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Loss of Sixth Amendment Confrontation Rights: Forfeiture Triggered by Voluntary Wrongful Conduct

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LOSS OF SIXTH AMENDMENT CONFRONTATION RIGHTS: FORFEITURE TRIGGERED BY VOLUNTARY WRONGFUL CONDUCT * ** †

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I. Introduction

The hotly contested debate about the nature of confrontation rights of the criminally accused under the Sixth Amendment continues. The latest issue before the United States Supreme Court is whether intent to prevent live in-court testimony is a necessary element of the constitutional forfeiture analysis. A number of state courts, including the Supreme Court of California in People v. Giles,1 have rejected the element of intent. Other courts, including the Illinois Supreme Court in People v. Stechly,2 have mandated the inclusion of the element of intent. The matter is now before the United States Supreme Court.3

In this article, we argue that the inclusion of the element of intent into the forfeiture analysis under the Sixth Amendment is not supported by the English and American common law and is not constitutionally mandated. Some courts mistakenly believe that forfeiture by wrongdoing necessarily requires intent because they improperly link the constitutional doctrine to jurisprudence that examines forfeiture under the Federal Rules of Evidence. The direct consequence of this improper connection to evidentiary rules is that these courts confuse the doctrine of forfeiture with that of waiver. We maintain that a showing of intent to prevent the testimony of an unavailable out-of-court declarant is not constitutionally required in determining whether the accused has forfeited his or her Sixth Amendment right to confrontation.

The Sixth Amendment to the United States Constitution fully protects the criminally accused against the admissibility of a testimonial out-of-court statement of an unavailable declarant-witness where the accused did not have a prior opportunity to cross examine him or her. However, in order to best serve the interests of justice, a prosecutor must be allowed to
introduce a testimonial out-of-court statement without the accused having the benefit of a prior opportunity to cross examine the out-of-court declarant in circumstances where the accused forfeits the right of confrontation by his or her own voluntary and wrongful conduct, or by wrongful conduct in concert with others, that prevented the live in-court testimony of the declarant. There are a number of such situations that render a witness unavailable to present live in-court testimony, including the murder of the out-of-court declarant, intimidation of or improper payments or other inducements to the declarant, concealment of the whereabouts of the declarant, or persuading the declarant to absent himself or herself from the trial. In these circumstances, where it is shown that the accused caused or procured the unavailability of the testimony, the dispositive constitutional question is not whether the accused intended to prevent the testimony of the out-of-court declarant but whether the voluntary wrongful conduct of the accused actually caused the unavailability of the live in-court testimony. As an equitable principle, the constitutional forfeiture rule allows the use of a declarant’s out-of-court statement without distinction as to whether it is a pre-crime statement, a contemporaneous statement made while the crime was committed, or whether it is a post-crime statement. The only limitation on the admissibility process remains relevancy.4

II. The English and Early American Common Law Doctrine of Forfeiture by Wrongdoing Did Not Recognize an Intent Requirement

The doctrine of forfeiture by wrongdoing was first developed in seventeenth century England as a means of preventing witness tampering. Early English cases focused on post-crime attempts by the accused to prevent the trial testimony of a previously deposed witness. The first case to apply the doctrine was the 1666 murder trial of Lord Morley before the British House of Lords.5 Lord Morley was indicted for running his sword through the head of his victim in an argument over a half-crown outside the Fleece-Taverne.6 Prior to the start of the trial, the Law
Lords met at Serjeants-Inn on Fleet-Street to discuss the evidentiary issues that may arise at trial. At that meeting, they agreed that if it were found that a previously-examined witness, now absent from trial, “was detained by means or procurement of the prisoner, then the examination might be read . . .”

After the start of the trial, it was discovered that Thomas Snell, an apprentice who had provided an incriminating deposition to the coroner, had disappeared. His master, Thomas Harding, testified that Snell told him that “the Lord Morley’s trial was to be shortly but he would not be there.” While it was clear that Snell disappeared in anticipation of the upcoming trial, “the court not thinking this evidence sufficient [to show that the accused procured Snell’s absence], the deposition was not read.” Lord Morley was acquitted of murder but was found guilty of manslaughter and fined. This case stands for the proposition that where it is sufficiently shown that the unavailability of a witness at trial was caused by a voluntary wrongful act of the accused, the out-of-court statements of the now unavailable witness will be admitted in evidence against the accused.

Some years later, in 1692, Henry Harrison was charged with the “choke and strangle” murder of Dr. Andrew Clenche. At trial before the House of Lords, Barnabas Smith testified that an apprentice, Andrew Bowsell, told him that while on an errand, he was approached by a man who had asked him if he was going to testify against Harrison. When Bowsell said that he would testify, the man offered him money, “desiring him to be kind to Mr. Harrison.” Richard Tims, Bowsell’s master, testified that Bowsell was taken away later that evening by three soldiers, that one soldier returned the next morning to pick up his clothes, and that subsequent attempts to locate him were unsuccessful. On this testimony, the court allowed in evidence Bowsell’s earlier deposition, given before the coroner, connecting Harrison to the murder.
Relying on the Lord Morley precedent, the House of Lords held that an out-of-court deposition given to the coroner would be admissible at trial to replace live in-court testimony of the missing witness if the proponent of the evidence “sufficiently” proved that the accused had procured the absence of the witness.\textsuperscript{18}

Four years after Harrison’s Case, in 1696, the House of Commons expanded the application of Lord Morley’s Case to the admissibility of prior trial testimony evidence. Sir John Fenwick, a Jacobite, plotted with many others to restore James II who lost the throne to William III in the Revolution of 1688.\textsuperscript{19} However, before the co-conspirators could carry out their plot, three members of the group disclosed the plan to King William.\textsuperscript{20} One by one, the members of the group, including Fenwick, were arrested, tried, and eventually convicted of treason.\textsuperscript{21} Fenwick knew that there were only two witnesses who could prove his guilt, George Porter and Cardell Goodman.\textsuperscript{22} Under the then existing law, two witnesses were needed to convict the accused of high treason.\textsuperscript{23} In an effort to subvert this requirement, Fenwick first sent his agent to bribe Porter to leave for France, however, Porter took the money and turned Fenwick’s agent into the authorities.\textsuperscript{24} Having failed with Porter, Fenwick threw himself on the mercy of the court by promising to “tell the full” of everything that he knew about the plot in order to delay his own trial.\textsuperscript{25} In the meantime, Lady Fenwick, his wife, was successful in helping Goodman escape.\textsuperscript{26} Although foul play appeared to be afoot, the court ruled that Goodman’s prior testimony from the trial of another co-conspirator could not be admitted against Fenwick because there was no evidence to link Lady Fenwick’s conduct to her husband.\textsuperscript{27} Nevertheless, perhaps because the court still suspected that Lady Fenwick’s cunning actions were in consort with her husband, the House of Commons passed a bill of attainder against Fenwick, with the consent of the Crown, nullifying the two-witness requirement after reviewing the contents of Goodman’s sworn
deposition. Subsequently on the testimony of Porter alone, Lord Fenwick was found guilty of treason and beheaded on January 28, 1697.

The common law forfeiture doctrine was further refined in *Regina v. Scaife*, an appeal from a larceny conviction of Mathew Scaife, who was tried jointly with Thomas Rooke and John Smith. At trial, the prosecution presented evidence that Smith had bribed Sarah Ann Garnet, a prosecution witness, to prevent her trial testimony. Subsequently, the judge allowed her sworn deposition to be read in open court against Smith. On appeal, the Queen’s Bench held that the jury should have been instructed that the deposition evidence could only be applied against Smith, the party who had caused her absence. “[I]t ought to have been applied to the case against him only, and not to the case against the other prisoners” because there was no evidence that they had acted in any way to procure the absence of the witness. Lord Coleridge explained that “if a witness was absent, either by reason of death of the witness, or by the procurement of the prisoner, the deposition was receivable in evidence against him.”

The same result was reached in *Williams v. State*, the first American case to recognize the forfeiture doctrine. There, the defendant was convicted of larceny of a watch. At trial, the prosecutor suggested that the accused had induced the rightful owner of the watch to absent himself from court, and consequently the trial judge allowed the owner’s written testimony, given to a Magistrate, to be read to the jury. On appeal, the Supreme Court of Georgia found that there was no evidence that the accused had attempted to procure the owner’s absence. The evidence only showed that the accused and the owner had settled the claim. As such, the owner’s out-of-court deposition was not admissible in the absence of evidence that the accused had procured the unavailability of the victim’s testimony.
These common law cases clearly demonstrate that the standard for the admissibility of evidence by application of the forfeiture rule focused exclusively on the voluntary wrongful conduct of the accused in causing the unavailability of the live in-court testimony of the out-of-court declarant. This approach to forfeiture did not require a showing that the accused had acted with intent to prevent the witness from testifying, and it steadfastly preserved the right of confrontation where there was no causal link between the accused and the witness’ failure to appear at the proceedings. While the early common law cases had addressed post-crime conduct of the accused, there is nothing in the historical development of the forfeiture doctrine to suggest that it should be limited to post-crime conduct. We will show that a modern application of the common law principle of forfeiture has no temporal or subject matter limitations, and therefore, the constitutional forfeiture doctrine should apply whenever the voluntary and wrongful conduct of the accused causes unavailability be it pre-crime, post crime or the very act that constitutes the crime for which the accused is now on trial.

