PROVING FORFEITURE AND BOOTSTRAPPING TESTIMONY AFTER *CRAWFORD*

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INTRODUCTION

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] Unfortunately, very little debate accompanied the drafting of this amendment and there is "virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."[2] In *Crawford v. Washington*,[3] the Supreme Court recently laid down some clear markers for what they believe the Confrontation Clause requires.

In Part I of this Article, I review the evolution of the confrontation right from English decisions of the Seventeenth Century through the 2004 Supreme Court decision in *Crawford*. I then

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The most infamous of these prosecutions, and perhaps the most helpful for determining the scope and significance of the Confrontation Clause, was the treason trial of Sir Walter Raleigh. Raleigh was accused of, *inter alia*, plotting to assassinate James VI of Scotland (later James I of Great Britain) before he could assume the English throne.[9] Lord Cobham, the prosecution's chief witness against Raleigh, never testified at the trial.[10] Instead, officers reported Cobham's statements to the court.[11] Raleigh objected to this mode of offering evidence, stating "The Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ."[12] The evidence was received over Raleigh's objections, and the jury convicted Raleigh and sentenced him to death.[13]

Modern American sensibilities suggest that Raleigh's trial was unfair because he was not permitted to confront his accuser. But *why* this is problematic is a more nuanced question. There are at least two historical reasons for the creation of the confrontation right, and at least one more modern approach to why confrontation is beneficial. One view, which will be called the "evidentiary view," suggests that confrontation is synonymous with the right to cross-examine. Evidence, admitted without cross-examination, denies the defendant the opportunity to test the witness' credibility.[14] Dean Wigmore "believed that English political trials were unjust because the hearsay testimony was never tested by cross-examination and, thus, could not be considered reliable."[15] In this view, "confrontation is an evidentiary rule that functions solely to further the ascertainment of the truth."[16] Another historical perspective, which will be called the "procedural view," posits that confrontation is a procedural right which prevents the government from introducing (or fabricatingSMrevew[(Another histori8 r)5.9(

the power of the government over the accused because the Crown had used *ex parte* testimony as a political weapon.[18] Finally, there may be an importance to live testimony generally which transcends these approaches.[19]

The Supreme Court's recent jurisprudence in this area follows the same dichotomy. For nearly twenty-five years, the evidentiary view held sway under *Ohio v. Roberts*.[20] In *Roberts*, the defendant was convicted in part on the basis of testimony given at a prior hearing by a witness who did not appear at trial.[21] In keeping with the evidentiary view of the confrontation right, the Court upheld the conviction and articulated a Confrontation Clause analysis that presumed the purpose of the Clause was to prevent the introduction of unreliable testimony.[22]

In 2004, *Crawford v. Washington* overturned *Roberts* with regard to the application of the Confrontation Clause to "testimonial" hearsay.[23] In *Crawford*, a tape-recorded statement a witness gave to police was admitted into evidence, and the defendant was subsequently convicted of assault.[24] The Court traced the origins of the Confrontation Clause in both England and the American colonies, concluding that confrontation was more than a preference to ensure introduction of reliable testimony, but rather was a command to prevent the introduction of secret *ex parte* testimony.[25] Thus, *Crawford* signaled a shift in doctrine from the evidentiary view to the

18. Berger, *supra* note 8, at 577 ("confrontation emerged as a procedural package for diminishing the government's inquisitorial powers. . . ."); Counseller, *supra* note 8, at 9-10. It is interesting to note that Sir Walter Raleigh never requested cross-examination of his accuser; he simply wanted the testimony to be presented live in court. Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 545 (1994). This suggests that perhaps the prevention of fabricated testimony is the historical root of the clause.

19. *See generally* Raymond LaMagna, Note, *(Re)constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. CAL. L. REV. 1499 (2006).

20. 448 U.S. 56 (1980).

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procedural view of the Confrontation Clause.

