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Expanding Forfeiture without Sacrificing Confrontation after *Crawford*

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NOTE

EXPANDING FORFEITURE WITHOUT SACRIFICING CONFRONTATION AFTER *CRAWFORD*

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I love murder cases; you have one less witness to worry about.

—Murray Richman, defense lawyer[1]

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* J.D. expected, May 2006. I am particularly indebted to Richard D. Friedman, not only for his time in helping me with this Note, but for laying the groundwork for this discussion in his own writings. I am also grateful for help and support from Eve Brensike, Jeffrey L. Fisher, Samuel R. Gross, Bernard Eskandari, Jessica Wanke, and all those who participated and judged the 2004–05 Campbell Moot Court Competition, where many of the thoughts herein were first raised, and many of the arguments left out were buried.

1. Joyce Wadler, *In Court, an Expert in Packaging Rappers*, N.Y. TIMES, Jan. 26, 2000, at B2. The irreverent Murray Richman is also featured in a nonfiction novel recounting the story of a double-homicide prosecution that took place decades after the killings occurred. *See* PHILIP GOUREVITCH, A COLD CASE (2002).

INTRODUCTION

The central holding of *Crawford v. Washington*[2] is fairly straightforward: The Confrontation Clause[3] bars the admission of out-of-court testimonial statements unless the defendant had a prior opportunity to cross-examine the witness.[4] *Crawford*, however, has an often overlooked caveat. In renouncing numerous exceptions to the confrontation right, the Court rejected only those that purport to test the reliability of testimonial statements. It left equitable exceptions undisturbed. As the Court pointed out, "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds."[5]

The parameters of the rule of forfeiture are a matter of some dispute. As opposed to a waiver, which requires a knowing and intelligent relinquishment of a right, forfeiture occurs when an individual commits an act inconsistent with maintaining a right.[6] It has traditionally applied in witness-tampering cases, where a defendant intimidates, bribes or kills a witness just before she is scheduled to testify. In those situations, forfeiture should bar the defendant from successfully objecting to the admission of the witness's prior unconfronted testimony.

To illustrate, consider a defendant who is charged with running a large drug operation.[7] The day the prosecution's key witness is to testify, he is killed on the way to the courthouse. Luckily for the prosecutor, the witness already gave testimony implicating the defendant before a grand jury, and the prosecutor now seeks to admit it in lieu of the witness's in-court testimony. Let us assume that there is no question that the defendant played a role in killing the witness; he admits it. Nevertheless, he objects, "The Sixth Amendment grants me the right to confront this witness, and since I have not been afforded that right, this unconfronted testimony should be excluded." The rule of forfeiture prevents this objection from succeeding, since it was the defendant who caused the unavailability of the witness. As one authority explained, applying the rule of forfeiture effectively says to the defendant, "You have no valid complaint about the loss of a right that, as

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2. 541 U.S. 36 (2004).

3. The Sixth Amendment to the U.S. Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

4. As the Court noted, "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68–69. Courts have focused on flushing out this rule, with particular attention paid to outlining exactly what constitutes a testimonial statement, as the Court explicitly left that issue unresolved. *Id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

5. *Id.* at 62 (citing Reynolds v. United States, 98 U.S. 145, 158–59 (1878)).

6. See Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214 (1977).

7. This fact pattern is modeled after *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982). To be exact, evidence showed that *Mastrangelo* was involved in the importation of 23.4 tons of marijuana and 499,000 methaqualone tablets. *Id.* at 271.

a natural and desired result of your own conduct, it is impossible to afford you."[8]

Before *Crawford*, only when a defendant acted to silence a witness to a prior crime would courts apply forfeiture.[9] The rule operated as a disincentive to keep organized crime affiliates from "knocking off" witnesses.[10] But as one judge succinctly put it, "*Crawford* heightens the importance of . . . the rule of forfeiture by wrongdoing."[11] In the brief period of time since *Crawford* was decided, a number of courts have extended the rule's reach to instances where the wrongdoing that makes a witness unavailable is identical to the defendant's alleged crime,[12] while several courts have declined the invitation.[13] The California Supreme Court recently granted review to answer the question, "Does [forfeiture] apply where the alleged 'wrongdoing' is the same as the offense for which defendant was on trial?"[14] This has been

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8. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 518 (1997) [hereinafter Friedman, *Chutzpa*]. A more common way of stating the principle, albeit slightly less pointed, is that "one not be permitted to profit from one's own wrongdoing." People v. Cotto, 642 N.Y.S.2d 790, 793 (App. Div. 1996); *see also* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1390 (James H. Chadbourn ed., rev. ed. 1974) ("Where . . . the failure to obtain cross-examination is in any sense attributable to the *cross-examiner's own consent or fault*, the lack of cross-examination is of course no objection.") (emphasis in original).

9. 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, 482 (2003) (surveying case law and concluding that forfeiture "has only been used when the defendant specifically intended to prevent the witness from testifying at trial").

10. *Id.* at 466–72 (describing the modern doctrine as arising with the Organized Crime Act of 1970, 18 U.S.C. § 1961, and the development of the Witness Protection Program).

11. United States v. Arnold, 410 F.3d 895, 916 (6th Cir. 2005) (Sutton, J. dissenting).

12. *See, e.g.*, United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005). In *Garcia-Meza*, the Sixth Circuit noted:

> There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness's unavailability, he intended to prevent the witness from testifying. Though the Federal Rules of Evidence may contain such a requirement, *see* FED. R. EVID. 804(b)(6), the right secured by the Sixth Amendment does not depend on, in the recent words of the Supreme Court, "the vagaries of the Rules of Evidence."

Id. at 370; People v. Moore, 117 P.3d 1 (Colo. App. 2004); State v. Meeks, 88 P.3d 789 (Kan. 2004); Gonzalez v. State, 155 S.W.3d 603 (Tex. App. 2004). A line of cases decided in California Courts of Appeal in the last year has shown this same willingness, prompting the California Supreme Court to review the questions arising from them. *See* People v. Giles, 19 Cal. Rptr. 3d 843 (Ct. App. 2004), *review granted*, 102 P.3d 930 (Cal. Dec. 22, 2004); People v. Jiles, 18 Cal. Rptr. 3d 790 (Ct. App. 2004), *review granted*, 103 P.3d 270 (Cal. Dec. 22, 2004); *see also* People v. Taylor, No. A095412, 2005 WL715973 (Cal. Ct. App. Mar. 30, 2005); People v. Baca, No. E032929, 2004 WL 2750083 (Cal. Ct. App. Dec. 2, 2004).

13. *See, e.g.*, United States v. Jordan, No. Crim. 04-CR-229-B, 2005 WL 513501 (D. Colo. Mar. 3, 2005); United States v. Mikos, No. 02 CR 137-1, 2004 WL1631675 (N.D. Ill. July 16, 2004); State v. Wiggins, No. 99 CRS 46567, 2005 WL 857109 (N.C. Super. Ct. Mar. 18, 2005); State v. Ivy, No. W2003-00786-CCA-R3-DD, 2004 WL 3021146 (Tenn. Crim. App. Dec. 30, 2004).

14. People v. Giles, 19 Cal. Rptr. 3d 843 (Ct. App. 2004), *review granted*, 102 P.3d 930 (Dec. 22, 2004).

referred to as applying forfeiture "reflexively,"[15] and I will borrow the term throughout this Note.

A reflexive application of forfeiture occurs whenever a defendant is charged with the very act that allegedly made the witness unavailable. Consider a defendant (D) who is charged with murder. Just before death, the victim calmly told the police, "I would like to report that D inflicted this potentially fatal injury upon me."[16] The prosecutor may then seek to admit this testimony at D's murder trial—although D has not had the chance to confront the victim—on the grounds that D forfeited his confrontation right by killing the victim. Post-*Crawford* courts have been somewhat receptive to this rather innovative application of forfeiture.[17]

This extension of the rule would understandably be an unwelcome development for a number of jurists. One judge responded to suggestions that forfeiture ought to apply reflexively by saying, "It's almost frivolous to argue forfeiture in this case . . . . I wouldn't have given anybody five minutes to argue forfeiture."[18] Nevertheless, it may have been exactly what the Supreme Court intended when it mentioned the rule of forfeiture in *Crawford* and described it as an equitable principle.[19] After all, the only brief that mentioned forfeiture explicitly advocated this reflexive application of it.[20]

This Note argues that forfeiture ought to apply reflexively and that there is no principled way to limit the doctrine—as pre-*Crawford* courts had—to witness-tampering cases. Forfeiture should apply whenever a defendant's wrongdoing caused a witness's unavailability. Extending forfeiture in this way could drastically alter the way certain crimes are prosecuted. Unavail-

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15. *See* Friedman, *Chutzpa*, *supra* note 8, at 508.

16. The reason why I frame it as a calm police report is just to make clear that it would be testimonial under *Crawford*, the implications of which I describe in Part I.