III. Recognition and Affirmation of the Constitutional Doctrine of Forfeiture by the United States Supreme Court

A. Reynolds v. United States: Recognition of the Common Law Equitable Doctrine of Forfeiture

More than 200 years after Lord Morley’s Case, the United States Supreme Court, in Reynolds v. United States, first recognized the doctrine of forfeiture by wrongdoing. The case arose in the Territory of Utah where George Reynolds was charged and convicted of bigamy based on his marriage to Amelia Jane Schofield while still being married to his first wife, Mary Ann Tuddenham. The dispositive facts begin with a marshal who had arrived at the home of the accused to serve a subpoena on Amelia Jane Schofield. Although the subpoena was issued incorrectly in the name of Mary Jane Schibold, the marshal knew Schibold as Mary Jane
It was also established in court that Amelia Jane Schofield was living with the accused at the time that the marshal appeared at their home. The marshal testified that he spoke to the accused who claimed that Mary Jane Schofield was not at home and refused to tell him where she was. Reynolds also told the marshal that “[Schofield] does not appear in this case.”

Early on in the trial, the prosecutor discovered the error in misnaming the witness in the subpoena. A new subpoena with her correct name was then issued. The same marshal returned to the home of the accused that evening and spoke with his first wife. She told the marshal that the wife who was named in the subpoena was not home and had not been there for three weeks. The marshal returned once again the next morning but had the same result. The next day, the judge held an evidentiary hearing and then ruled to allow the use of Schofield’s sworn testimony from a prior trial of the accused, on a different charge, in evidence.

On appeal, the United States Supreme Court affirmed Reynolds’ conviction and found no constitutional error, since the evidence supported the trial court’s determination that the accused was responsible for Schofield’s unavailability at trial. Chief Justice Waite, speaking for the Court, reasoned that the prosecutor had presented “enough” unrebutted evidence to explain the unavailability of the witness in the presence of the accused. “Clearly, enough had been proven to cast the burden [on Reynolds to show] that he had not been instrumental in concealing or keeping the witness away.” Reynolds did not rebut the prosecution evidence, even though he had an opportunity to explain Schofield’s absence from the trial. Chief Justice Waite elaborated that

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.
Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.\textsuperscript{60}

According to Reynolds, the forfeiture rule “has its foundation in the [equitable] maxim that no one shall be permitted to take advantage of his own wrong.”\textsuperscript{61} Consequently, “if there has not been . . . a wrong committed, the way has not been opened for the introduction of the testimony.”\textsuperscript{62} The Court noted that “this long-established usage . . . has rarely been departed from” and is an “outgrowth of a maxim based on the principles of common honesty . . .”\textsuperscript{63}

What is most striking about the Reynolds constitutional analysis is that it focused exclusively on the voluntary wrongful conduct of the accused and the consequences of his wrongful conduct. The Reynolds Court did not inject an element of intent or suggest that forfeiture of confrontation rights depends on the purpose or motivation of the accused in preventing his wife from giving adverse testimony against him at trial.

Professor James Flanagan argues that what the Supreme Court did in Reynolds was to apply the waiver doctrine which was later articulated in Johnson v. Zerbst;\textsuperscript{64} as “an intentional relinquishment or abandonment of a known right or privilege.”\textsuperscript{65} This he maintains requires a showing that the accused acted with specific intent to prevent live trial testimony.\textsuperscript{66} To support his position, Professor Flanagan relies on language from the Court’s opinion in Reynolds that concluded that Reynolds had “considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own.”\textsuperscript{67} In extrapolating a waiver rationale, he argues that Reynolds knew that his wife had testified against him in a previous trial and that the prosecutor was seeking her live testimony.\textsuperscript{68} Additionally, he notes that Reynolds
had refused to reveal the whereabouts of his wife to frustrate the efforts of the marshal who had attempted to serve her with a subpoena. He concludes that the silence of the accused in open court after hearing the testimony of the marshal supports an inference that Reynolds knew where she was.\(^6^9\) From these assumptions, Professor Flanagan deduces that Reynolds had knowingly and intentionally waived his constitutional right to confront his wife in court.\(^7^0\) To validate his position, Professor Flanagan relies on the *Johnson v. Zerbst* waiver test which “looks to the defendant’s knowledge of the right as well as the deliberate intention to relinquish that right.”\(^7^1\) He concludes that the defendant’s “[k]nowledge of the right of confrontation and the intention to relinquish that specific right are inferred from the defendant’s intentional act aimed at preventing a witness from testifying.”\(^7^2\)

At first blush Professor Flanagan makes an appealing argument in support of his waiver claim, however the *Reynolds* opinion itself does not support his conclusions. The *Reynolds* Court did not suggest that the application of forfeiture hinged on Reynolds’ purpose or motivation in keeping his wife away from giving testimony at the trial. On the contrary, the Court focused exclusively on his voluntary wrongful act of keeping his wife away from trial. The triggering event for the application of the forfeiture was the voluntary and wrongful act of Mr. Reynolds who had prevented her in-court testimony.

A fair reading of *Reynolds* reveals that the accused made no personal decision to forego a constitutional right. What is obvious in this case is that Reynolds had *lost* his confrontation rights by making his wife unavailable for live testimony, a judicial decision that was made for him. There is no evidence that Reynolds was aware that he had a constitutional right to confront witnesses against him or that he knowingly and intentionally relinquished such a right. Rather, Reynolds forfeited his constitutional right, a form of punishment for his voluntary and wrongful
act. Therefore, there is no basis to conclude, as Professor Flanagan does, that Reynolds affirmatively chose to waive his confrontation rights. Additionally, the English common law cases that the Reynolds Court reviewed and relied on did not make intent an element of the forfeiture analysis.  Instead, the “focus was on whether there was adequate proof that the defendants caused the witnesses’ absence.” This shifts the analysis away from intent and waiver to voluntary and wrongful conduct and forfeiture.

Professor Flanagan would be correct to suggest that the Reynolds decision was grounded in waiver if there was credible evidence that Reynolds knew, understood, and appreciated his constitutional right to confrontation, that he had intended to prevent the in-court testimony of his wife, and that he had knowingly and intelligently waived his right to cross-examine her. However, such evidence is missing from the Court’s opinion. In the final analysis, Professor Flanagan’s conclusion that “[t]he constitutional rule stated in Reynolds was that a deliberate intention to prevent a witness from testifying supports the loss of confrontation as to that witness,” is untenable. Intent has no bearing on the constitutional analysis of forfeiture by wrongdoing.

B. Forfeiture and Waiver: Clarifying the Blurred Line

Waiver and forfeiture are two distinct concepts, yet same courts misapply waiver in confrontation clause analysis. Professor Flanagan posits that “forfeiture by wrongdoing” should actually be termed “estoppel by wrongdoing,” a more neutral label that he argues does not immediately assume the absence of the intent requirement for purposes of the debate. However, injecting an additional label into the mix will only further confound and mystify courts. Justice Antonin Scalia has noted that “although our cases have so often used them interchangeably,” the concepts of waiver and forfeiture “are really not the same.” Waiver is
“an intentional relinquishment or abandonment of a known right or privilege” which can occur either before or during a trial. When it comes to waiver, the accused makes personal choices, such as whether to confess, plead guilty, proceed to a jury, defend through counsel or personally, choose to testify, or whether to present a defense. Waiver is dependent on a showing that the accused knew the nature of his or her constitutional right and that he or she intentionally relinquished its protection. Professor Peter Westen is correct when he states that before the prosecution can assert that the accused has waived a constitutional right, it has to “show that he [or she] made a deliberate decision to forgo [this right], that he [or she] made the decision after being fully apprised of the consequences and alternatives, and that the [prosecution] itself had done nothing to make a decision to assert his [or her] rights more ‘costly’ than a decision to relinquish them.” In the end, the decision to waive a constitutionally protected right must be made by the accused personally.

