, 2006).

the relationship.[182] In other words, the State will have established that the defendant's behavior in the relationship is the reason that the victim is unavailable for trial. The second alternative to the fourth element represents a significant expansion beyond current forfeiture by wrongdoing doctrine.

The importance of the second avenue of proving the link between the defendant's conduct and the victim's absence is that it recognizes the complexity and the reality of domestic violence. While the second alternative will be difficult to prove, given the inherent isolation of the domestic violence victim from society, it maintains the possibility of establishing forfeiture when the defendant's wrongdoing is more subtle and non-violent. The second avenue recognizes the contextual nature of the defendant's actions and seeks to recognize the entirety of the battering relationship. In this way, the second avenue allows the reconceptualization of forfeiture to embrace the full complexity and reality of domestic violence.

5. Reliability Component

The final aspect of the reconceptualization of the forfeiture doctrine for domestic violence is the addition of a reliability component. Coupled with the fourth element, this additional requirement should adequately address the defendant's constitutional concerns.

Traditionally, the forfeiture rule has not required any reliability considerations.[183] Rather, satisfying forfeiture satisfied both hearsay issues and confrontation concerns.[184] As the reconceptualization envisions a greatly increased application of forfeiture, the need to separately consider reliability grows, particularly with declarants who are not dead, but absent for more subtle reasons. With a murdered declarant, the court has fewer concerns about other competing reasons for declarant's absence. When the declarant is alive and absent, additional concerns arise about the ability of the victim-declarant to take advantage of liberal forfeiture rules and abuse the system. Additionally, an expanded forfeiture rule requires the jury base its decision on competent evidence. For these reasons, as forfeiture is expanded, it is appropriate to impose an additional reliability consideration.

A reliability component could take several forms. For instance, it could be simply a requirement that the court engage in an Evidence Rule 403 analysis of whether the probative value of the evidence is substantially outweighed by other concerns, such as unfair prejudice,

182. *See supra* notes 13-14, 17, 148, 150, 181 and accompanying text.
183. *See supra* note 107 and accompanying text.
184. *See supra* notes 89, 101 and accompanying text.

confusion of the issues, or delay.[185] However, since the reliability component is only invoked after the defendant's confrontation rights have been forfeited, it seems most appropriate to employ the reliability consideration that existed prior to *Crawford*'s revitalization of the Confrontation Clause: the *Roberts* test.[186]

The *Crawford* Court found that the *Roberts* test inappropriately added an alternative reliability test [to the test required by the Confrontation Clause].[187] The Court did not, however, suggest that the *Roberts* test was not appropriate for assessing reliability of statements outside of the Confrontation Clause.[188] Once forfeiture by wrongdoing has been established, the Confrontation Clause issues are resolved and the *Roberts* test can be appropriately used for assessing the reliability of the statement of the unavailable witness.[189] In this way, if the prosecution can demonstrate that the unavailable victim's statement falls within either a firmly rooted hearsay exception or bears particular guarantees of trustworthiness, the prosecution will be able to use the statement as substantive evidence of the charged crime.

One benefit of using the *Roberts* test in this context is that the courts already have significant experience using the test.[190] In addition, in the domestic violence context, the *Roberts* test will allow the prosecution to rely on its considerable experience with victimless prosecution. Many prosecutors' offices have pursued victimless prosecutions based upon excited utterances, present sense impressions, and statements to medical personnel. Courts have already determined that these exceptions to the hearsay rule are firmly rooted hearsay exceptions. In other words, they are deemed to have sufficient inherent reliability that the jury would be justified in relying on them in reaching a verdict. In this way, the reliability component advances the societal interest in confidence in the ability of our criminal justice system to render just verdicts.

185. *See, e.g.*, United States v. Mayhew, No. 2:03-cr-165, 2005 WL 1847239, at *6 (S.D. Ohio Aug. 5, 2005); United States v. Rivera, 412 F.3d 562, 571 (4th Cir. 2005); United States v. Honken, No. CR 01-3047-MWB, 2004 WL 3418693, at *22 (N.D. Iowa July 16, 2004).

186. *See supra* notes 23-30 and accompanying text.

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

188. "While Justice Scalia devoted a huge portion of the opinion to lambasting the *Roberts* Court, and suggesting that *Roberts* is unworkable in any context, the *Crawford* ruling left *Roberts* unscathed as the controlling authority for a substantial amount of hearsay evidence admitted in criminal trials." Lininger, 91 VA. L. REV. at 166-67.

189. Lininger, 91 VA. L. REV. at 766.

190. Lininger, 91 VA. L. REV. at 767 (stating "[i]n fact, among the approximately 500 federal and state court opinions applying *Crawford* between March 8, 2004, and December 31, 2004, nearly one-third of the courts reaching the merits have distinguished *Crawford* on the ground that the statement in question is not testimonial, and many of these courts have applied the *Roberts* framework as if *Crawford* had never been decided.").

VI. CONCLUSION

The Court's decision in *Crawford* creates perverse incentives for domestic violence batterer-defendants to absent their victims from court and then seek dismissal of their charges by raising the Confrontation Clause. This is precisely the sort of behavior—and threat to our criminal justice system—that the rule of forfeiture by wrongdoing was originally designed to eliminate. While considerable resistance can be anticipated to a broad application of forfeiture by wrongdoing in domestic violence cases, such a broad reading is required when the true nature of a battering relationship is recognized: batterers seek to prevent disclosure about the relationship, particularly to police or prosecutors.

The effort to preserve the integrity of the criminal justice system through a broad application of forfeiture by wrongdoing to domestic violence cases, however, carries with it the potential to erode the integrity of the criminal justice system by undermining societal confidence in jury verdicts. To prevent this erosion of a fundamental aspect of our society, broad application of forfeiture must be coupled with procedural safeguards, and any statements of an absent victim must be deemed reliable prior to admission to the jury.

In this way, prosecutors can effectively reach those domestic violence cases in which the defendants have attempted to manipulate the system to their advantage. A broad reading of forfeiture by wrongdoing, therefore, has the potential to be a solution to the conundrum created by *Crawford*. Prosecutors will still be able to pursue victimless domestic violence prosecutions and attempt to hold batterers accountable, even when the battering has successfully prevented the victim from testifying. At the same time, forfeiture may provide further ammunition in the critical battle against domestic violence by deterring batterers from additional acts of violence.