17. *See supra* note 12 and accompanying text. The most illustrative case is *Meeks*, 88 P.3d 789. In that case, an officer rushed to the scene of a shooting, and asked the victim who shot him, to which the victim replied, "Meeks shot me." *Id.* at 792. The trial court admitted the statement prior to the ruling in *Crawford* under an evidentiary rule that was almost certainly inapplicable post-*Crawford*. Nevertheless, the Supreme Court of Kansas affirmed the conviction, holding that the defendant had forfeited his confrontation right by killing the witness, despite the fact that his wrongdoing was not targeted at silencing a witness.

18. This was the statement of Judge Avern Cohn of the U.S. District Court for the Eastern District of Michigan, after judging a moot court round featuring an argument in favor of applying forfeiture in this way. His reactions to the argument, and the round which discussed forfeiture at some length, can be viewed *at* http://www-personal.umich.edu/~shawndel/campbell.htm (last visited July 24, 2005). This particular statement was made approximately one hour and twenty six minutes into the recording.

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

20. *See* Amicus Curiae Brief, Law Professors Clark, et al., *Crawford* (No. 02-9410), *available at* 2003 WL 21754958 (July 24, 2003) [hereinafter Law Professors' Brief]. Addressing forfeiture, the brief argued:

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

Id. at *24 n.16 (citing Friedman, *Chutzpa*, *supra* note 8).

able victims who were intimidated by the crimes against them, such as domestic abuse victims, could have their prior unconfronted testimony admitted based on forfeiture findings.

Beyond revisiting the arguments in favor of the reflexive application of forfeiture, this Note adds a new layer of analysis. It requires looking at a hybrid case. It is different from the two hypotheticals described above insofar as it includes both witness tampering and reflexive application of forfeiture. The case I have in mind involves a witness coming forward to the police and reporting, "D is engaged in a large drug operation, and he threatened to kill me if I cooperated with the police." When the witness is subsequently killed, prosecutors seek to admit this statement against D, not in his trial for running the drug operation, but in his trial for murdering the witness. The reason for discussing this third type of case is that it requires the reflexive application of forfeiture—but even pre-*Crawford* courts were typically willing to apply forfeiture reflexively so long as it involved a fact pattern like this one. This suggests that courts are not opposed to applying forfeiture reflexively in any principled way. Instead, there is likely an alternative explanation that captures why courts are willing to apply forfeiture reflexively in witness-tampering cases but are reluctant to do so under other circumstances.

Part I of this Note sets the stage by briefly reviewing *Crawford* and its implications for the rule of forfeiture. Part II argues that forfeiture ought to apply reflexively and that the reason why courts are reluctant to apply it as such is not because of a principled objection to it, but for an alternative, purely evidentiary reason. That is, evidence of forfeiture's occurrence is likely to be particularly strong in witness-tampering cases. Part III considers the potentially vast ramifications of applying forfeiture so expansively, as it threatens to extinguish the right to confront critical witnesses in a variety of cases. Part III, therefore, also suggests some principled limitations to the rule. I argue that two limitations—a narrow interpretation of witness unavailability and a bar on bootstrapping testimonial evidence—should largely allay the concerns of jurists worried about the expansion of forfeiture. I conclude that while forfeiture should be substantially limited to protect the vitality of the Confrontation Clause, it should not be restricted to witness-tampering cases. After rejecting this limitation, which has needlessly preoccupied courts and commentators, we should expect more defensible constraints to develop.

I. How *Crawford* Calls for a New Approach to Forfeiture

While *Crawford* largely revamped and clarified Confrontation Clause analysis, it also called the scope of forfeiture into question. This may come as a surprise, since the language of *Crawford* appears to have done nothing

more than reaffirm the rule of forfeiture in passing.[21] It becomes necessary to review the changing face of the Confrontation Clause post-*Crawford* alongside the rule of forfeiture to understand how forfeiture is due for a makeover.

Before *Crawford*, *Ohio v. Roberts*[22] provided the predominant framework for interpreting the Confrontation Clause. Under *Roberts*, the Confrontation Clause was concerned with all statements made by out-of-court declarants.[23] Noting, however, that confrontation was aimed at testing the reliability of these statements, a defendant's confrontation right could be satisfied if the witness was unavailable and the contested statement contained "adequate 'indicia of reliability.' "[24] These indicia were usually found within "firmly rooted hearsay exception[s]."[25] For example, one firmly rooted hearsay exception is the dying declaration, which allows the admission of hearsay statements in homicide prosecutions if they are "made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death."[26] The peculiar rationale for this exception is that "[n]o person who is immediately going into the presence of his Maker will do so with a lie upon his lips."[27]

Crawford drastically altered this framework in two principal ways. First, it held that the Confrontation Clause concerns only *testimonial* statements.[28] While the parameters of what constitutes a testimonial statement were not precisely drawn, it is enough for our purposes to know that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[29] In other words, the Court gave substance to what it means to be a "witness against" somebody, such that Sixth Amendment protection applies only if the out-of-court declarant can fairly be described as bearing witness.

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21. To reiterate, the Court's only mention of the rule came when it said, "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds. . ." 541 U.S. 36, 62 (2004).

22. 448 U.S. 56 (1980).

23. Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 5 (2004).

24. *Roberts*, 448 U.S. at 66.

25. *Id.*

26. FED. R. EVID. 804(b)(2).

27. Queen v. Osman, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881). This rationale is strange, to say the least. I am reminded of a sketch by a comedy troupe, *The Kids in the Hall*, that somewhat captured the fallacy behind this explanation. After a defendant took the stand in his own defense and blatantly lied in response to every question, the prosecutor reminded him that he was under oath. In response, the defendant quipped, "Oh right. And I would never lie under oath—not to God." *The Kids in the Hall: The Murder Trial* (HBO television broadcast 1991), transcript *available at* http://www.kithfan.org/work/transcripts/three/suspicsn.html (last visited July 24, 2005). *See also* RICHARD D. FRIEDMAN, THE ELEMENTS OF EVIDENCE 327–32 (3d ed. 2004) [hereinafter FRIEDMAN, EVIDENCE] (providing a more in-depth discussion of the peculiarities of this exception).

28. Crawford v. Washington, 541 U.S. 36, 50–53 (2004).

29. *Id.* at 51.

Second, once it is determined that a statement is testimonial, a judicial finding that the statement is reliable will not satisfy a defendant's confrontation right.[30] Confrontation is the constitutionally prescribed procedure for testing the reliability of testimony, and there can be no substitute for that method, even when a witness becomes unavailable. *Crawford* narrowed the scope of the Confrontation Clause, applying it only to testimonial statements; it also strengthened it, renouncing exceptions to the rule that purported to be surrogate tests for reliability. The Confrontation Clause is now a "smaller mouth [with] bigger teeth."[31]

But the rule after *Crawford* is not as clear cut as it appears to be. In noting that confrontation is a constitutionally required check on the *reliability* of testimonial statements, the Court stated that it was renouncing only those exceptions to the Confrontation Clause that purported to assess the reliability of testimony.[32] The Court noted that forfeiture remains a valid exception to the Confrontation Clause, as it is an equitable principle unconcerned with the reliability of the statements at issue.[33] That is, when it is the defendant's own fault that she cannot confront a witness, she loses her confrontation right regardless of the testimony's reliability. The Court's reference to the rule of forfeiture is odd, if for no other reason than the Supreme Court has rarely mentioned it in its opinions. Despite dating back to the seventeenth century,[34] and more recently being codified in the Federal Rules of Evidence,[35] the rule of forfeiture had been mentioned in only one other Supreme Court opinion in the past seventy years.[36]

The mention of forfeiture was more than a trivial passing reference. While prior exceptions to the inadmissibility of hearsay have been largely eviscerated when testimony is at issue, forfeiture remains intact because it is not a gauge for reliability. As a result, prosecutors eager to admit testimonial evidence have become rather innovative in arguing for an expansive

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30. *Id.* at 53–56.

31. W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After* Crawford v. Washington: *Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1 (2005).

32. *Crawford*, 541 U.S. at 62. Another example of such an exception is the "excited utterance" exception to the rule against hearsay. *See* FED. R. EVID. 803(2) (1980). The justification for admitting such excited utterances is that "a condition of excitement which temporarily stills the capacity of reflection . . . produces utterances free of conscious fabrication." FED. R. EVID. 803 advisory committee's notes. Before *Crawford*, these hearsay exceptions applied indiscriminately to both testimonial and non-testimonial statements. Indeed, under the Federal Rules of Evidence, any statement—testimonial or otherwise—demonstrating "equivalent circumstantial guarantees of trustworthiness" was an exception from the rule against hearsay under certain conditions. FED. R. EVID. 807.

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

34. *See* Lord Morley's Case, 6 How. St. Tr. 769 (H.L. 1666).