Forfeiture, on the other hand, is the loss of a constitutional right by misconduct of the accused. The right is taken away from the accused as a direct consequence of his or her wrongful and voluntary conduct “regardless of the [accused’s] knowledge thereof and irrespective of whether the [accused] intended to relinquish the right.” It is the “automatic and unintentional loss of a right upon the happening of a specified condition” and “occurs by operation of law without regard to the [accused’s] state of mind.” The significant difference between a waiver and forfeiture analysis is that an accused “can forfeit his [rights] without ever having made a deliberate, informed decision to relinquish them, and without ever having been in a position to make a cost-free decision to assert them.” Ultimately, the final decision to strip the accused of his or her confrontation rights is made by the trial judge against the accused. Forfeiture of confrontation rights is the price that the accused pays as a penalty for having caused
the unavailability of the live testimony of the out-of-court declarant through his or her voluntary wrongful conduct. Conversely, where the unavailability of the witness at trial is the result of an unintentional act of the accused, the forfeiture doctrine is not justified.92

The forfeiture of confrontation rights is analogous to the “loss” of the right of the accused to be physically present at his or her own trial. In *Allen v. Illinois*,93 the accused, after refusing the services of appointed counsel, began to *voir dire* the first juror. After the judge requested that Allen restrict his questions to the prospective juror’s qualifications, he began to argue with the judge in an “abusive and disrespectful manner.”94 He ended his remarks by telling the judge that “[w]hen I go out for lunchtime, you’re going to be a corpse here.” He also tore the file that was in possession of his standby attorney and threw various papers on the floor.95 Once again the judge warned Allen to behave, but he continued to talk back to the judge saying that “[t]here’s not going to be no trial either. I’m going to sit here and you’re going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there’s not going to be no trial.”96 He then expressed additional abusive remarks at which time the trial judge ordered the trial to proceed without the presence of the accused who was removed from the courtroom.97

On appeal to the Supreme Court, the removal procedure was sustained. Speaking for the Court, Justice Black recognized that “[o]ne of the most basic of rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”98 However, Allen had “lost” his right to be present during the trial proceedings and to confront witnesses against him because of his disruptive behavior which justified his removal from the courtroom.99 Justice Black explained that

. . . a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive
behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.\textsuperscript{100}

In upholding Allen’s removal from the trial proceedings, Justice Black did not invoke the waiver doctrine but instead focused on the voluntary disruptive conduct of the accused.\textsuperscript{101} Allen paid a price for his voluntary wrongful conduct. He forfeited his right to be present during the court proceedings. It naturally follows that an accused who renders a witness unavailable for live testimony at trial through voluntary wrongful conduct should be subject to a similar loss of constitutional rights via forfeiture.


The \textit{Reynolds} forfeiture analysis, which we have shown did not include an element of intent, has been affirmed in \textit{dictum} in \textit{Crawford v. Washington}\textsuperscript{102} and \textit{Davis v. Washington}.\textsuperscript{103} In \textit{Crawford}, Justice Scalia wrote that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.”\textsuperscript{104} He did not say that the accused \textit{waives} confrontation rights by his or her wrongdoing. Likewise in \textit{Davis}, Justice Scalia reiterated the \textit{Crawford dictum} and added that “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”\textsuperscript{105} He noted that

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\text{. . . when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.}\textsuperscript{106}
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Justice Scalia’s focus on the voluntary wrongful conduct of the accused once again supports a forfeiture analysis that implicitly rejects intent as an element and with it the application of the waiver principle.
Professor Flanagan argues that the *dictum* in *Crawford* and *Davis* supports his view that the Supreme Court has adopted an estoppel or waiver by wrongdoing standard.\footnote{107} He acknowledges that the Court “did not explicitly hold that intent was required, but . . . it came as close to that conclusion as possible.”\footnote{108} He concludes “[t]he words, and the Court’s discussion, are inconsistent with any theory that the defendant’s intent is irrelevant or that merely being the proximate cause of the witness’ unavailability is sufficient grounds to support the loss of confrontation rights.”\footnote{109} He argues that Justice Scalia’s use of the phrase “procuring or coercing the silence from witnesses”\footnote{110} in *Davis* necessarily implies intent because “coercing” and “procuring” are “purposeful acts” intended to achieve an objective. We disagree. Standing alone, the words “procuring or coercing the silence from witnesses” do not include or convey an intent element. These words can and do support a contrary conclusion that pins the focus on the consequence of the voluntary and wrongful conduct of the accused that renders the live testimony unavailable. Since Justice Scalia did not inject an intent element explicitly in his articulation, it would be wrong to argue that he did so implicitly.

Although Justice Scalia recognized in *Davis* that Rule 804(b)(6) of the Federal Rules of Evidence (“FRE”), which contains a statutory intent element, is a codification of the forfeiture doctrine, he did not say that FRE 804(b)(6) codifies the constitutional doctrine of waiver by wrongdoing.\footnote{111} The *Davis* articulation of forfeiture under the Sixth Amendment is not tied to the elements of FRE 804(b)(6). The use of the word “forfeiture” by Justice Scalia\footnote{112} was made in reference to *Reynolds* that “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”\footnote{113} It is therefore reasonable to conclude that Justice Scalia purposely used the word “forfeiture,” and not “waiver,” in order to affirm the equitable forfeiture
doctrine first developed in English and early American common law cases to create a constitutional measure.

Since the language in question is precise, a reasonable reading of Reynolds, Crawford, and Davis leads us to the conclusion that the constitutional analysis under the Sixth Amendment should focus exclusively on the wrongful and voluntary conduct of the accused that actually prevents live trial testimony without reference to the intention or the motivation of the accused.

Professor Flanagan also argues that in order to circumvent the rule against the admissibility of untested testimonial hearsay, courts will be inclined to use the forfeiture exception to test the “outer limits of forfeiture” in circumstances where witnesses are merely unwilling to cooperate with the prosecution, notably in domestic violence cases.114 This prediction will not materialize because the constitutional forfeiture by wrongdoing analysis does not dispense with proof that voluntary and wrongful conduct of the accused actually caused the unavailability of the witness’ live testimony.

IV. Post Crawford-Davis – Intent or No Intent: Conflicting Applications of the Forfeiture Doctrine

A. People v. Giles: Intent Not Required

Post Crawford and Davis, there has been a split among a number of jurisdictions as to whether intent to procure unavailability is an element in the analysis of the equitable forfeiture doctrine of the Sixth Amendment. California holds that it is not. In People v. Giles,115 the defendant appealed his conviction of first degree murder arguing that the trial court had improperly admitted statements made by the victim to police officers in an earlier domestic violence incident.116 His defense at trial was self-defense.117
A few weeks prior to the murder, police officers were called to investigate a report of domestic violence between the defendant and the murder victim.\textsuperscript{118} She told the officers that the defendant had accused her of having an affair with her friend, that he beat her face and head, and that he told her that he would kill her if he caught her cheating on him.\textsuperscript{119} Over the defendant’s objection, the trial court admitted the victim’s hearsay statement to the officers.\textsuperscript{120} He was subsequently convicted by a jury of first degree murder.\textsuperscript{121}

On review, the California Supreme Court observed that \textit{Crawford} had changed the standard for the admissibility of testimonial statements,\textsuperscript{122} and there was no dispute that the victim’s statements to the police officers were testimonial.\textsuperscript{123} However, the question on review was whether the statements were nonetheless properly admitted under the forfeiture exception to the Confrontation Clause.\textsuperscript{124} In deciding whether the forfeiture exception was applicable, the court observed that English and early American common law cases that developed the doctrine of forfeiture by wrongdoing “did not suggest that the rule’s applicability hinged on [the accused’s] purpose or motivation in committing the wrongful act.”\textsuperscript{125} It concluded only a voluntary and wrongful act is required. The court noted that following \textit{Reynolds}, the development of the equitable doctrine of “forfeiture by wrongdoing” was largely insignificant, and it was not until the 1960’s and 1970’s that lower federal courts began to apply the doctrine in witness tampering cases where the defendant had murdered or was responsible for the murder of a witness.\textsuperscript{126} The \textit{Giles} court found that the federal courts employed this doctrine “where the defendant, by a wrongful act, was involved in or responsible for procuring the unavailability of a hearsay declarant, and did so, at least in part, with the intention of making the declarant unavailable as an actual or potential witness against the defendant.”\textsuperscript{127} However, the court observed that after the equitable forfeiture doctrine was accepted by the Supreme Court in
Crawford, many courts altered their views and began to “focus on the equitable forfeiture rationale” as a means for admitting hearsay testimony without proof of witness tampering in homicide cases.\textsuperscript{128}