Crawford both narrows and expands application of the Confrontation Clause. Post-*Crawford*, the right applies solely to

defendant's actions.[34] The Supreme Court first recognized forfeiture[35] by wrongdoing in the 1879 case *Reynolds v. United States*.[36] Reynolds petitioned the Court for a review of his conviction for bigamy.[37] He argued that the trial court admitted previous testimony of a witness (his second wife, Ms. Schofield) without affording him an opportunity to confront the witness.[38] Ms. Schofield previously testified against Mr. Reynolds under a different indictment for the same offense. After efforts to locate Ms. Schofield proved fruitless, the court determined that she was unavailable because Mr. Reynolds was concealing her or keeping her away from the trial.[39] The court held that, under those circumstances, "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. . . . [I]f he voluntarily keeps witnesses away, he cannot insist on his privilege."[40] Therefore, evidence from the witness supplied in some legal way could be received into evidence without running afoul of the Confrontation Clause.[41] Between *Reynolds* and *Crawford*, the Court only came close to considering forfeiture by wrongdoing a handful of times, but no case squarely presented an issue of forfeiture by wrongdoing under the Confrontation Clause, and thus, none provided a suitable vehicle for

34. Adam Sleeter, Note, *Injecting Fairness into the Doctrine of Forfeiture by Wrongdoing*, 83 WASH. U. L.Q. 1367, 1369 (2005). *See also* FED. R. EVID. 804(b)(6).

35. Professor Flanagan presents a well-researched argument that forfeiture by wrongdoing should properly be called waiver by wrongdoing. However, it does not appear that Professor Flanagan's view holds sway in most jurisdictions. James F. Flanagan, *Confrontation, Equity and the Misnamed Exception for "Forfeiture by Wrongdoing,"* 14 WM. & MARY BILL RTS. J. 1193 (2006).

36. 98 U.S. 145 (1878).

37. *Id.* at 146.

38. *Id.* at 158.

39. *Id.* at 159-60.

40. *Id.* at 158.

41. *Id.* The decision in *Reynolds* was premised in part on the 1666 House of Lords decision in *Lord Morley's Case*. In that case, the Lords resolved that:

> [I]n case oath should be made that any witness, who had been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination might be read; but whether he was detained by means or procurement of the prisoner was a matter of fact, of which we were not the judges, but their lordships.

Id. (quoting *Lord Morley's Case*, 6 St. Tr., 770 (1666)).

any lengthy analysis of this issue.[42]

As a result, the lower courts were left with the task of drawing the bounds of forfeiture by wrongdoing. In *United States v. Carlson*, the Eighth Circuit affirmed the district court's admission of a witness's grand jury testimony after determining that the defendant procured the witness' absence.[43] In *United States v. Mastrangelo*, the only evidence linking the defendant to a conspiracy to possess with intent to distribute marijuana was evidence of his purchase of four trucks, which were found to contain drugs when seized by narcotics officials.[44] The only witness to the truck purchase testified before the grand jury that he sold the defendant the trucks under suspicious circumstances.[45] The witness also authenticated a recording of the defendant threatening him if the witness identified him to the grand jury.[46]

regard to the reliability of the statements or whether the declarant could reasonably believe they would be used as evidence.[52]

Generally speaking, there are two constituent elements necessary to find forfeiture by wrongdoing: 1) the unavailability of the witness, and 2) the defendant's responsibility for the witness' absence.[53] Courts will deem a witness to be unavailable if the witness is dead,[54] refuses to testify[55] (although sometimes only under a grant of immunity or contempt order),[56] forgets,[57] is not or cannot be properly served,[58] or cannot be located despite good faith efforts of the prosecution.[59] Other examples of unavailability macT1,44 610.5601 Tm0.004 Tc0 Tw(

804(b)(6) uses the language "engaged or acquiesced," but the rule (even assuming continuing applicability to confrontation post-*Crawford*) only goes to the level of intent—it says nothing about whether there is a requirement of purpose as well.[62] Despite the lack of clarity surrounding the substantive rules for determining forfeiture, there are, at a minimum, some key elements capable of determination. Rather than attempting to refine these further through the scant case law available, the balance of this Article will attempt to illuminate a few possible approaches to the procedural rules that might apply to a forfeiture by wrongdoing inquiry.