35. FED. R. EVID. 804(b)(6) (amended 1997).

36. *See* Illinois v. Allen, 397 U.S. 337, 342–47 (1970). It was mentioned in five decisions prior to *Allen*. *See* Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Diaz v. United States, 223 U.S. 442, 452–53 (1912); Motes v. United States, 178 U.S. 458, 472–74 (1900); Mattox v. United States, 156 U.S. 237, 242 (1895); Reynolds v. United States, 98 U.S. 145, 158–59 (1878).

forfeiture[37]—since they often have little other recourse in trying to admit unconfronted testimony—and courts have been pretty receptive.[38] Given the new approach to the Confrontation Clause, overlooking the emerging importance of forfeiture could be a serious mistake.

The analysis here aims at exploring the outer reaches of the rule of forfeiture, as confined by the Confrontation Clause of the Constitution. Even if the Constitution permits a finding of forfeiture, though, testimony may still be excluded under the Federal Rules of Evidence or under any given state's evidentiary code.[39] A plain reading of the Federal Rules may restrict the application of forfeiture reflexively, as it applies only when a defendant "intended to . . . procure the unavailability of the declarant as a witness," although this language is not entirely clear.[40] Thus, if a prosecutor successfully argues that a defendant can reflexively forfeit his confrontation right under the Constitution, she will still have to contend with the evidentiary rules, since they may provide broader protection for a defendant.[41] Courts have specifically noted that the dimensions of forfeiture may be different in the Federal Rules and state codes of evidence than in the Constitution.[42] I will not explore the extent of these potential differences, as the analysis here targets the constitutional dimensions of forfeiture.

II. EXPANDING FORFEITURE BEYOND WITNESS-TAMPERING CASES

There is an unnoticed trend in the forfeiture case law that should lead us to accept its expansion beyond witness-intimidation cases. This Part aims at

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37. *See, e.g.*, Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to* Crawford *in Domestic Violence Cases*, PROSECUTOR, Nov.–Dec. 2004, at 14.

38. *See supra* notes 12–13; *infra* Part II.A.

39. In stressing the disjunction between the Rules of Evidence and the Constitution, the Court stated, "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence." Crawford v. Washington, 541 U.S. 36, 61 (2004); *see also* 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 418, at 123 (1980) ("Few tasks in criminal evidence are more perplexing than to describe the effect of the Confrontation Clause of the Sixth Amendment upon the hearsay doctrine.").

40. *See* FED. R. EVID. 804(b)(6). While this could be read to limit forfeiture to witness-intimidation cases, it is a matter for debate. Usually when somebody commits murder, we might accurately say that she intends to keep her victim from coming forward as a witness, even though we probably would not describe it that way. While surely that is not her only motivation—since she might just as easily do that by not committing the murder in the first place—most murderers certainly see the absence of their victims as an intended benefit.

41. For a reading of the statutory history behind Rule 804(b)(6) that would lend support to interpreting it as only applying to witness-intimidation cases, see generally Leonard Birdsong, *The Exclusion of Hearsay Through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)*, 80 NEB. L. REV. 891 (2001), and Flanagan, *supra* note 9.

42. *See, e.g.*, United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002) (finding that the court "need not worry about any potential differences between the substantive forfeiture standards . . . under [the] two provisions" as the defendant had only raised the hearsay issue). For an in-depth discussion about how one state's code of evidence differs from the Federal Rules with regard to forfeiture, see State v. Henry, 820 A.2d 1076, 1085–91 (Conn. App. Ct. 2003).

exploring that trend in the hopes of determining the proper scope of the rule along with some limitations. In Section II.A, I review three different scenarios where forfeiture might apply and how courts have responded to that suggestion. The cases demonstrate that, while courts sometimes object to the reflexive application of forfeiture, it is actually well-accepted under the proper circumstances. Sometimes courts will only apply forfeiture if the defendant was motivated by a desire to procure a witness's unavailability, while in other cases they seem entirely unconcerned by the defendant's motive. Likewise, some courts appeal to maintaining a presumption of innocence in refusing to apply forfeiture reflexively, but that concern disappears under certain fact patterns for no discernible reason. Therefore, in order to make sense of the cases, we will need an alternative explanation for when courts are reluctant to apply forfeiture.

In Section II.B, I argue that the explanation is that courts are really only concerned with two limiting principles: (1) that forfeiture should be applied in a relatively narrow set of cases, and (2) only upon strong evidence of its occurrence. Accepting these as basic precepts underlying forfeiture should allow us to develop a more coherent approach to the rule and put the cases in perspective.

A. *Three Applications of Forfeiture: Revealing a Trend*

Many courts are willing to apply forfeiture reflexively in some situations, but not in others, and a closer look reveals that there is no principled distinction between the situations that justifies this disparity. An illustration should help ground the analysis. Victim 1 (V_1) has been fatally shot, but just before he dies, he finds a police officer and makes Statement 1, "D shot me." Having witnessed the shooting, Victim 2 (V_2) goes to the police and gives Statement 2, "D threatened to kill me if I cooperate with the police," and Statement 3, "I saw D shoot V_1." V_2 is subsequently killed just before she is scheduled to testify at trial. Assuming that there is enough evidence for a judge to find that D committed both the killings as a preliminary matter,[43] there are three questions[44] we should ask with regard to the constitutionality of applying forfeiture:

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43. This is an assumption that I will be making throughout the analysis in Part II, but one that should not ordinarily be taken for granted. Of course, that both victims implicated D in their murders—V_2 at least did so speculatively—does not mean that D is guilty. How much discretion judges should have to make these determinations and what safeguards we should have in place is the subject of Part III, *infra*. But for now, the assumption is that there is ample evidence for a predicate finding that D committed both killings.

Most courts have held that a predicate finding of forfeiture should be made under a "preponderance of the evidence" standard. *See* FED. R. EVID. 804(b)(6) advisory committee's notes for 1997 amends. (listing cases that apply the preponderance test, and offering only one case that applied a clear and convincing standard). ***But see*** United States v. Thevis, 665 F.2d 616, 631 (5th Cir. Unit B 1982) (requiring clear and convincing evidence).

44. Since there are three statements and two trials in the hypothetical, there are technically six potential ways forfeiture could apply. However, we need not consider the other three possible combinations, as they would be either redundant or uninteresting. Also, the more accurate—but less

1. Could (V_2's) Statement 3 be admitted in D's trial for murdering V_1?

2. Could (V_2's) Statement 2 be admitted in D's trial for murdering V_2?

3. Could (V_1's) Statement 1 be admitted in D's trial for murdering V_1?

Courts addressing the constitutionality of these questions have unanimously answered "yes" to Question 1, as the Supreme Court has explicitly authorized this application of forfeiture.[45] Similarly, an overwhelming majority of courts have answered "yes" to Question 2, despite the fact that it requires reflexive application of forfeiture. This puts the numerous courts and commentators answering "no" to Question 3 in a predicament. They must either (1) object to reflexive application of forfeiture, putting them at odds with the vast majority of courts answering "yes" to Question 2, or (2) come up with some justification for applying forfeiture reflexively in scenario 2 but not in scenario 3. Courts have been unable to do this because there is no principled explanation for this discrepancy. A closer look at the three questions should help demonstrate this.

1. *The Classic Case for Forfeiture*

The first question is the easiest to answer: Forfeiture will preclude D's objection to the admission of V_2's statement, "I saw D shoot V_1," at his trial for killing V_1. This has been settled as a constitutional matter for more than a century. In other words, where a defendant's wrongful actions prevent a witness to a prior crime from testifying, he has forfeited his right to confront that witness in his trial for the initial crime.

The Supreme Court already settled this question in *Reynolds v. United States*.[46] Reynolds was on trial for bigamy, and one witness against him—his second wife—previously testified about the bigamy offense in an earlier trial. When the court officer contacted Reynolds in an attempt to serve a subpoena upon his second wife, Reynolds would not divulge her location. Instead, he stated, "[T]hat will be for you to find out . . . . She does not appear in this case."[47] The Court, finding that Reynolds had kept his wife from testifying, held that when a defendant "voluntarily keeps the witnesses away, he cannot insist on his [confrontation] privilege."[48] Notably, the Court never undertook any consideration of Reynolds' purpose, apparently indifferent to the motivations underlying his obstructionism. While the Supreme

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concise—form of the questions would be, "Does forfeiture preclude D's confrontation-based objection to the admission of Statement X in his trial for murdering V_X?"

45. Reynolds v. United States, 98 U.S. 145, 158–59 (1878).

46. *Id.*

47. *Id.* at 160.

48. *Id.* at 158. A court addressing a case like this today would likely have no occasion to reach the issue of forfeiture, because it appears that Reynolds had a full opportunity to examine the witness at his prior trial for the same offense. *Id.*; *see* Crawford v. Washington, 541 U.S. 36, 59 (2004) ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where *the defendant has had a prior opportunity to cross-examine*." (emphasis added)).