The Giles court rejected the claim by the accused that intent is an essential element and his contention that the constitutional analysis “is, in essence, not based on broad forfeiture principles, but instead on waiver principles.”\textsuperscript{129} The court found support for its position in the Crawford formulation of “forfeiture” as a principle that “‘extinguishes confrontation claims on essentially equitable grounds,’ not a waiver.”\textsuperscript{130} The equitable basis for the doctrine “strongly suggests that the rule’s applicability does not hinge on the wrongdoer’s motive.”\textsuperscript{131} The court proceeded to reject the earlier view which some federal courts had articulated prior to Crawford, concluding that “it appears that the intent-to-silence element required by some cases evolved from the erroneous characterization of the forfeiture doctrine as the waiver by misconduct doctrine.”\textsuperscript{132} The Giles court reasoned that the forfeiture principles “can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing.”\textsuperscript{133} It explained that forfeiture of a constitutional right “is a logical extension of the equitable principle that no person should benefit from his own wrongful acts.”\textsuperscript{134} Where the accused through his “intentional criminal act” renders a witness unavailable for trial, he or she would improperly “benefit[] from his crime if he can use the witness’s unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible.”\textsuperscript{135} This conclusion does not depend on “whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.”\textsuperscript{136} The California Supreme Court held that post-Crawford decisions, including the Court of Appeals in this case, “have correctly applied the forfeiture doctrine in a necessary,
Equitable manner.”137 Equity allows courts to “further the truth-seeking functions of the adversary process when necessary, allowing fact finders access to relevant evidence that the defendant caused not to be available through live testimony.”138

Other jurisdictions have applied the same forfeiture analysis as expressed in *Giles*. These courts have similarly eliminated intent where it is shown that the out-of-court declarant had been made unavailable to the prosecution as a result of the voluntary and wrongful conduct of the accused.139 For example, in *State v. Sanchez*,140 the accused shot and killed the victim.141 Over his objection, the trial court admitted a note in which the victim had written that the accused had threatened to kill her if he ever caught her cheating on him.142 The accused appealed his jury conviction of deliberate homicide by arguing that the trial court had violated his confrontation rights when it admitted the victim’s note.143 He asserted that the note was inadmissible and that he was unable to cross-examine her about the contents of her note.144 The Montana Supreme Court agreed that the victim’s note was testimonial,145 but it determined that the accused had lost his confrontation right under the doctrine of forfeiture by wrongdoing.146 The court declined to adopt *Giles* in its entirety and qualified its holding as not “amount[ing] to a broad sweeping statement as to the applicability of the forfeiture doctrine,”147 reasoning that to the “extent that a deliberate criminal act results in the victim’s death, . . . the forfeiture by wrongdoing doctrine does not hinge on whether the defendant specifically intended to silence a witness.”148 Also in the spirit of *Giles*, the court acknowledged that the forfeiture doctrine is based on the *Reynolds* maxim that no person should benefit from his or her own wrongdoing.149

By its very nature, the murder of the out-of-court declarant always results in the unavailability of his or her adverse trial testimony.150 For this reason, the accused who commits murder should not be allowed to exclude the victim-declarant’s out-of-court statements
“regardless of whether the defendant specifically intended to silence the victim-declarant.”

To deny the admissibility of these statements would “undermine[] the judicial process and threaten[] the integrity of court proceedings.” In applying the forfeiture doctrine in this case, the Montana Supreme Court held that “when a defendant admittedly and deliberately kills another person, thus procuring the person’s unavailability as a witness, the defendant forfeits the constitutional rights to confront the victim at trial.”

Another case in point is Wisconsin v. Jensen. There, the accused was charged with first-degree intentional homicide for the poisoning death of his wife. At a preliminary hearing, a witness testified that the victim had given him an envelope and told him to mail it to the police if anything were to happen to her because she was scared that her husband was trying to poison her. A police detective testified that he had received that envelope, shortly after the victim was found dead, which contained a letter from her stating that she was scared because her husband was trying to kill her and that she would never commit suicide. The defendant challenged the admissibility of his wife’s letter and the oral statements that she allegedly made to the witness in light of Crawford and Davis. On appeal from an order of the trial court that denied the admissibility of the victim’s letter to the police and her other out-of-court statements, the Wisconsin Supreme Court first found that the trial court had properly concluded that the letter was testimonial and that her oral statements were not testimonial.

Turning to the State’s forfeiture by wrongdoing argument, the court recognized that Crawford had accepted the equitable doctrine of forfeiture in its discussion of Reynolds and early English precedent. In fashioning a broad forfeiture by wrongdoing doctrine that does not include an intent requirement, the court recognized that the post Crawford holding in United States v. Garcia-Meza (discussed infra) was very persuasive to its analysis. The Jensen
court relied on Garcia-Meza that explained that while the Federal Rules of Evidence contained an element of intent, Sixth Amendment rights are not governed by “the vagaries of the Rules of Evidence” and that the United States 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.” The court concluded that forfeiture can be established by showing that the accused had voluntarily committed the wrongful act which rendered the live in-court testimony of the witness unavailable. Unlike Sanchez, the Wisconsin Supreme Court did not limit its holding instances of homicide.

The final case is the Kansas Supreme Court case of State v. Meeks. In this case, the accused shot his victim after a fist-fight. Approximately ten minutes after the shooting, a police officer arrived on the scene and asked the victim who had shot him. The victim replied, “Meeks shot me.” One hour later, the victim was pronounced dead. A jury convicted him of first-degree premeditated murder, and he was subsequently sentenced to life without eligibility of parole for 25 years. On appeal, the Supreme Court of Kansas initially determined that under the Crawford framework, the victim’s statement to the police officer was testimonial, arguably because the police officer was conducting an interrogation. However, stopping short of making a definitive ruling that the statement was testimonial, the court held that the accused had forfeited his right to confrontation by murdering the victim who was a witness against him. The court observed that the majority of cases that analyze the forfeiture doctrine focus on post-crime conduct that renders the witness unavailable to testify at trial about the details of the underlying crime. However, it went on to reject any subject matter limitations on the application of forfeiture where, as here, the accused was charged with murder, the very act that had caused the unavailability of the witness. This idea that the accused forfeits his or her right of
confrontation in murdering the out-of-court declarant finds support in what Professor Richard Friedman calls the “reflexive” application of the forfeiture doctrine. In applying forfeiture reflexively in homicide cases, courts do not require a finding that the accused had intended that the victim be unable to present adverse live trial testimony.

The Meeks court accepted Crawford’s formulation of forfeiture by wrongdoing as a rule which “extinguishes confrontation claims on essentially equitable grounds.” It recognized that Crawford, in turn, relied on Reynolds which had held pronounced that if the accused “voluntarily keeps witnesses away, he cannot insist on his privilege.” Here, it was the murder of the declarant that rendered the testimony of the victim unavailable for trial. Having wrongfully caused the victim’s unavailability, the Meeks court held that the accused had forfeited his right to confront the out-of-court declarant and a fortiori to any hearsay objection that he may have had to the victim’s out-of-court statements.

Following Crawford, several federal circuit courts of appeals have also embraced a forfeiture analysis that does not include the element of intent. In United States v. Garcia-Meza, the defendant was convicted of first-degree murder of his wife. On appeal to the United States Court of Appeals for the Sixth Circuit, he argued that the trial court had violated his confrontation rights by allowing hearsay evidence of what his wife had told investigating officers after an earlier assault. He contended that in order for the prosecution to prevail on its forfeiture claim, it had to prove that he had killed or otherwise prevented his wife from testifying with specific intent to prevent her testimony. The court rejected his contention and found that “[t]here 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.” It also drew a
The court reasoned that the *Crawford* affirmation of the equitable foundation of the forfeiture doctrine “strongly suggests that the rule’s applicability does not hinge on the wrongdoer’s motive.” It concluded that the accused forfeits his confrontation rights “regardless of whether he intended to prevent the witness from testifying against him or not.”

Just four months later, *Garcia-Meza* was cited by the United States District Court for the Southern District of Ohio in *United States v. Mayhew*, in a ruling on a defendant’s motion *in limine* to exclude an inculpatory audiotape recording. The defendant had kidnapped and fatally wounded his daughter. On the way to a nearby hospital, she said that the defendant had killed her mother (his ex-girlfriend) her mother’s fiancéé, and that he had kidnapped her. This conversation was recorded on an audiotape. As a threshold matter, the court found that the victim’s statements were testimonial because a “reasonable person in the declarant’s position would anticipate [her] statement being used against the accused in investigating and prosecuting the crime.” Nonetheless, the court held that the statements would be allowed because the accused had forfeited his rights under the Confrontation Clause by his own wrongdoing. Citing *Garcia-Meza*, the court agreed that where the defendant, through his voluntary wrongful act, had rendered unavailable a witness against him, “the motivation behind his wrongdoing was irrelevant.” The equitable considerations of the forfeiture doctrine “demand that a defendant forfeits his Confrontation Clause rights if the court determines . . . that the declarant is unable to testify because the defendant intentionally murdered her.” All that matters is that the
defendant rendered the unavailability of live trial testimony through his or her own voluntary wrongful conduct regardless of the underlying motivation.194

B.  