C. New Approaches for New Problems

One commentator has noted that "[a]s prosecutors rely increasingly on the forfeiture doctrine in the aftermath of *Crawford*, important questions remain unanswered. What standard of proof should apply? Should all categories of statements by the victim be admissible against the wrongdoer?"[63] This Article attempts to answer these two important questions by demonstrating that they are best answered together.

The bootstrapping question is best answered after determining the appropriate standard of review. Both answers are necessary to determine *how much* confrontation a criminal defendant is entitled under the Sixth Amendment. Therefore, this Article proposes a synthesis of the questions "What standard of proof applies to forfeiture proceedings?" and "May the challenged statement itself be used to demonstrate forfeiture?" By unifying the inquiry, it becomes possible to articulate a broad general standard along two axes. This standard captures the force of the Confrontation Clause more fully and implements it in a manner more jurisprudentially sound than if the inquiries and subsequent case law were to develop independently. The low preponderance standard with bootstrapping likely does not fulfill the accuracy-by-live-testimony aspect of the Confrontation Clause, and a clear and convincing standard without bootstrapping is, as a matter of policy, unduly burdensome on prosecution.[64] Clear and

intent to prevent testimony is required, there is an intentional relinquishment of the confrontation right—a waiver rather than forfeiture. *Id.* at 1198.

62. *See* FED. R. EVID. 804(b)(6).

63. Tom Lininger, *Yes, Virginia, There is a Confrontation Clause*, 71 BROOK. L. REV. 401, 407 (2005).

64. Except, of course, in cases where reflexive forfeiture is applied. In those cases, bootstrapping is not necessary to give the prosecution a chance of meeting the clear and

that the *Mastrangelo* court referred to as "the usual burden of proof."[80] However, after *Crawford*, it is clear that the burden of proof used for evidentiary determinations under the rules is not binding on equitable exceptions to constitutional rights.[81]

Finally, some courts analogized forfeiture by wrongdoing to the admission of co-conspirator statements.[82] This argument also does not appear to survive *Crawford* because it assumes that admission of co-conspirator statements that are admissible under the evidence rules would never violate the Confrontation Clause. This is plainly incorrect.

For example, suppose co-conspirator X makes a pre-trial statement that is clearly testimonial—a statement at a police station perhaps—which implicates Y. Y does not have an opportunity to cross examine X on the statement and X then declines to testify at the trial of Y. There is no evidence whatsoever of any wrongdoing on the part of the defendant Y and X asserts that his religious beliefs prohibit him from testifying against Y at trial. The prosecution wants to introduce the prior statement of the co-conspirator for the truth of what it asserts. After *Crawford*, it seems this would present a serious confrontation problem, as the witness' unavailability is clearly not the result of any wrongdoing on the part of Y. While this example may be extreme, it serves to illustrate the illogic of identifying an appropriate standard of review *solely* by analogy to co-conspirator statements post-*Crawford*. Because co-conspirator statements are not by their nature consistent with the Confrontation Clause, the analogy carries little weight, and less still when it is the only or the best reason for selecting a standard of proof.

The *Mastrangelo* and *White* courts have made additional arguments defending the election of the preponderance standard, rather than rote application of it. Few of these arguments carry much weight. First, the *White* court notes that "[a]lthough the main purpose

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of the confrontation clause is to ensure the reliability of evidence, it does not follow that every ruling on every related issue. . . must rest on clear and convincing evidence."[83] This is true, but it is equally true that it also does not follow that every ruling on every related issue should rest on a preponderance of the evidence standard. This observation does not get us any closer to determining *which* standard to apply. Secondly, the *Mastrangelo* court noted that claims of waiver are not "unusually subject to deception or disfavored by the law."[84] This may have been true before *Crawford,* but because forfeiture by misconduct now clearly involves a constitutional right with independent force, it would seem that the weight of authority would disfavor a penalty of constitutional magnitude.[85]