Court has not made much use of the doctrine,[49] every Circuit to address the issue has recognized this application of forfeiture.[50]

As in *Reynolds*, the courts addressing similar scenarios give little to no attention to the defendant's underlying motives.[51] Indeed, if one places much importance on them, the results are absurd. Assume D killed V_2 not to keep her from testifying about V_1's murder, but solely to get revenge when he found out V_2 cooperated with the police in their investigation of him. How could that possibly count in D's favor when balancing the equities? To place any importance on this motive, a court would have to effectively say, "You would not be able to object to the admission of this testimony had you killed V_2 to keep her from testifying, but since you killed her only to get revenge, your objection is allowed and V_2's testimony is precluded notwithstanding the fact that you killed her." A court clinging to this distinction could not be viewed as one concerned with equity, but only with a contrived formal limitation. As the Sixth Circuit found, "[t]he Supreme Court's recent affirmation of the 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive."[52] While some courts espouse such formal limitations in other contexts, none has done so in a case where the victim witnessed a prior crime, gave testimony about it, and was then precluded from testifying by the defendant's wrongdoing.[53]

Thus, we can safely answer "yes" to Question 1 without further consideration of D's motives.

2. *Reflexive Application of Forfeiture in Witness-Tampering Cases*

Forfeiture should, and typically will, preclude D from successfully objecting to the admission of V_2's statement, "D threatened to kill me if I cooperate with the police," at his trial for killing V_2. If there were a principled objection to applying forfeiture reflexively, it would sound in this second type of case. However, while Question 2 is slightly more

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49. *See supra* note 36 (counting a total of six cases in which the doctrine was even mentioned).

50. *See* FED. R. EVID. 804 advisory committee's notes to 1997 amend. ("Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied."); *see, e.g.*, United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982); United States v. Thevis, 665 F.2d 616, 631 (5th Cir. Unit B 1982); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346, 1358–59 (8th Cir. 1976).

51. *See id.* (citing five cases with similar fact patterns, none of which gave much consideration to the defendant's motives in procuring the witness's absence).

52. United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005); *see also* United States v. Arnold, 410 F.3d 895, 916 (6th Cir. June 21, 2005) (quoting this same language).

53. At least one case, in dicta, stated that the defendant's motivation behind procuring a witness's absence could be of decisive importance, even in witness-intimidation cases. *See, e.g.*, State v. Hinson, No. M2000-02762-CCA-R3-CD, 2002 WL 31202134, at *6 (Tenn. Crim. App. Sept. 27, 2002) ("Even intentional misconduct, such as killing a witness, does not qualify unless done for the purpose of procuring the witness's unavailability.") Notably, that court was not interpreting the constitutional limitations of forfeiture, but those under the Tennessee Rules of Evidence.

controversial than the first, an overwhelming majority of courts have answered its equivalent in the affirmative.[54]

The question posed is whether V_2's statement, "D threatened to kill me if I cooperate with the police," is admissible in D's trial for killing V_2 on the grounds that D forfeited his right to confront her. While the question might seem far-fetched, there is no shortage of cases posing nearly identical scenarios. For instance, a similar fact pattern arose in *United States v. Dhinsa*.[55] In that case, after Manmohan Singh provided the police with information regarding numerous crimes Gurmeet Dhinsa had committed, he further stated that he was afraid that Dhinsa would kill him—and had threatened to do so—for cooperating with the police. After Singh was killed, his statements that Dhinsa had threatened to kill him were admitted in Dhinsa's trial for Singh's murder.[56] The Second Circuit, agreeing with the majority of courts addressing similar scenarios, found no problem with applying forfeiture under these circumstances.[57]

This question is both similar and different to Question 1 in important ways. It is similar insofar as it involves tampering with a witness to a prior crime. V_2 had witnessed D's slaying of V_1 and made testimonial statements about it before D killed him. And for the same reasons stated above, it would be misguided for a court to become preoccupied with D's motives for slaying V_2. But it is different from the scenario in Question 1, since D is now on trial for the same wrongdoing that caused the forfeiture of his right to confront V_2. In this case, the court's forfeiture finding depends on determining that D murdered V_2 as a predicate matter, and then the court must try D for the same murder of V_2.

That there are two identical issues to be decided—first as a predicate matter and then at trial—does raise concerns. One court recently articulated the typical objections:

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54. *See, e.g.*, United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001) (applying forfeiture reflexively in a murder trial when the victim had contacted the police about some of defendant's illegal activities and defendant subsequently ordered him killed after learning about it); United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (rejecting the defendant's objection that forfeiture should only apply for "the underlying crimes about which he feared [his victim] would testify, not in a trial for murdering her."); United States v. Miller, 116 F.3d 641 (2d Cir. 1997) (same); United States v. Houlihan, 92 F.3d 1271, 1278–81 (1st Cir. 1996) (same); United States v. Rouco, 765 F.2d 983, 993–95 (11th Cir. 1985) (finding that forfeiture applied in a defendant's murder case, where he committed the murder upon finding out that his victim was an undercover informant); United States v. Thevis, 665 F.2d 616, 627–33 (5th Cir. Unit B 1982) (admitting murder victim's prior testimony when one of the three charges against the defendant was the murder of that victim). *But see* United States v. Lentz, 282 F. Supp. 2d 399, 426–27 (E.D. Va. 2002) (rejecting the reflexive application of forfeiture even though the government argued that the murder in question was done in order to procure the witness's unavailability in a divorce proceeding).

55. 243 F.3d 635 (2d Cir. 2001).

56. In one of his appellate briefs—coauthored by Alan M. Dershowitz—Dhinsa argued that this was the most important evidence against him regarding Manmohan Singh's murder. Reply Brief of Defendant-Appellant Gurmeet Singh Dhinsa at 9, *Dhinsa*, 243 F.3d 635 (No. 99-1682) ("The most important . . . evidence was testimony by Manmohan's emotional, grieving father that Manmohan said that [Dhinsa] had threatened to kill him—evidence used by the government as evidence that the defendant did have Manmohan killed.").

57. *Dhinsa*, 243 F.3d at 649–58.

> [The] Defendant is being tried under well settled Constitutional principles, [therefore] Defendant is presumed to be innocent until proven guilty. To hold otherwise would be to deprive a defendant of his right to a jury trial and allow for a judge to preliminarily convict a defendant of the crime on which he was charged. This Court is unwilling to extend [forfeiture] to allow in the testimony of a decedent victim for whose death a defendant is on trial.[58]

While there is some appeal to this argument, it is ultimately unconvincing. The judge, in making a finding of forfeiture, is not declaring a defendant guilty but merely finding that there is sufficient evidence to admit the contested testimony to the jury.[59] The jury still must find a defendant guilty beyond a reasonable doubt before any punishment can be imposed. In short, "[t]he judge has her job and the jury has its own, and they perform them in a substantially different manner."[60] The judge's inquiry is merely evidentiary, reserving for the jury any judgment that the defendant's actions were criminal. Judges are frequently called upon to make preliminary findings that are identical to jury issues. For example, a majority of states do not require a grand jury to issue an indictment in felony cases.[61] They allow judges to make preliminary determinations of probable cause to believe a defendant committed the very crime for which she will later stand trial.[62] The Supreme Court also has approved of a trial court's predicate finding that a conspiracy existed even when one of the underlying crimes before the jury was the existence of the same conspiracy.[63] In light of these common practices, there is no merit to the objection that courts should not determine preliminary matters that are identical to the ultimate issues that a jury will confront.

That courts rarely voice a concern with forfeiture's reflexive application when witness tampering is involved provides strong evidence that when courts do object they are doing so, not because reflexive application is inherently objectionable, but for different reasons. Addressing Question 3 will help reveal those reasons.

3. *A Broader Application of Reflexive Forfeiture*

Courts have been extremely reluctant to answer Question 3 in the affirmative because, I argue, the evidence of forfeiture's occurrence is usually relatively weak. That is, there is no conceptual reason to reject forfeiture in a case like this—as courts often argue—it is just that there usually is not strong evidence that forfeiture actually occurred.

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58. United States v. Lentz, 282 F. Supp. 2d 399, 426 (E.D. Va. 2002).

59. *See* Friedman, *Chutzpa*, *supra* note 8, at 522–23.

60. *See* FRIEDMAN, EVIDENCE, *supra* note 27, at 269–70.

61. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 14.2(d) (2d ed. 1992).

62. *See id.*

63. *See* Bourjaily v. United States, 483 U.S. 171 (1987).

Question 3 asks whether V_1's statement, "D shot me," can be admitted against D in his trial for murdering V_1 based on a forfeiture finding. Forfeiture had never been applied in this manner before *Crawford*.[64] However, in the brief time since *Crawford* was decided, a number of courts have reconsidered this application of forfeiture, a small majority have endorsed it,[65] and the California Supreme Court has taken it under review.[66] In the case most similar to the one posed in Question 3, a police officer responded to a report that a shooting had occurred and found James Green wounded and laying in the street.[67] The officer asked Green who shot him, and Green responded, "Meeks shot me." Less than two hours later, before he could be questioned any further on the matter, Green was pronounced dead.[68] The court held that forfeiture applied in this situation and approved of the statement's admission against Meeks at his trial for Green's murder. This third case differs from the first two insofar as the victim did not witness any prior crime, and forfeiture is being applied on the sole ground that the defendant wrongly caused his victim's unavailability.