*People v. Stechly*: Intent Is Required

There are some courts that have gone the other way and have mistakenly injected an element of intent into the constitutional forfeiture analysis. One example is the Illinois Supreme Court in *People v. Stechly*.195 In that case, the defendant appealed his convictions of predatory criminal sexual assault, criminal assault, and aggravated criminal sexual abuse of a five year old child.196 He argued that the trial court had erred in admitting the child-victim’s out-of-court statements in violation of his constitutional right to confront her.197 In a pre-trial hearing, it was shown that after sexually abusing the child-victim the defendant told her that he would “hurt” her if she told her mother about the incident.198

On appeal to the Illinois Supreme Court, the defendant argued that the admissibility of the victim’s hearsay statements violated his rights under the Confrontation Clause.199 The State answered that under the equitable doctrine of forfeiture by wrongdoing, he should not be allowed to raise his constitutional claim because it was his own actions that had rendered the victim unavailable for trial.200 Writing for the plurality, Justice Freeman chose to rely on *Davis v. Washington*,201 to find that intent to render unavailable is an essential element in the application of the forfeiture rule.202 He pointed to language in *Davis* that when the accused “seek[s] to undermine the judicial process . . . or destroy the integrity of the criminal trial system”203 to find intent as an essential element. He concluded that an act of assault by itself is not enough,204 because “[i]t is, after all, impossible to deter those who do not act intentionally.”205

The *Stechly* plurality chose to link the constitutional equitable doctrine of forfeiture to FRE 804(b)(6), forfeiture by wrongdoing, which does require intent.206 While recognizing that
FRE 804(b)(6) does not have the authority of a constitutional rule, the court acknowledged that some courts have found that intent is not a required element in a constitutional analysis. Nonetheless, it concluded that these cases were limited to situations where the accused had actually murdered the victim. In instances other than murder, the court held, proof of intent to render a witness unavailable is a necessary element. While the prosecution argued that the accused had demonstrated his intent to procure the child-victim’s unavailability when he told her not to tell anyone of the incident or that he would hurt her, the court was ultimately not willing to make such a factual determination on its own. As a result, the court remanded the inquiry to the trial court for a hearing to determine whether the defendant had forfeited his confrontation objection by his own wrongdoing.

Chief Justice Thomas dissented, arguing that in light of the overwhelming evidence which supported the defendant’s convictions, it was unnecessary to address the issue of forfeiture by wrongdoing. However, assuming arguendo that the forfeiture question was to be addressed, he disagreed with the manner in which the plurality chose to apply the doctrine. He asserted that the inquiry should not focus on the intent of the accused in creating the unavailability of live in-court testimony. He argued, instead, that the accused should not profit from his own wrongdoing regardless of motive or intent. The true purpose behind the common law doctrine of forfeiture, he explained, is broader than the rationale of deterring intentional acts, and it “should not be confused with the federal statutory hearsay exception, which does have the limited purpose of addressing witness intimidation.” He declared that in contrast to FRE 804(b)(6), “the common law doctrine of forfeiture by wrongdoing has a broader grasp” and operates under equitable principles, as was recognized by the United States Supreme Court in Crawford.
assault of the out-of-court declarant-victim for the application of forfeiture. There only needs to be a “direct causal connection between the [accused’s] wrongdoing . . . and the unavailability” of the declarant.

In *New Mexico v. Romero*, the New Mexico Supreme Court also applied a forfeiture analysis that is similar to that of the Illinois Supreme Court, and it too was met with a strong dissent. The defendant in that case was convicted of domestic violence and second-degree murder of his estranged wife. On appeal to the New Mexico Supreme Court, he argued that the trial court had erred in admitting testimonial hearsay evidence in violation of his right to confront adverse witnesses against him. The court analyzed the hearsay statements in light of *Crawford* and *Davis*, determined that the statements were testimonial, and concluded that they were improperly admitted. The prosecution had argued that even if the statements could qualify as testimonial, the accused should nonetheless be precluded from raising the claim because he had forfeited the right by wrongdoing. The court resolved in his favor finding that intent to prevent live testimony is an essential element of the forfeiture doctrine. The court observed that some courts have “considered distinct” the elements of the Federal Rules of Evidence and the requirements of the federal constitution, noting that courts even suggest that the rule of forfeiture applies “whenever a defendant’s wrongdoing caused a witness’s unavailability” regardless of a specific intent to render the witness unavailable. Nonetheless, the court held that despite the strong rationale and public policy against allowing an accused to profit from his or her own wrongdoing, “emphasis must be not only on wrongdoing but on intentional wrongdoing, from which an inference of waiver might be appropriate or in which an equitable conclusion of forfeiture is justified.” It concluded that a rule that requires proof that
the accused intended to prevent a witness from testifying should not be abandoned “in cases where it helps provide a strong basis for finding waiver or forfeiture.”

In his dissent, Justice Bosson stated that the majority applied the forfeiture doctrine too narrowly. He argued that the accused had forfeited the right to confront his wife when he killed her and made her unavailable for trial. He reasoned that it should not make a difference whether the accused had procured the absence “with the specific intent to prevent his wife from testifying, or whether he caused that absence simply in a drunken rage, the effect is the same.” The witness is unavailable to testify. It “seems a perversion of the Constitution and the Confrontation Clause to allow any defendant to profit so from his own misdeeds.” Referring to Giles and Jensen, Justice Bosson complained that the majority limited the application of the forfeiture doctrine too narrowly so as to require “an intent not just to kill the witness, but also to silence her as well” without accounting for the “sweeping changes to the Confrontation Clause analysis” brought about by the Crawford decision.

We recognize that the constitutional right of confrontation must be protected, however, this right is not absolute. Forfeiture by wrongdoing terminates the right because the accused should not be allowed to benefit from his or her own voluntary and wrongful conduct. Consequently, a voluntary wrongful act that prevents the live in-court testimony of a witness, regardless of motive or purpose, should result in a loss of the right so as to allow the use of relevant out-of-court statements in evidence. To hold otherwise would give a windfall to the accused. The California Supreme Court in Giles and other courts have identified and formulated the correct standard for Sixth Amendment forfeiture analysis. Unlike the doctrine of waiver, as articulated by Johnson v. Zerbst, where an accused may knowingly and intelligently forego a constitutional right, the equitable doctrine of forfeiture by wrongdoing does not include an intent
element. The *Giles* line of cases properly utilizes the forfeiture doctrine as a tool to deliver judicial punishment to the accused when the prosecution proves that he or she caused the unavailability of the live in-court testimony of the out-of-court declarant by his or her voluntary and wrongful act.

V. The Forfeiture Rule in FRE 804(b)(6) Should Not be Confused with the Sixth Amendment Forfeiture Doctrine

Prior to the 1997 codification of the forfeiture by wrongdoing doctrine in FRE 804(b)(6), some federal courts used the residual exception to the hearsay rule to admit out-of-court statements of an unavailable witness employing the common law forfeiture doctrine on condition that the proponent was able to make a sufficient showing that the accused had procured the witness’ unavailability. For example, the Second Circuit in *United States v. Mastrangelo*, applied the former residual hearsay exception, FRE 804(b)(5), to admit prior grand jury testimony after finding that the evidence “was surrounded with sufficient ‘particularized guarantees of trustworthiness.'” While recognizing that the grand jury statements were hearsay, Judge Winter explained that to not allow the grand jury testimony “would mock the very system of justice the confrontation clause was designed to protect.”