Finally, both *Mastrangelo* and *White* suggest that there is something unseemly about requiring wrongdoing to be proven by anything higher than the preponderance of the evidence. The *Mastrangelo* court suggested that "there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself."[86] The *White* court was concerned that "[t]he forfeiture principle, as distinct from the Confrontation Clause, is designed to prevent a defendant from thwarting the normal operation of the criminal justice system."[87] Essentially, the concern is that the clear and convincing standard is too high for prosecutors to meet, and there is little value in a rule that cannot be enforced. While this is a valuable conclusion in its own right, two questions remain. Will such a standard *actually* invite defendants to make witnesses unavailable? Clearly this argument carries no weight at all in cases where forfeiture is applied reflexively—the witness is already unavailable as a result of the wrongful act itself. In other cases, is the incentive argument sufficient to outweigh the other concerns countenancing against the preponderance standard? It appears unlikely, as there are strong

83. *See White*

faces the defendant that it is more difficult to lie, and thus, confrontation helps to assure the accuracy and integrity of the

to society of the issue to be resolved."[99] The Supreme Court has noted that criminal trials are at the far end of the spectrum because determinations of guilt are "of transcendent value" to the defendant.[100] Although the question of forfeiture is not a determination of guilt itself, it will likely have a significant role in that determination. A standard of review higher than the preponderance of the evidence may be necessary to address society's determination of the gravity of the interest at stake by placing a greater risk of an erroneous evidentiary decision on the state.[101]

2. Personal Rights Considerations

In addition to considerations regarding the trial process, a clear and convincing standard of review would better effectuate the defendant's personal rights. Confrontation is a constitutional right and waiver or forfeiture of constitutional rights is generally disfavored.[102] Therefore, an appropriate standard should protect constitutional rights and resolve close cases in the defendant's favor.[103] Some commentators suggest that a higher standard of review is a necessary corollary to the expansion of the forfeiture doctrine post-*Crawford*.[104]

3. Stare Decisis Considerations

Some commentators also support the contention that *stare decisis* requires lower courts to apply a clear and convincing standard of review in the absence of contrary instruction from the Supreme Court. "Where the accuracy of evidence is important, the Supreme Court has conditioned admissibility on compliance with the clear and convincing standard."[105] Because the Court has also held that

99. *Geraci*, 649 N.E.2d at 821.

100. Speiser v. Randall, 357 U.S. 513, 526 (1958).

101. *Geraci*, 649 N.E.2d at 821. *See also* In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring); Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 121 (1972) (noting "the function of the Confrontation Clause and the constitutionally required burden of proof was to place the risk of the absence of reliable evidence of guilt or innocence upon the state rather than the defendant").

102. *See supra* note 87 and accompanying text.

103. United States v. Thevis, 665 F.2d 616, 630-31 (1982). *See also* Alicia Sykora, *Forfeiture by Misconduct: Proposed Federal Rule of Evidence 804(b)(6)*, 75 OR. L. REV. 855, 884-85 (1996) (noting the confrontation right secures fundamental personal rights to the defendant).

104. *See* Markham, *supra* note 62, at 18.

105. United States v. Houlihan, 887 F. Supp. 352, 360 (1995) (citing United States v.

serve."[113] This holding of *Lego* is inapplicable to the confrontation right. First, the clear and convincing standard was not before the Court in *Lego*. Second, the "independent values"[114] inherent in the confrontation right may be different from those underlying Due Process, which the Court determined did not warrant protection by the reasonable doubt standard.[115]