The only objections courts make to applying forfeiture in this third type of case are unpersuasive. Courts have made one of two—or both—objections to applying forfeiture under these circumstances: (1) forfeiture does not apply because the defendant's *motive* was not to make the witness unavailable,[69] and (2) it does not apply because it would be improper to apply the rule reflexively.[70] But, as I have argued, both of these objections are

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64. *See* Flanagan, *supra* note 9, at 483 (surveying opinions, and noting that none of them stood for "the broader principle that responsibility for the witness's absence . . . would be a waiver of constitutional and evidentiary rights.") However, I disagree with Flanagan's description that the cases all require a specific intent to prevent a witness from testifying at trial, since the courts often gloss over or skip the intent inquiry entirely. *See, e.g.*, United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (rejecting an argument that forfeiture requires this specific intent, countering that "it establishes the general proposition that a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness.").

65. *See supra* notes 12–13 and accompanying text (listing the post-*Crawford* cases to consider the issue and grouping them based on how each has come down on the matter).

66. People v. Giles, 19 Cal. Rptr. 3d 843 (Ct. App. 2004), *review granted*, 102 P.3d 930 (Cal. Dec. 22, 2004).

67. State v. Meeks, 88 P.3d 789, 792 (Kan. 2004).

68. *Id.*

69. *See, e.g.*, United States v. Jordan, No. Crim. 04-CR-229-B, 2005 WL 513501, at *5 (D. Colo. Mar. 3, 2005) ("The Doctrine as codified applies [only] to actions whose *purpose* is to prevent the testimony."); Wyatt v. State, 981 P.2d 109, 115 n.11 (Alaska 1999) ("The cases espousing this rule all involve a defendant who has intentionally acted to silence an individual *in order to* prevent the witness from testifying . . ."); People v. Maher, 654 N.Y.S. 2d 1004, 1007 (1997) ("[The] exception cannot be invoked where, as in the instant case, there is not a scintilla of evidence that the defendant's acts against the absent witness were motivated, even in part, by a desire to prevent the victim from testifying against him in court."); Commonwealth v. Laich, 777 A.2d 1057, 1062 n. 4 (Pa. 2001) (holding that forfeiture "only applies when a party's wrongdoing is done with the intention of making the declarant unavailable to testify as a witness.").

70. *See, e.g.*, United States v. Lentz, 282 F. Supp. 2d 399, 426 (E.D. Va. 2002) (refusing to apply forfeiture reflexively because it would "deprive a defendant of his right to a jury trial and allow for a judge to preliminarily convict a defendant of the crime on which he was charged"); State v. Jarzbek, 529 A.2d 1245, 1253 (Conn. 1987) (refusing to apply forfeiture because, "although the threats made by the defendant against the minor victim were . . . designed to conceal his wrongdo-

foreclosed. Preoccupation with a defendant's motives in these cases ignores the equitable underpinnings of forfeiture,[71] and courts frequently decide issues that are identical to the questions a jury must face.[72] Not only are these two objections unpersuasive, but they are almost uniformly rejected whenever a case involving witness tampering arises.[73]

Why are courts, in answering Question 3 in the negative, relying on two justifications that are transparently weak and typically rejected in answering Questions 1 and 2 in the affirmative? The answer is that this third type of case is fairly common and the evidence that the defendant did commit the wrongdoing at hand is typically weaker because of the underlying circumstances. While there is no principled objection to forfeiture's reflexive application, there is an evidentiary explanation for why courts have been reluctant to accept it.

B. *An Evidentiary Explanation for the Discrepancies*

In the third type of case there is usually less convincing evidence that forfeiture actually occurred, and that provides the best explanation for the above discrepancies in forfeiture's application. The hypothetical situation we have been considering illustrates this point. Remember that, as previously explained, we can expect that both of V_2's statements will be admitted based on a finding of forfeiture, whereas the admissibility of V_1's statement is more questionable. The reason for this discrepancy has nothing to do with concerns about the defendant's motives or reflexive application of forfeiture. It is simply that we have significantly better evidence suggesting that D actually killed V_2. This may be a surprising statement, as the hypothetical was sketched so thinly that it is no doubt difficult to detect the disparity in the amount of evidence. In fact, the opposite appears to be true, since V_1's statement, "D shot me," looks to be *more* probative of what it asserts than V_2's speculative statement, "D threatened to kill me if I cooperate with the police."

But even the thinly sketched circumstances we have provide much stronger evidence that D actually killed V_2: V_1's statement, while unambiguous and nonspeculative, has absolutely nothing to corroborate D's identity as the killer. To find that D actually killed V_1, a judge would have to rely entirely on V_1's assertion of that fact. This is especially problematic after *Crawford*, which teaches that the Confrontation Clause will not allow judges to accept such testimonial statements at face value if they have not been

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ing, they were made *during* the commission of the very crimes with which he is charged"); *Maher*, 654 N.Y.S. 2d at 1007 (finding forfeiture's application "is even more anomalous where, as here, it is invoked against a defendant in the very trial in which the charge is murder of the unavailable witness").

71. *See supra* notes 52–55 and accompanying text.

72. *See supra* Part II.A.2.

73. *See supra* Parts II.A.1, II.A.2.

confronted.[74] Conversely, in addition to V_2's speculative statement implicating D, there is strong corroborating evidence that D killed V_2. D was on trial, V_2 was a key witness against D in that trial, and just before V_2 was to testify she was murdered. I suspect that most people confronted with these circumstances would preliminarily conclude that D killed V_2, or was at least involved in the murder, even had V_2 never made the speculative accusation. To be clear, I am not claiming that these circumstances alone are enough to find beyond a reasonable doubt—or under any other standard of proof—that D murdered V_2. The claim is only that they are highly probative of that fact, and there is no similar corroborating evidence to suggest that D killed V_1.

Strong evidence such as this will typically exist to support a forfeiture finding in witness-tampering cases by the very nature of the circumstances that underlie them. One court, faced with a standard witness-tampering case, was not at all concerned about the lack of any material evidence. In that case, a defendant stood trial for various drug offenses, and the principal witness against him was killed on his way to the courthouse to testify. In holding that the defendant was probably responsible for the witness's death, Judge Jack B. Weinstein did not see the need to dig too deeply:

> I was warranted in finding that this defendant . . . either directly arranged for the killing of the witness or was advised of the possible killing of the witness and acquiesced. He was the only person that could gain from it . . . . It just is inconceivable . . . that this radical step to aid Mastrangelo, who is the only person that could have been helped by killing this witness, would have been taken without his knowledge, acquiescence, or orders.[75]

That a witness was at one point willing to testify against a defendant, but suddenly became unavailable, just happens to be strong evidence that the defendant took some intermediate action to procure the witness's unavailability.

The reason why courts repeatedly offer the two deficient objections regarding a defendant's motives and forfeiture's reflexive application when confronted with the third type of case—instead of simply declaring that there is insufficient evidence to make a forfeiture finding—is tough to determine. The best explanation is that there may be sufficient evidence in a particular case, but courts are worried about extending forfeiture outside of the classic witness-intimidation realm because of broader implications for how the rule is applied. I do not claim they are conscious of this behavior, merely that they are often unwilling to give due consideration to arguments in favor of expanding forfeiture because it is easiest to keep it limited to a

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74. In overturning what had been the prevailing framework for more than two decades, the Court described the flaws in that framework as "allow[ing] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability . . . . thus replac[ing] the constitutionally prescribed method of assessing reliability with a wholly foreign one." Crawford v. Washington, 541 U.S. 36, 62 (2004). The difficulties with such a finding are discussed further in terms of bootstrapping evidence, *infra* Part III.B.2.

75. United States v. *Mastrangelo*, 693 F.2d 269, 271 (2d Cir. 1982) (quoting Judge Weinstein's trial findings). Judge Weinstein also noted the "neutral" demeanor of the defendant upon hearing the announcement that the witness had been killed. *Id.*

circumscribed set of facts. There is evidence of this concern in several cases.[76] These courts are not objecting to forfeiture's reflexive application on any principled basis, but only on the grounds that the rule should be applied narrowly and only in cases where the evidence of forfeiture is rather strong.

Limiting the rule's application to witness-tampering cases achieves both these goals. They are relatively rare and will inherently have a fairly strong evidentiary basis for a forfeiture finding, as explained above. However, it should not be too difficult to fashion coherent rules that would achieve these goals more effectively and consistently.

III. How Expansive Forfeiture Could Become and Some Proposed Limitations

Expanding forfeiture beyond witness-tampering cases leaves us with a much simpler equitable doctrine. While the sentiment that forfeiture should apply infrequently and only when there is strong evidence of its occurrence is a good one, it would be better realized with limitations that are designed to consistently achieve that end. Part III.A offers a further exploration of the equitable doctrine of forfeiture envisioned here, and in Part III.B I offer two proposed limitations. The two I offer—regarding a narrow interpretation of unavailability and a bar on testimonial bootstrapping—are merely first attempts at fashioning coherent limiting principles.