The idea to codify the forfeiture by wrongdoing doctrine was first brought to the Advisory Committee on Federal Rules of Evidence in 1992 by Professor Stephen Saltzburg and Professor David Schlueter, who intended to resolve a split among the federal circuits on the nature of the burden of proof to establish that wrongful conduct had occurred. This was clarified by commentary to the new rule that explained that the appropriate burden of proof is a preponderance of the evidence. The proposed rule was approved by the Supreme Court on April 11, 1997, and became effective on December 1, 1997, as FRE 804(b)(6). The forfeiture rule provides:
(b) 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.\(^{245}\)

The Advisory Committee Notes to the 1997 Amendment expressly limit the application of the rule to “actions taken after the event to prevent a witness from testifying.”\(^{246}\) The text of the Advisory Committee Notes suggests that the rule was originally created as a means to prevent witness tampering.\(^{247}\) In fact, the Advisory Committee chose not to make reference to witness tampering in the text of the rule because it believed that the language of the rule and the intent requirement in it made it very clear that the hearsay exception would apply only when the accused acted after his or her original crime to procure the unavailability of an adverse witness at trial.\(^{248}\) It has also been suggested that the drafters of the rule had never questioned that intent to render a witness unavailable is an element of the rule.\(^{249}\) The language of the rule includes an intent requirement and provides that forfeiture will be result from conduct of the accused who engaged in “wrongdoing that was intended to, and did, procure the unavailability.”\(^{250}\)

Courts regularly apply the rule as it was intended by its proponents. For example, in United States v. Gray,\(^ {251}\) the defendant appealed her conviction of mail and wire fraud arguing that the trial court had violated her confrontation rights by admitting several out-of-court statements made by the deceased to his family members during the a period of three months prior to his murder.\(^ {252}\) The prosecution claimed that she was responsible for his murder. The court rejected her claim and determined that FRE 804(b)(6) “applies whenever the defendant’s wrongdoing was intended to, and did, render the declarant unavailable as a witness against the defendant.”\(^ {253}\) The court noted that there are no limits “on the subject matter of statements that can be admitted under [FRE 804(b)(6)],”\(^ {254}\) and therefore the rule accomplishes its purpose “to
deter criminals from intimidating or ‘taking care of’ potential witnesses against them.”\footnote{255} The court recognized that the language of the rule “requires that the wrongdoing was intended to render the declarant unavailable as a witness”\footnote{256} and held that “a defendant need only intend ‘in part’ to procure the declarant’s unavailability.”\footnote{257} Intent to render unavailable “need not be the actor’s sole motivation;” it is “sufficient in this regard to show that the [defendant] was motivated in part by a desire to silence the witness.”\footnote{258}

We argue that the intent element in FRE 804(b)(6) creates a distinct evidentiary condition for admissibility but it should not be confused with the equitable common law notion of forfeiture which is the basis of the constitutional forfeiture doctrine. The intent element in FRE 804(b)(6) is directed at witness tampering that results from post-crime intentional conduct of the accused. Unlike the Sixth Amendment forfeiture rule, FRE 804(b)(6) would not apply where there is insufficient evidence to show, at least in part, an intent to procure the unavailability of a witness. This is supported by Professor Saltzburg in his own commentary to the 1997 amendment where he explains that before the rule can apply “it must be shown that the party against whom the evidence is offered acted with intent to procure the unavailability of the declarant as a witness.”\footnote{259} He reasons that where a “defendant kills a declarant simply because he didn’t like him, or because he was burned in a drug deal by him, then the defendant has not forfeited his right to object to the declarant’s hearsay statement [under the rule].”\footnote{260} In the equitable common law forfeiture analysis, the basis for the constitutional principle, intent is not a relevant consideration. A court will find that the accused forfeits his confrontation right under the Sixth Amendment whenever it is sufficiently shown that the unavailability of live in-court testimony is the direct result of his or her voluntary and wrongful act.
Justice Scalia made it clear in *Crawford* that “we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence.” For this reason, the determination of “whether defendant has forfeited his constitutional right of confrontation is an issue separate from whether a particular rule of evidence has been satisfied.”

While FRE 804(b)(6) contains an intent requirement, the Sixth Amendment forfeiture doctrine is derived independently from the common law which does not contain an element of intent. The constitutional forfeiture doctrine is not a means of circumventing the hearsay rule or to allow statements in evidence that would normally not be admissible. The constitutional doctrine has a broader purpose and represents sound public policy to penalize the accused whose voluntary and wrongful actions subvert the legal system. The loss of the right of confrontation prevents the accused from gaining an unfair advantage in the adversarial contest by his or her voluntary and wrongful act. Ultimately, the rule promotes the truth finding process.

**VI. Conclusion**

The *Giles* line of cases is consistent with the earlier common law view of forfeiture. Since *Reynolds*, the common law principle of forfeiture has been elevated into a constitutional doctrine and remains faithful to its equitable foundation and public policy concern “that no person should benefit from his own wrongful acts.” Equitable forfeiture “does not hinge on the wrongdoer’s motive.” From this perspective, forfeiture is nothing more than judicially imposed punishment for the voluntary and wrongful conduct of the accused in rendering the unavailability of the live in-court testimony of the out-of-court declarant, especially in circumstances where the “intent-to-silence is missing.”

The *Giles* court was correct to separate the constitutional doctrine of forfeiture from the evidentiary approach of FRE 804(b)(6). Courts that incorrectly inject the element of intent,
finding support for it in FRE 804(b)(6), have done so in derogation of the equitable foundations of the constitutional forfeiture rule.\textsuperscript{268} Since the United States Supreme Court has labeled the rule as one of “forfeiture” and not “waiver” in both \textit{Crawford} and \textit{Davis},\textsuperscript{269} intent is not a relevant aspect of the confrontation analysis.
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4 To the extent that there is a concern that without an intent element the forfeiture doctrine may render the dying declaration hearsay exception meaningless, we suggest that it is without merit because a dying declaration is most likely not testimonial, and therefore it falls outside the parameters of the Confrontation Clause. Crawford v. Washington, 541 U.S. 36, 56 n. 6 (2004) (stating that the dying declaration exception to the rules of evidence is sui generis); see generally Michael J. Polelle, The Death of Dying Declarations in a Post-Crawford World, 71 MO. L. REV. 285 (Spring 2006).

5 Lord Morley’s Case, 11 Charles II, 6 State Trials 769 (1666) (Eng.)

6 Id. at 776

7 Id.

8 Id. at 770-71.
9 Id. at 771.
10 Id. at 777.
11 Id.
12 Id. at 785-86.
13 Harrison's Case, 4 William & Mary, 12 State Trials 833, 834 (Old Bailey 1692) (Eng.)
14 Id. at 851.
15 Id.
16 Id. at 851-82.
17 Id. at 852-53.
18 Id. at 853.
20 Id.
21 Id.
22 Id.
23 Id. at 526-27 (referring to “An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason”).
24 Fenwick's Case, 8 William III, 13 State Trials 538, 550 (1696) (Eng.)
25 Id. at 538-40.
26 Id. at 579.
27 Id. at 578-83.
28 Id. at 538. There was extensive discussion about the *ex post facto* application of the new statute against Lord Fenwick, however, it was declared that Lord Fenwick was “so
inconsiderable a man, as to endangering the peace of the government” justifying the retroactive application of the law. See id. 601-756.

29 Id. at 588-99.

30 Id. at 757.


32 Id.

33 Id.

34 Id.

35 Id.

36 Id. at 1273 (discussion by Judge Patteson).

37 Id. at 1276.

38 19 Ga. 402 (Ga. 1856).

39 Id.

40 Id. at 403.

41 Id.

42 Id.

43 98 U.S. 145 (1879).

44 Id. at 148.

45 Id.

46 Id.

47 Id.

48 Id.

49 Id.
304 U.S. 458 (1938).


Flanagan, *supra*, note 65, at 1205-06.

Id. at 1208.

Id. at 1206.

Flanagan, *supra*, note 65, 1200.
72 Id. at 1201.

73 Giles, 152 P.3d at 438 n. 3.

74 Id.

75 Flanagan, supra note 114, at 869.

76 Id. at 867.

77 Id. at 867.


79 Zerbst, 304 U.S. at 464.

80 Miranda v. Arizona, 384 U.S. 436 (1966). The Fifth Amendment commands that no person “shall be compelled in any criminal case to be a witness against himself.” Id. at 461 (citing U.S. CONST. amend. V). Chief Justice Warren stated that the constitutional rule requires that the accused be made aware that he or she has the right to remain silent and that any statements made by the accused must be made voluntarily. Id. at 462. In other words, the accused must not be “involuntarily impelled to make a statement [by improper police influence], when but for the improper influences he would have remained silent.” Id. The Court established that “[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” Id. at 444. However, an accused may always waive his own constitutional rights, “provided the waiver is made voluntarily, knowingly and intelligently.” Id.
Boykin v. Alabama, 395 U.S. 238 (1969). Justice Douglas explained that a “plea of guilty . . . is itself a conviction; nothing remains but to give judgment and determine punishment.” Id. at 242. Therefore, the validity of a guilty plea “must be based on a ‘reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.’” Id. The record must clearly demonstrate that the accused “intelligently and understandingly” waived his constitutional protection. Id. “Anything else is not waiver.” Id.