Furthermore, the Court has generally required clear and convincing evidence where the individual interests at stake are both "particularly important" and "more substantial than mere loss of money."[116] The confrontation right satisfies both of these requirements.[117] Other instances of courts employing the clear and convincing standard include deportation proceedings, denaturalization proceedings, civil commitment proceedings, termination of parental rights, and termination of life-sustaining care.[118] This level of proof, or an even higher one, has also traditionally been employed in cases involving fraud, lost wills, oral contracts to make bequests, and similar disputes.[119]

Given the foregoing considerations, and particularly placing older decisions in light of *Crawford*, it appears as though there are relatively few good reasons for courts to apply the "preponderance of the evidence standard" to questions of forfeiture by wrongdoing. That is not to say there are none, but the weight of the reasons supporting the "clear and convincing standard" appear to be significantly heavier.

Crawford was a seminal decision, and it will likely take significant time for courts to come to the realization that they are free to decide issues such as this one anew. But even assuming that courts do reach out to address the issue fully, the question remains: how important is the standard of proof for forfeiture going to be in the total calculus of guilt or innocence? Professor Friedman said,, "I don't know if that is going to make much of a difference."[120] Judges may simply recite "clear and convincing" when they believe the defendant

113. *Lego*, 404 U.S. at 487.

114. *Id*. at 488.

115. *Id*. at 486-487.

116. Santosky v. Kramer, 455 U.S. 745, 756 (1982) (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)).

117. *See* People v. Geraci, 649 N.E.2d 817, 821 (N.Y. 1995) (noting the rights of criminal defendants as "transcendent").

118. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990).

119. *Id.* at 283.

120. Friedman, *Forfeiture of the Confrontation Right*, *supra* note 90, at 5.

caused the witness's unavailability, whether proven by clear and convincing evidence or not. However, selecting the standard carefully probably does have the potential to make a significant difference in some cases. First, it will encourage judges to think harder about the issue. Second, it may make a real difference on the margins, especially where the challenged statement itself is an important part of the case for forfeiture—if bootstrapping is permitted.

III. BOOTSTRAPPING TESTIMONY

Bootstrapping is the term applied to a piece of evidence that "lift[s] itself by its own bootstraps to the level of competent evidence."[121] In the context of forfeiture by wrongdoing, bootstrapping occurs when the statement the defense seeks to exclude on confrontation right grounds is admitted based on information contained in the statement itself.[122] In other words, the contested statement provides a basis for its own admissibility.[123]

A. Supreme Court Precedent

The Supreme Court spoke most recently on the issue of bootstrapping in the conspiracy case *Bourjaily v. United States*.[124] The defendant objected to the introduction of a phone conversation which identified a "friend" (the defendant) who was to appear in a parking lot to complete a drug transaction.[125] The district court found that, "considering the events in the parking lot and [the informant's] statements over the telephone, the Government had established that . . . a conspiracy . . . existed, and that [the informant's] statements . . . had been made8rlvr othaniece o [the conspirrm

a finding of forfeiture. In one post-*Crawford* case, the Supreme Court of Kansas, relying on an amicus brief submitted by law professors, held that bootstrapping did not pose a genuine problem, but declined to specify a reason or to elaborate on whether bootstrapping was permissible per se, or only in the presence of corroborating evidence.[155] Similarly, the Eighth Circuit has said that the necessity of independent evidence is "a matter that we are inclined to doubt" without significant elaboration.[156]

The extant case law is not particularly helpful in determining a direction for bootstrapping after *Crawford*. It does not appear that any case suggests bootstrapping is an inherent problem, but no case has squarely confronted the issue after *Crawford*. The state cases, which tend to involve co-conspirator statements, generally focus on state evidence codes, which are now practically irrelevant for purposes of determining the requirements of the Sixth Amendment. This likely affects both their results and their claim to persuasive authority over forfeiture cases, given the prima facie standard of proof employed by most courts in making the conspiracy determination. The cases suggesting bootstrapping is not a problem regardless of independent evidence have skirted the issue without significant analysis, and fail to even suggest a direction.