A. *The New Approach to Forfeiture and Its Implications*

Doing away with the formal constraints that pervaded forfeiture's application before *Crawford* leaves us with a much simpler equitable doctrine. Under the forfeiture doctrine envisioned here, a defendant should not prevail on a Confrontation Clause objection if her wrongful conduct caused the inability to cross-examine a witness. The Sixth Circuit recently endorsed a very similar view, indicating that under the doctrine a "defendant may not sustain a Confrontation Clause objection if the defendant is responsible for the declarant's unavailability at trial."[77]

There are two caveats to that articulation that should be recognized. First, forfeiture should apply only when the defendant's conduct is wrongful. A defendant who claims a privilege to keep a spouse from testifying, for

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76. *See* United States v. Jordan, No. Crim. 04-CR-229-B, 2005 WL 513501 at *6 (D. Colo. Mar. 3, 2005) (rejecting application of the rule as it could lead to its application "broadly . . . in any murder case."); State v. *Jarzbek*, 529 A.2d 1245, 1253 (Conn. 1987) ("The constitutional right of confrontation would have little force, however, if we were to find an implied waiver of that right in every instance where the accused, in order to silence his victim, uttered threats during the commission of the crime for which he is on trial."); People v. *Maher*, 654 N.Y.S. 2d 1004, 1007 (1997 (rejecting reflexive application of the rule in part because it would "swallow up the narrowly drawn traditional dying declaration hearsay exception").

77. United States v. Arnold, 410 F.3d 895, 916 (6th Cir. 2005) (Sutton, J., dissenting). While the *Arnold* majority did not consider the forfeiture issue, since it was not briefed, this statement merely reflects what the Sixth Circuit found in United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005).

instance, could be said to have caused the witness's unavailability,[78] but not in a way inconsistent with maintaining the right to confrontation. Indeed, *Crawford* would have had a different outcome had the Court envisioned forfeiture as applying to rightful conduct that caused a witness's unavailability.[79]

Second, even where a defendant does not directly *cause* a witness's unavailability, forfeiture may still apply if the defendant's wrongful conduct caused his inability to cross-examine the witness. For instance, if a defendant remains a fugitive until all witnesses against him die of natural causes, although he certainly did not cause the witnesses' deaths, forfeiture should still apply because he caused his inability to cross-examine them. Two recent cases involved a defendant who absconded, remained a fugitive for a number of years, and by the time he was captured a crucial witness against him died or was deported.[80] While both courts—adhering to unduly rigid definitions of what it means to cause a witness's unavailability without much analysis—found that forfeiture did not apply under these circumstances, that result is unjustified. While it is a stretch to say the defendants caused the witnesses' unavailability—since neither was involved with the death or deportation of the witnesses—we can say that their wrongful conduct caused their inability to cross examine the witnesses. It seems clear that causing one's own inability to cross-examine is what lies at the heart of the forfeiture rule. One foreseeable consequence of absconding for a prolonged period of time is that the witnesses you would want to confront may not be available when you are eventually brought to trial. That should be enough to dismiss any objection the defendants might raise under the Confrontation Clause with regard to the absent witnesses.

This reconceived rule of forfeiture has the unfortunate potential to put a substantial dent in the confrontation right. One commentator noted that it "could lead to the unavailability of confrontation in entire categories of cases."[81] While that is a mischaracterization—as forfeiture applies only to particular witnesses and never to cases entirely—it would be accurate to say that forfeiture threatens to eliminate a defendant's right to confront *the victim* in entire categories of prosecutions. The most obvious category is homicide prosecutions. If the applicable standard of proof for finding forfei-

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78. *Cf.* Lilly v. Virginia, 527 U.S. 116, 124 n.1 (1999) (plurality opinion) (assuming that the valid invocation of a Fifth Amendment privilege establishes unavailability).

79. It was Sylvia Crawford's out-of-court testimony implicating her husband that was at issue in the case. It is fair to say that Michael Crawford caused her unavailability at trial, since he refused to waive his spousal privilege. *See Crawford*, 541 U.S. at 40 ("Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent.") (citation omitted).

80. *See* People v. Melchor, No. 1-03-3036, 2005 WL 1522715 (Ill. App. Ct. June 28, 2005) (witness died); State v. Alvarez-Lopez, 98 P.3d 699 (N.M. 2004) (witness was deported).

81. Andrew C. Fine, a criminal defense lawyer, posted this comment on *The Confrontation Blog*, *at* http://confrontationright.blogspot.com/2004/12/forfeiture-and-dying-declarations.html#comments (no date provided) (last visited July 24, 2005). The comment was in response to the "Forfeiture and Dying Declarations" post and was made at 5:35 p.m.

ture is a preponderance of the evidence—as most courts have held[82]—then forfeiture will almost always bar a homicide defendant's Confrontation Clause objections to the admission of the victim's testimony. Without a preponderance of the evidence suggesting that the defendant killed the victim and thereby made her unavailable, the evidence is likely insufficient to try the defendant for homicide in the first place.[83] Likewise, prosecutors can make colorable arguments that forfeiture should apply whenever a defendant's crime could be said to have scared or intimidated the victim from testifying at trial.[84] This will be especially applicable in cases involving domestic abuse, sexual assault or any other "naturally intimidating offense" that might have the effect of keeping a victim from testifying.[85]

The prospect of a severely diminished confrontation right in these prosecutions where confrontation is most vital—due to the severity of the punishments and the heavy reliance on victim testimony[86]—is not an entirely welcome one. We should therefore hope to discover some principled limitations on the rule.

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82. *See supra* note 43; *see also* State v. Hale, 691 N.W. 2d 637, 653 (Wis. 2005) (Prosser, J., concurring) (surveying cases that apply the preponderance standard).

83. *See* Fine, *supra* note 81:

> When the ultimate issue is involved, a judge will almost always have found, before trial, that the prosecution's evidence establishes defendant's guilt by a preponderance of the evidence, either by finding probable cause to hold the defendant after a preliminary hearing, or by finding the evidence presented to a grand jury to be legally sufficient.

But see United States v. Miller, 116 F.3d 641, 669 (2d Cir. 1997), where the court drew a somewhat plausible distinction:

> A grand jury's indictment is based on probable cause, not on a preponderance of the evidence, and that body makes its judgment after an *ex parte* proceeding at which the target of its inquiry is normally not permitted to call or cross-examine witnesses. The grand jury's conclusion, after such a proceeding, that there is probable cause to indict a defendant for murder is not an acceptable surrogate for a court's finding, after a hearing at which both sides have the opportunity to be heard, that the defendant's responsibility for that murder is established by a preponderance of the evidence.

84. For a further discussion of these issues, see Friedman, *Chutzpa*, *supra* note 8, at 527–35 (discussing the implications of this rule for severely battered victims and child victims of sexual abuse).

85. *See* Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in* Crawford v. Washington, 50 S.D. L. REV. 41, 71 (2005) (pointing out that in these cases, "[t]he all-too-frequent recantations and refusals to testify [may be attributable] to the defendant's wrongdoing"); Tom Harbinson, Using the Crawford v. Washington *"Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, REASONABLE EFFORTS, Vol. 1, Num. 3 (2004), *available at* http://www.ndaa-apri.org/publications/newsletters/reasonable_efforts_volume_1_number_3_2004.html ("If the accused's acts are responsible for the child being in a condition where the child refuses to testify, states she cannot remember, or becomes non-responsive, the requirement of unavailability should be considered to be met.") (citations omitted); Krischer, *supra* note 37, at 15–16 ("Domestic violence is not an event, but ongoing, systematic abuse. Prosecutors must educate their judges that the domestic violence itself may have procured the victim's unavailability.").

86. *See* Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L. J. 1041, 1060–61 (2000) (noting that domestic abuse usually takes place in private with few witnesses, such that "the prosecution of domestic violence cases can only be effective if the . . . statements of the victim are admissible at trial").

B. *Two Suggested Limitations*

Limitations on the rule of forfeiture clearly should not be eliminated entirely; they should just be recalibrated. As discussed earlier, what had motivated courts to restrict forfeiture to witness-tampering cases was the sentiment that forfeiture should apply (1) infrequently and (2) only upon a showing of strong evidence of its occurrence.[87] While the sentiment has merit, it should be realized in a more principled way than confining forfeiture to witness-tampering cases. Two limitations that could achieve the above goals are to apply forfeiture (1) only upon a showing that the witness is "genuinely unavailable," which occurs infrequently, and (2) only when there is substantial evidence independent of the unconfronted testimonial statement at issue that forfeiture occurred, which requires strong evidence. This second proposed limitation is essentially a call to revive the rule against bootstrapping when testimonial statements are at issue.[88] The argument is not that these limitations are constitutionally required—although that ultimately may be true. My more humble suggestion is that recognizing these limitations would allay the legitimate concerns of judges and commentators who are worried about the frequency and evidentiary strength of forfeiture findings, and would do so in a more principled way than limiting forfeiture to witness-intimidation cases.