Patton v. United States, 281 U.S. 276 (1930). The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ..” Id. at 288 (citing U.S. CONST amend. VI). However, “these protective provisions of the Constitution are not so imperative that an accused shall be tried by jury when he desires to plead guilty . . . [or in other situations] when he had waived that constitutional right . . ..” An accused must have “intelligently refused such constitutional privilege” for the waiver to be effective. Id. at 294-95. The constitutional right to a trial by jury “is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election.” Id. at 298.

Faretta v. California, 422 U.S. 806 (1975). The Sixth Amendment guarantees that “a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” Id. at 807. These rights are granted to the accused “personally,” and include the implied right of the accused to proceed pro se in his own defense. Id. at 819. For an accused to represent him or herself, he or she must “knowingly and intelligently” waive his or her constitutional rights. Id. at 835 (citing Zerbst, 304 U.S. at 464-65). The accused should be made aware of the difficulty of proceeding pro se “so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” Id.
Ferguson v. Georgia, 365 U.S. 570 (1961). Justice Brennan explained that there is “no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case.” *Id.* at 582.

Chambers v. Mississippi, 410 U.S. 284 (1973). The Court explained that the right of an accused in a criminal trial to “a fair opportunity to defend against the State’s accusations” is essential to due process. *Id.* at 294 (Justice Powell quoting Justice Black in *In re Oliver*, 333 U.S. 257, 273 (1948): “A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel”).

*See Zerbst*, 304 U.S. at 464 (stating that a “waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege”).


Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure*, § 11.3(c), 546 n.4. (2d ed. 1992) (explaining that unlike forfeiture, “waiver” refers to an “intentional relinquishment of a known right”).

Flanagan, *supra* note 114, at 867.

Westen, *supra* note 87, *id.*

*Id.*

*See infra* note 136 for examples.

94 Id. at 339.
95 Id. at 340.
96 Id.
97 Id.
98 Id. at 338.
99 Id. at 343.
100 Id.
101 Id. at 346-47.
104 Crawford, 541 U.S. at 62.
105 Davis, 126 S. Ct. at 2280.
106 Id.
107 Flanagan, supra note 114, at 883.
108 Id. at 886.
109 Id. at 881.
110 Davis, 126 S. Ct. at 2280.
111 Davis, 126 S. Ct. at 2280.
112 Crawford, 541 U.S. at 62; Davis, 126 S. Ct. at 2280.
113 Davis, 126 S. Ct. at 2280.
115 *Giles*, 152 P.3d at 435.

116 *Id.* The defendant had been romantically involved with the victim, Brenda Avie, for several years, but was also seeing another woman. *Id.* at 435. Avie arrived at the house where the defendant was staying and had a conversation with him in a normal conversational tone. *Id.* at 436. Avie then yelled “Granny” several times, followed by a series of gunshots. *Id.* When people inside the house ran outside, they discovered the defendant holding a nine millimeter handgun and standing about 11 feet from Avie, who was shot six times in the torso and bleeding on the ground. *Id.* Avie was not carrying a weapon when she was shot. *Id.*

117 *Id.* To support his claim of self-defense, the defendant explained that he knew Avie to be very jealous of other women, that she had shot a man in the past, and that she had threatened other people with a knife. *Id.* When Avie arrived at the house, she allegedly threatened to kill the defendant, at which point, he retrieved a gun from under a couch in the garage. *Id.* When Avie saw the gun, she “charged” the defendant and he shot her claiming that he thought she had something in her hand. *Id.*

118 *Id.*

119 *Id.* at 436-37.

120 *Id.* at 437.

121 *Id.*

122 *Id.* at 437.

123 *Id.* at 438.

124 *Id.* at 435.

125 *Id.* at 438.

126 *Id.* at 439.
Id. at 439 (citing United States v. Dhinsa, 243 F.3d 635, 653–54 (2d Cir. 2001); United States v. Emery, 186 F.3d 921, 925–27 (8th Cir. 1999); United States v. Houlihan 92 F.3d 1271, 1279–80 (1st Cir. 1996); Steele v. Taylor, 684 F.2d 1193, 1198–99 (6th Cir. 1982); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982); United States v. Balano, 618 F.2d 624, 628–29 (10th Cir. 1979).

128 Id. at 440.

129 Id. at 442.

130 Id.

131 Id.

132 Id. at 444.

133 Id. at 443.

134 Id.

135 Id.

136 Id. The Court of Appeals also noted that “a defendant can only be deemed to have forfeited his right of confrontation through an intentional criminal act.” People v. Giles, 123 Cal. App. 4th 475, 487 (Ca. Ct. App. 2004), aff’d in part by superseded in part by People v. Giles, 152 P.3d 433 (2007). “[I]t is not enough to commit some act that incidentally produces that result.” For example, where a witness “was killed because [defendant] intentionally fired a gun at her; it is perfectly appropriate to conclude that in doing so, he forfeited his right to confront her in the event her hearsay statements were offered as evidence in some future criminal prosecution.” Id. However, if a witness “had instead been killed in an unintentional automobile collision while [defendant] was driving, he would have been the technical cause of her
unavailability at any future trial, but his actions could not be construed as a forfeiture of his right to confront her as a witness.” *Id.*

137 *Id.* at 444.

138 *Id.*

139 Courts applying the Sixth Amendment equitable forfeiture doctrine have made clear that the doctrine can be applied where no formal charges have yet been filed against the would-be defendant and no adverse witnesses have yet been designated. All that is required is that there is a possibility that an individual could be called as a witness if formal charges were to be brought against the would-be defendant. *See* Steele v. Taylor, 684 F.2d 1193, 1203 (6th Cir. 1982) (affirming application of the forfeiture doctrine to a signed statement given to FBI agents by a potential witness); United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997) (forfeiture doctrine should not be limited to situations where there is “an ongoing proceeding in which the declarant was scheduled to testify”); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996) (explaining that the forfeiture doctrine can be applied when it is “reasonably foreseeable that the investigation will culminate in the bringing of charges, the mere fact that the homicide occurs at an earlier step in the pavane should not affect the operation of the waiver-by-misconduct doctrine”); United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (concluding that “the right of confrontation is forfeited with respect to any witness or potential witness whose absence a defendant wrongfully procures”); United States v. Gray, 405 F.3d 227, 241 (4th Cir. 2005) (explaining that the forfeiture doctrine “does not require that the declarant would otherwise be a witness at any particular trial . . .”); accord United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001)

The accused testified that he became suspicious that the victim, his then girlfriend, was cheating on him. Id. at p10. He confronted her and had his suspicions confirmed. Id. In a later conversation, the victim had also threatened to create problems for him with the police so that his children would be taken away from him. Id. According to the accused, he became enraged and shot the victim several times. Id.

The court observed that the substance of the note was to explain the victim’s untimely death or poisoning. The note named the person she suspected would kill her and the method that he would use. In essence, the note contained information that could establish facts about “how, why, and by whom” the victim had been killed. Id. at p37.

727 N.W.2d 518 (2007).
The court held that the victim, Julie Jensen’s, letter was testimonial because “it had no apparent purpose other than to ‘bear testimony’ and Julie intended it exclusively for accusatory and prosecutorial purposes.” Id. at 527. Based on the surrounding circumstances, “a reasonable person in Julie’s position would anticipate a letter addressed to the police and accusing another of murder would be available for use at a later trial.” Id. It is clear that Julie intended the letter “to be used to further investigate or aid in prosecution in the event of her death.” Id.

As to statements made by Julie to the witness, the court concluded that her statements were non-testimonial because they were “informally made to her neighbor and her son’s teacher and not under circumstances which would lead an objective witness to reasonably conclude they would be available at a later trial . . ..” Id. at 529 (citing Crawford, 541 U.S. at 51, for the proposition 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”).

403 F.3d 364, 370 (6th Cir. 2005) (holding that for purposes of the doctrine of forfeiture by wrongdoing it was not necessary that Garcia-Meza murdered his wife with the intent of preventing her testimony).

Jensen, 727 N.W.2d at 534.

Id.; Garcia-Meza, 403 F.3d at 370-71.

Jensen, 727 N.W.2d at 533.
State v. Meeks, 277 Kan. 609 (2004), overruled in part on other grounds in State v. Davis, 283 Kan. 569, 575 (2006). Meeks came to a party and demanded that Green apologize for accidentally shutting Meeks’ hand in the door earlier in the day. *Id.* at 610. When Green refused to apologize, Meeks challenged Green to a fight outside. *Id.* After fighting for about five minutes, Green stopped and walked toward the house. *Id.* Meeks pulled out a handgun and began to chase Green around one of the cars that was parked on the street. *Id.* At this point, all of the observers ran back into the house to hide. *Id.* Wright, one of the people inside the house, saw Green slip and fall. *Id.* Shortly thereafter, Wright heard two gunshots and he came outside and saw Green lying on the ground with Meeks standing in front of him, gun in hand. *Id.*

Reflexive application of the forfeiture doctrine occurs when the accused is on trial for the murder of the out-of-court declarant and the primary reason why the victim cannot testify at trial is that the accused had murdered her. *See* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 Iss. L. REV. 506, 506 (1997) (arguing that an “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”). The classic illustration of *chutzpa* is “the man who kills both his parents and then begs the sentencing court to have mercy on an orphan.” *Id.* at 506. Professor Friedman argues that at the
defendant’s murder trial of his parents, the only way to prevent this person from benefiting from his wrongful act of murdering his parents is to apply the forfeiture doctrine reflexively. *Id.* at 517.