C. Academic Opinions

Bootstrapping has fared better in the scholarly debate. It has been said that "[*Bourjaily*] is not troublesome" because "[t]he evidentiary predicate is tried separately from the substantive question, and so there is no incoherence in allowing the judge, in determining the predicate evidentiary question, to consider the very statement the admissibility of which is in question."[157] Forfeiture may not be readily distinguishable from other areas of evidence where the judge is allowed to consider evidence that would not be admissible before the jury.[158] This argument can still hold even after *Crawford*, because under Rule 104(a), "the judge can take anything into account . . . in determining a threshold matter."[159]

155. State v. Meeks, 88 P.3d 789, 794 (Kan. 2004).

156. United States v. Emery, 186 F.3d 921, 927 (8th Cir. 1999).

157. Friedman, *Confrontation and the Definition of Chutzpa*, *supra* note 62, at 523.

158. *Id.* at 523-24

159. *Id.* Professor Friedman continues to adhere to this position noting in a recent speech "why not?" Friedman, *Forfeiture of the Confrontation Right*, *supra* note 90, at 5.

more than the miniscule amount of evidence suggested by some scholars.[162] Second, tying off the inquiry at these ends, as opposed to unavailability, for example, allows for greater predictability. No one wants to guess at what the standard of review is going to be, or what evidence will be considered at a forfeiture hearing.

Third, setting a relatively high burden lessens the need to enforce the guarantee of the Confrontation Clause by a narrow interpretation of unavailability.[163] While the Confrontation Clause clearly emphasizes the importance of face-to-face confrontation, it is less troubling to allow application of forfeiture in a broad range of situations when the relatively high burden necessary to establish forfeiture will not permit emasculation of the right. This is particularly important because the Supreme Court has previously indicated its potential willingness to construe unavailability broadly when dealing with child victims of sexual assault.[164] Whether a broad reading of unavailability should extend to domestic violence is a much more difficult question.

B. Results Under the Preponderance of the Evidence Standard

The preponderance of the evidence standard, with or without bootstrapping, should not be used. However, if courts insist on retaining the preponderance standard, they should not be permitted to consider bootstrapped evidence. With bootstrapping prohibited, the weight of authority would be against the two standards simultaneously as both the preponderance standard and the prohibition on bootstrapping are not well-supported. With bootstrapping permitted, the resulting combined standard would be so low as to call the effectiveness of the Confrontation Clause into question. The requirement of demonstrating forfeiture would be in danger of becoming a mere formality whenever a witness became unavailable.

162. *See* Duane, *supra* note 140, at 353.

163. *Cf.* Deahl, *supra* note 4, at 618.

164. Maryland v. Craig, 497 U.S. 836, 855 (1990). The Supreme Court indicated that it might look favorably on admitting testimony of these witnesses without face-to-face confrontation if the legislature expressed an interest in their not testifying. *Id.* It is unclear how much of this statement survives *Crawford*, but it does not seem unlikely that the Court would arrive at the same conclusion through other routes.

C. Anticipating Exceptions

The clear and convincing standard appears to be the most appropriate standard of review for determination of forfeiture by wrongdoing. Whether bootstrapping should be permitted is a closer question, but in light of the appropriate standard of review, as well as other considerations, it appears that it should be allowed. The resulting standard should be adequate in most cases, but is not without some lingering questions as to its effectiveness. Foremost among these are the twin concerns of many in academia and in practice: the confrontation right as applied to child sexual abuse and domestic violence.[165] Without hedging on the importance of the confrontation right, or the necessity of face-to-face testimony when possible, these issues—in particular child sexual abuse—can and should be distinguished in a manner consistent with the framework laid out above.

Before fine substantive distinctions such as these can properly be drawn, the framework in which courts are operating must be clearly delineated. With luck, the Court will not grant *certiorari* in a domestic violence or child sexual abuse case until the basic structure of the post-*Crawford* Confrontation Clause is firmly in place. Otherwise, the Court runs the risk of creating rules based on what would more aptly be considered exceptions to the rule.

CONCLUSION