1. *A Narrow Interpretation of Unavailability*

Requiring that a witness be unavailable in a strict sense would help confine forfeiture to relatively few cases. There is no question that homicide victims are unavailable for cross-examination, but determining unavailability in domestic and sexual abuse cases is a more difficult task. Studies on the willingness of domestic abuse victims to testify against their abusers indicate that up to eighty percent of them seek to dismiss charges against their abusers,[89] while as few as four percent are actively willing to testify.[90] As the Second Circuit put it, a witness who is "so fearful that he will not testify or will testify falsely is just as unavailable as a witness who is dead or cannot be found."[91] Since domestic abuse is an intimidating offense, victims of which are typically unwilling to testify, one could mistakenly conclude that in nearly every domestic violence case, the defendant has forfeited his right

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87. *See supra* Part II.B.

88. I use the word "revive" because the rule against bootstrapping had been accepted for decades until 1987, when *Bourjaily v. United States*, 483 U.S. 171, all but obliterated it. *See infra* Part III.B.2.

89. David M. Gersten, *Evidentiary Trends in Domestic Violence*, 72 FLA. B.J. 65, 67 n.3 (1998) (indicating that fifty to eighty percent of victims seek to dismiss the charges).

90. Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 139 n.108 (1991). For a discussion of this issue that speaks of the trend more broadly than Asmus's targeted study, see generally EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE (3d ed. 2003).

91. Geraci v. Senkowski, 211 F.3d 6, 9 (2d Cir. 2000) (citation and quotation omitted).

to confront the victim. In the wake of *Crawford*, this has prompted one attorney to brazenly declare, "[d]omestic violence almost always involves forfeiture."[92]

It would be a mistake to extend forfeiture to cases in which the witness may genuinely be available to testify, as *Crawford* evinces a preference for in-court testimony and cross-examination whenever possible. The Supreme Court has noted that complying with a forum's evidence rules with regard to unavailability may not satisfy Confrontation Clause concerns,[93] but exactly what is required is unclear. It might be that the Confrontation Clause requires only a "good faith" effort by a prosecutor to obtain a witness's live testimony,[94] but such a malleable standard is hardly illuminating.

What constitutes "genuine unavailability" is a tough question, but at the very least it should mean that the witness refuses to testify even when faced with a court order, as the Federal Rules require.[95] It should not extend to cases where the witness is willing to take the stand but will explicitly recant any prior accusations.[96] In those circumstances, the prosecutor will typically have the opportunity to impeach the witness with prior testimony and let the jury draw whatever conclusions it will. Given what is at stake, an argument could be made that the witness must be physically incapable of testifying before being considered unavailable in this context, but that is probably too harsh a limitation. There is some thoughtful scholarship on the question of when a witness should be considered unavailable,[97] although it is not exactly clear how *Crawford* will impact such analysis.[98] It is enough to say that, in this context, unavailability should be defined in a way that will require prosecutors to exhaust all reasonable means to obtain live testimony.[99]

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92. Krischer, *supra* note 37, at 14.

93. Barber v. Page, 390 U.S. 719 (1968).

94. *Id.* at 724–25. While this standard has garnered some consensus, it really only begs several other questions regarding what constitutes a good faith effort in light of the protections of the Sixth Amendment.

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

96. *But see Geraci*, 211 F.3d at 7–9 (affirming the application of forfeiture where the witness was willing to take the stand, but would only recant his prior account of the event at issue).

97. *See, e.g.*, Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695, 708–11 (2002); Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189 (1993).

98. *See* Miguel A. Méndez, Crawford v. Washington: *A Critique*, 57 STAN. L. REV. 569, 589–90 (2004). Jeffrey L. Fisher also notes in his outline of post-*Crawford* cases, with regard to unavailability, "*Crawford* does not appear to change this law, but it makes it much more important." Crawford v. Washington: *Reframing the Right to Confrontation*, http://www.dwt.com/lawdir/publications/CrawfordOutline.pdf (last visited Nov. 6, 2005).

99. This tracks some language in the Federal Rules of Evidence, stating that unavailability applies when the proponent of a declaration could not produce the declarant "by process or other reasonable means." FED. R. EVID. 804(a)(5). The suggestion here is simply that we should require a fairly high bar for what constitutes "reasonable means." Given the difficulty with making that assessment, the rule should likely intrude into instances where a prosecutor did make all reasonable attempts to obtain a witness but failed. That is, the rule will probably have to be overly broad (e.g., requiring that a witness be physically incapable of testifying) in order to provide prosecutors with fit

The exact parameters of this limitation are not of too much concern here, though, as it is enough to notice that the limitation—whatever form it may take—is far more principled than limiting forfeiture to witness-intimidation cases. This limitation is based on the preference for in-court testimony and on keeping overzealous prosecutors from bypassing that preference by arguing forfeiture in every case. It provides clear incentives for prosecutors to do everything in their power to produce their witnesses at trial, in accordance with the principles underlying the Confrontation Clause. It does not draw unworkable distinctions between witness intimidation and other types of cases.

2. *A Rule against the Bootstrapping of Testimony*

The second proposed limitation is that, in making a predicate finding of forfeiture, a court should place minimal reliance on the unconfronted testimonial evidence at issue. At the very least, a court should not make a forfeiture finding based solely on unconfronted testimony. The practice of considering a contested statement as evidence of its own admissibility is known as bootstrapping.[100] For a time, bootstrapping was uniformly prohibited.[101] But following *Bourjaily v. United States* in 1987, it was essentially an unobjectionable practice.[102] In that case, the Supreme Court explicitly permitted trial courts to engage in bootstrapping when co-conspirator statements, are at issue.[103] That is, a court is allowed to consider an alleged co-conspirator's statement as evidence that a conspiracy did exist, and thereby admit the same statement at trial based on the co-conspirator exception to the rule against hearsay.[104] After recognizing that its prior holdings counseled against bootstrapping, the court found that those holdings were

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incentives for obtaining witnesses. While I do regret that I do not have a firmer or better developed opinion on the matter, I hope it is contribution enough to raise the issue in this context.

100. The term refers to a piece of evidence "lift[ing] itself by its own bootstraps to the level of competent evidence." Glasser v. United States, 315 U.S. 60, 75 (1942). For instance, when a witness's unconfronted testimony is, "D is the one who fatally injured me," and a defendant objects that it should not be admitted because it violates the Confrontation Clause, a judge who considers that statement as evidence that the defendant forfeited his confrontation right has bootstrapped the evidence insofar as she has allowed it to provide the basis for its own admissibility. *See generally* Bourjaily v. United States, 483 U.S. 171 (1987).

Sometimes the practice of a judge deciding, as a preliminary matter, the same issue that will be decided at trial is referred to as bootstrapping. This is *not* how I use the term here, as I have no objection to that practice. *See supra* notes 58–63 and accompanying text.

101. *See Glasser*, 315 U.S. at 74-75; *see also* Patrick J. Sullivan, Note, *Bootstrapping of Hearsay Under Federal Rule of Evidence 801(d)(2)(E): Further Erosion of the Coconspirator Exemption*, 74 IOWA L. REV. 467, 482-83 nn.96–101 (1989).

102. *See* 483 U.S. at 180–81.

103. *Id.* at 180 ("We think that there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy.").

104. *See* FED. R. EVID. 801(d)(2)(E). To be more precise, the Federal Rules hold that statements made by co-conspirators in furtherance of a conspiracy are not excepted from the rule against hearsay—as exceptions can be found in Rules 803 and 804—but are not hearsay at all.

superseded by the Federal Rules of Evidence.[105] However, *Crawford* rejects the position that the Federal Rules dictate the constitutional content of the Confrontation Clause, and thereby calls *Bourjaily* into question.[106] While bootstrapping is clearly allowed when ordinary hearsay is concerned, *Crawford*'s new framework raises some serious doubts as to its permissibility when testimonial statements are involved.[107]

Crawford explicitly abrogated a process where testimonial statements were admitted "based on a mere judicial determination of reliability."[108] Indeed, the Court endorsed the rule of forfeiture on the basis that "it does not purport to be an alternative means of determining reliability."[109] However, when a judge relies on a testimonial statement as evidence of its own truth in making a forfeiture finding, it would be an obvious fiction to say that forfeiture does not purport to be a means of determining reliability.

Revisiting our Question 3, a judge faced with that scenario could find forfeiture only if she found that V_1's statement, "D shot me," was wholly reliable. Recall that the issue is whether V_1's statement can be used against D in his trial for shooting V_1. Furthermore, let us assume that this is the only significant evidence that implicates D in V_1's murder.[110] While Part II operated on the assumption that there was sufficient evidence for a judge to find forfeiture, the issue posed here is what evidence the judge should consider when making the finding. If a judge relied on the unconfronted statement to make a finding of forfeiture, it would be the functional equivalent of admitting testimony based on a judicial determination of its reliability, as expressly prohibited in *Crawford*.[111] Therefore, it would be tough to square *Crawford* with unfettered bootstrapping in cases like this.

Unfortunately, my analysis here is doomed to circular reasoning. If our hypothetical defendant complained to a judge about this form of bootstrapping, the conversation would probably develop as follows:

D: You should not consider V_1's testimony when determining forfeiture, as I have not had the chance to confront him about it.