Professor Friedman also argued in his Amicus Brief to the United States Supreme Court in *Crawford* that

> [i]f 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.


Reflexive application of the forfeiture doctrine under Professor Friedman’s formulation can be triggered by any act of homicide. We would limit the forfeiture doctrine to instances where the accused causes the unavailability by his or her wrongful and voluntary acts. Therefore, an act of homicide in the nature of involuntary murder, for example, would not trigger the application of the forfeiture doctrine.

*Meeks*, 227 Kan. at 614 (citing *Crawford*, 541 U.S. at 62).

*Id.* (citing *Reynolds*, 98 U.S. at 158);

*accord* *People v. Moore*, 117 P.3d 1, 5 (Co. Ct. App. 2004) (applying the equitable forfeiture doctrine reflexively to hold that a defendant must not “benefit from his or her wrongful prevention of future testimony from a witness, regardless whether that witness is the victim in the case”).

*Meeks*, 227 Kan. at 615;
accord People v. Bauder, 712 N.W.2d 506, 514 (Mich. Ct. App. 2005) (holding that the test for forfeiture is whether the out-of-court declarant is unavailable as a direct result of some wrongful voluntary act of the defendant regardless of intent).

177 403 F.3d 364 (6th Cir. 2005).

178 Id. at 368. The defendant and his wife Kathleen began to physically fight after she danced with a male friend at a party. Id. at 366. After the fight ended, she left with some family members to go to friend’s house to avoid going home that evening. Id. The defendant broke into the house, and when his wife refused to come with him he plunged a steak-knife into her chest. Id. at 367. The prosecution was allowed to use the testimony of investigating police officers who several months prior to the murder had responded to a domestic violence dispute between the defendant and his wife. Id. at 368.

179 Id. at 369.

180 Id. at 370.

181 Id.

182 Id.

183 Id.

184 Id.


186 Id. at 963.

187 Id. The defendant broke into the home of his ex-girlfriend and her fiancée, shot and killed them both, and kidnapped his and his ex-girlfriend’s daughter. Id. When the defendant, still with his daughter, was pulled over for a minor traffic offense, he drew and shot the officer as the officer was approaching the car. Id. After a 30-minute car chase, the defendant was stopped
by a roadblock and tire spikes. *Id.* When the police ordered him to exit the car, he shot his
daughter twice and then shot himself once in the chest. *Id.* The daughter was taken to a nearby
hospital and died shortly thereafter. *Id.*

188 *Id.*

189 *Id.*

190 *Id.* at 965 (citing United States v. Cromer, 389 F.3d 662, 674 (6th Cir. 2004)).

191 *Id.* at 966 (accepting, after an extensive discussion, a reflexive application of the
forfeiture doctrine).

192 *Id.*

193 *Id.* at 968. In the authors’ opinion, by adopting a reflexive approach to the forfeiture
doctrine, the court stopped short of imputing intent to commit the underlying crime to intent to
render the declarant unavailable.

194 *Id.*


196 *Id.* at 344.

197 *Id.* at 344-45 (citing 725 ILCS 5/115-10 (1998)). Prior to trial, on motion of the State,
the court held an availability hearing to determine whether the child-victim, M.M. was available
to testify at trial. *Id.* at 339. To reach a decision, the court ordered M.M. to be interviewed by a
clinical child psychologist. In the interview, M.M. indicated that she did not want to talk about
the abuse and expressed an unwillingness to testify at trial. *Id.* The psychologist testified that it
was her professional opinion that it would not be in M.M.’s best interests to force her to testify
because she would likely suffer psychological trauma. *Id.* at 340-41. After hearing this
testimony, the trial court concluded that M.M. was unavailable to testify and admitted her
hearsay statements into evidence. *Id.* at 341. The defendant was found guilty on all counts. *Id.* at 344.

198 *Id.* at 339. Joan, the child-victim’s mother, testified that her daughter’s babysitter came to her work and informed her that her daughter, M.M., needed to go to the hospital but did not tell her why. *Id.* On the way to the hospital, Joan asked her daughter what was wrong. *Id.* M.M. recounted an incident of sexual abuse by “Bob.” *Id.* Joan understood that M.M. was referring to Joan’s boyfriend. *Id.* Joan testified that the defendant babysat M.M. prior to Christmas 1998, but when Joan returned, M.M. was “acting peculiar.” *Id.* Joan suspected that the defendant or M.M.’s father had sexually abused the child. *Id.* She had confronted the defendant who denied doing anything to the child. *Id.* On arrival at the hospital, a specialist for the hospital’s child abuse team interviewed M.M regarding the incident. *Id.* In the interview, M.M. told her of sexual abuse by “Bob” and that Bob told her he “would be mad” if she told her mother of the incident. *Id.*

199 *Id.* at 344-45.

200 *Id.* at 348.

201 126 S. Ct. at 2266.

202 *Id.* at 349.

203 *Id.* at 350 (citing *Davis*, 126 S. Ct. at 2280).

204 *Id.*

205 *Id.* at 349.

206 *Id.* at 350.

207 *Id.* at 351.

208 *Id.* at 350.
See id. at 383 (Chief Justice Thomas responding to the plurality: “after all, impossible to deter those who do not act intentionally”).
Id.

Id.

Id.

Id. (emphasis in original).

Id.

Id.

Id.

Id. Flanagan, supra, note 65, 1209.


Id. at 272.

Id. at 273.


242 FED. R. EVID. 804 Advisory Committee’s Notes to the 1997 Amendment, 56 F.R.D. 183, 322, reprinted in, FEDERAL RULES OF EVIDENCE 198 (Thomson West, 2006) [Advisory Note].

Id.

Id.

Fed. R. Evid. 804(b)(6).

246 Advisory Note, supra note 242, id. (emphasis added).

247 Flanagan, supra note 65, 1213; see also United States v. Thompson, 286 F.3d 950, 962 (7th Cir. 2002) (holding that the forfeiture doctrine is an equitable principle and “the primary reasoning behind the rule is
obvious—to deter criminals from intimidating or ‘taking care of potential witnesses against them’


249 Flanagan, supra, note 65, 1213.

250 FRE 804(b)(6) (emphasis added).

251 405 F.3d 227 (4th Cir. 2005).

252 Id. at 240. A grand jury indicted defendant Gray on five counts of mail fraud and three counts of wire fraud. Id. at 230. Gray told her new friend, Wilson, that she has killed her former husband to escape his abuse. Id. at 231. Shortly after his death, Gray made a claim and received insurance benefits on a life insurance policy maintained by her late husband. Id. During her marriage to her late husband, the defendant had an affair with another man, Robert Gray. Id. The couple used the insurance proceeds to purchase a home, however, he left the home because he was afraid that the defendant was trying to kill him to collect on a life insurance policy that he had naming defendant as the beneficiary. Id. Shortly thereafter, Robert Gray was found dead, shot once in the chest and once in the neck. Id. at 231-32. Gray told Wilson that she also had to kill Goode, her cousin and boyfriend, because he helped her with Robert Gray’s murder and wanted a part of the insurance money that Gray received from his insurance policy in return for his silence. Id. at 232. At the close of the evidence at trial, a jury found Gray guilty on all counts and sentenced her to 40 years in prison. Id. at 230.

253 Id. at 241 (emphasis in original).

254 Id.

255 Id. at 242.

256 Id.
257 Gray, 405 F.3d at 242.

258 Dhinsa, 243 F.3d at 654 (citing Houlihan, 92 F.3d at 1279).


260 Id.

261 Crawford, 541 U.S. at 61

262 Bauder, 712 N.W.2d at 514.

263 Garcia-Meza, 403 F.3d at 370 (citing Crawford, 541 U.S. at 61).

264 Giles, 152 P.3d at 433.

265 Id. at 442.

266 Id. at 443.

267 Id. at 442 (citing Houlihan, 92 F.3d at 1280 and noting that despite a holding that intent, at least in part, was required, none of the cases held that intent was required under the Sixth Amendment equitable forfeiture framework).

268 Id.

269 Id.