Judge: But that is your own fault, as you caused V_1's unavailability by killing him, so you cannot now complain of your inability to confront him.

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105. *Bourjaily*, 483 U.S. at 180–83.

106. Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . .").

107. Co-conspirator statements will almost categorically not be testimonial. It would be very difficult for a statement to be made in furtherance of a conspiracy and in anticipation that it will be used at trial. While I have not argued for any particular view of what constitutes a testimonial statement, it seems fairly certain that co-conspirators acting in furtherance of their plot are not bearing witness. This was discussed at some length during the oral arguments in *Crawford*. Transcript of Oral Argument at 14–16, *Crawford*, 541 U.S. 36 (No. 02-9410).

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

109. *Id.*

110. Of course, there will always be *some* other evidence. For instance, that V_1 even knew D's name will count as *some* corroborating evidence, it is just not very significant.

111. *See Crawford*, 541 U.S. at 61–62.

D: There is no evidence that I killed V_1 other than his testimony, which is precisely what I have a right to confront. I cannot be deprived of my right to confront him based on the very statement that is constitutionally inadmissible.

Judge: But forfeiture provides an exception to your confrontation right, and having found that the exception applies here, you cannot complain about my consideration of the testimonial statement.

D: You only made that finding based on the very statement that I should have had a right to confront!

The debate has reached an impasse, as both the judge and the defendant are arguing in circles.

In light of how critical confronting adverse witnesses is to a fair trial—and given *Crawford*'s affirmation of that right when testimony is concerned—the circle must be broken in favor of the defendant. That is the only way to give the Confrontation Clause meaning in these contexts. If V_1's statement, "D shot me," can furnish the basis of its own admissibility and then be used to convict the defendant, the confrontation right would become empty in these situations. An unconfronted accusation could be enough to convict a defendant, and the Confrontation Clause clearly counsels against that outcome. The better rule after *Crawford* is that an unconfronted testimonial statement cannot furnish the basis for a forfeiture finding absent "substantial independent evidence." That is, substantial evidence other than the contested testimonial statement.

While a fair conclusion from the above discussion is that the judge should be absolutely prohibited from considering unconfronted testimony in making forfeiture findings, such a bright line is unnecessary. A "substantial independent evidence" test is better than an absolute prohibition on bootstrapping for two, largely pragmatic reasons.[112] First, given how difficult it is for judges to discount evidence entirely, it will usually be inaccurate to describe a judge as giving *no* weight to evidence that she is aware of if it is largely on point. It would be better if the rule recognized this fact and simply required that the judge's finding be based substantially on independent evidence—evidence independently sufficient for a forfeiture finding—to circumvent concerns that judges should not even be exposed to evidence they are prohibited from considering. Second, this rule will also make the job of reviewing courts easier while remaining consistent with the concerns expressed here. Rather than asking reviewing courts to probe the record for evidence that a trial judge considered prohibited evidence when finding forfeiture, it would be easier to ask if the independent evidence was

112. Of course, what this amounts to is that a judge can bootstrap only in those situations where bootstrapping would be ostensibly unnecessary. It is like responding to a thirsty man's cries for water by saying, "I would gladly give you a glass of water if only you were not so thirsty." But, for reasons considered *infra*, it does not mean that the distinction between this "substantial independent evidence" test and an absolute prohibition on bootstrapping is meaningless.

sufficient.[113] These two considerations are not the most compelling and perhaps there are overriding reasons to prefer an absolute prohibition on bootstrapping testimony. But, again, the goal here is not to sketch any particularly robust limiting principles; it is to show there are principled ways of constraining forfeiture to meet the concerns that courts have displayed.

What is problematic is depriving the confrontation right of any real meaning by allowing testimonial statements to lift themselves into admissibility. This concern is dispelled so long as they are not given significant weight and are supported by substantial evidence. For instance, recall the *Meeks* case described above,[114] in which the victim's unconfronted statement, "Meeks shot me," was used against the defendant on the basis of a forfeiture finding. In addition to that statement, the trial court heard four witnesses who watched the fight between Meeks and Green, all of whom heard gunshots and saw Meeks standing over Green directly thereafter.[115] With this independent evidence, a judge could disregard the testimonial statement and still find that forfeiture occurred. In cases like this, bootstrapping would not run afoul of *Crawford*, as the independent evidence makes the forfeiture finding noticeably different from a mere judicial proclamation that the statements are reliable.

While *Bourjaily* held that the Federal Rules of Evidence abrogated the rule against bootstrapping with regard to ordinary hearsay, now that the distinction between testimony and hearsay is recognized, a "substantial independent evidence" test should be applied when testimonial statements are at issue. Interestingly, a rule similar to the one proposed here prevailed before *Bourjaily*.[116] In *United States v. Nixon*, addressing the bootstrapping problem with regard to co-conspirator statements, the Court stated, "As a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury."[117] Only with this requirement in place could a finding of forfeiture be meaningfully different from a mere determination of the reliability of unconfronted testimony.

One might respond that confrontation is a trial right[118]—not extended to pretrial proceedings—making this argument unorthodox, as it contemplates a Confrontation Clause violation where the judge considers unconfronted testimony at a preliminary hearing. But the pretrial right envisioned here is essential to giving the confrontation right meaning at trial. It is limited to the rare occasion when the pretrial question requires determining the reliability of a testimonial statement, and the result of the finding is to admit the same

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113. Perhaps this goal could also be achieved by limiting reviewing courts to a more restricted review, such as a harmless error analysis.

114. State v. Meeks, 88 P.3d 789 (Kan. 2004); *see supra* notes 70–71 and accompanying text.

115. *Id.* at 794–95.

116. Bourjaily v. United States, 483 U.S. 171 (1987).

117. 418 U.S. 683, 702 n.14 (1974).

118. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 52–53 (1987) (noting that the Confrontation Clause does not force the government to provide the accused with confrontation at pretrial proceedings).

unconfronted testimony into evidence at trial. Without this pretrial confrontation right, the trial right would be too easily circumvented, as an unconfronted statement could lift itself into admissibility based on a forfeiture finding, thereby bypassing confrontation safeguards altogether.[119]

While this argument has probably raised more questions than it has answered, the goal here is only to define some principled means of limiting forfeiture findings to cases where strong evidence exists.[120] This proposed rule against bootstrapping addresses the unfairness of using evidence that has not yet been shown to be trustworthy through the constitutionally prescribed method of confrontation against a defendant. Similarly, requiring that a witness be genuinely unavailable helps realize the preference for in-court testimony whenever possible. With these two limitations in place, courts could rest assured that forfeiture will not swallow up the Confrontation Clause, as it would apply only in rare cases and upon a showing of substantial evidence.

CONCLUSION

My conclusions conflict somewhat with regard to just how expansively forfeiture should apply. If equity is the guiding concern, as *Crawford* indicates, then forfeiture should preclude a Confrontation Clause objection whenever a defendant's wrongful conduct causes a witness's unavailability. This should increase forfeiture's importance in more run-of-the-mill criminal cases, including homicide and domestic abuse cases where an unavailable victim gave prior testimony. While limiting the rule to witness-tampering cases is unjustifiable, I share the worry with many courts that expanding forfeiture further could result in an impoverished confrontation right. But the answer cannot be to stand by an indefensible distinction between witness intimidation and other types of cases. Instead, breaking down the cases that address forfeiture reveals that the meaningful objections to expanding forfeiture are directed at the breadth of the exception and its evidentiary support.

Taking these objections to heart, we might begin to formulate more principled limitations to the rule of forfeiture. I believe the two limitations proposed here—focused on declarant unavailability and testimonial bootstrapping—would help alleviate the concerns about forfeiture swallowing up the confrontation right. They directly address the frequency and evidentiary strength of forfeiture findings and can be derived from the themes underly-

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119. After *Crawford*, it is worth revisiting other circumstances where a pretrial right of confrontation might exist. The topic is one that I have not thought enough about to offer any views beyond the narrow ones already given.

120. Perhaps a more straightforward way of achieving this would be to require a higher standard of proof for forfeiture findings. *See* United States v. Thevis, 665 F.2d 616, 631 (5th Cir. Unit B 1982) (requiring clear and convincing evidence); People v. Maher, 654 N.Y.S. 2d 1004, 1007 (1997) ("Because of the weighty countervailing interests, that is, the constitutional right of confrontation . . . we imposed a clear and convincing evidentiary standard of proof for the establishment of the factual basis for admitting out-of-court statements of a declarant whose unavailability was caused by the defendant.").

ing *Crawford* and the Confrontation Clause. Nonetheless, they are only first attempts at addressing concerns that accompany an expansive rule of forfeiture. There are certainly other limitations that might have the same desired effect. Recognizing that limiting forfeiture to witness-tampering cases is unprincipled, and that there are alternative methods to addressing concerns about forfeiture's expansiveness, is just the first step in revamping the equitable doctrine. *Crawford* has provided the occasion to do just that.