

## THE UNAVAILABILITY REQUIREMENT

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The Sixth Amendment provides that a criminal defendant is entitled to “be confronted by the witnesses against him.”<sup>1</sup> But this right is not absolute. Forfeiture by wrongdoing extinguishes a defendant’s Sixth Amendment right to confront witnesses if the defendant wrongfully causes or is complicit in the unavailability of a witness. But when the Supreme Court reiterated its approval of this doctrine in *Crawford v. Washington*,<sup>2</sup> it left few clues suggesting how the doctrine should be applied. Instead, defining the doctrine’s contours was left to the lower courts. In determining whether the witness is “unavailable” to testify, these courts have borrowed the “good faith” test traditionally used to establish whether a witness is unavailable for purposes of admitting prior testimony.<sup>3</sup> In this Essay, I propose a more nuanced approach to unavailability. In Part I, I review the two situations in which testimonial statements of an unavailable witness may be admitted at trial notwithstanding the Confrontation Clause: admission of prior testimony and forfeiture by wrongdoing.<sup>4</sup> I then suggest, in Part II, that forfeiture by wrongdoing serves, in part, to remedy the wrongdoing of defendants who misbehave, whereas admission of prior testimony does not serve a remedial function. As a result, I recommend in Part III that the standard for proving unavailability should not only be different in the two situations, but that it should be significantly lower in the context of forfeiture by wrongdoing. I conclude that once the proper standard is applied, the

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> See *Crawford v. Washington*, 541 U.S. 36 (2004) (link). The Court noted forfeiture by wrongdoing extinguishes the confrontation right on “essentially equitable grounds” without expanding further. *Id.* at 62.

<sup>3</sup> *Barber v. Page*, 390 U.S. 719 (1968) (link), holds that a witness is not unavailable, such that prior sworn testimony may be admitted, unless the prosecution has made a good faith attempt to secure the presence of the witness. For recent forfeiture cases explicitly borrowing the *Barber* test, or assuming it applies, see, for example, *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007), and *State v. Mizenko*, 127 P.3d 458, 502 (Mont. 2006) (Nelson, J., dissenting). Jeffrey L. Fisher, lead counsel for the petitioner in *Crawford*, notes in an outline of post-*Crawford* cases that *Crawford* does not appear to have changed the unavailability inquiry, only increased its importance. *Crawford v. Washington: Reframing the Right to Confrontation* 10, [http://www.dwt.com/pdfs/01-05\\_CrawfordOutline.pdf](http://www.dwt.com/pdfs/01-05_CrawfordOutline.pdf) (link) (last visited February 19, 2008).

<sup>4</sup> The confrontation right only applies to statements that are “testimonial.” *Crawford*, 541 U.S. at 51–52.

concept of unavailability loses much of its utility. Courts would do better to focus instead on relevant wrongdoing to determine when forfeiture occurs.

### I. UNAVAILABILITY AS A CONSTITUTIONAL MATTER

Two situations prompt Sixth Amendment concern with the unavailability of prosecution witnesses: (1) admission of prior testimony and (2) forfeiture by wrongdoing. Admission of prior testimony may include, for example, deposition testimony or testimony from a preliminary hearing. At common law, only death and extreme illness were sufficient to excuse live, in-court testimony of a witness.<sup>5</sup> A witness is obviously unavailable in death, and physical incapacity is a close second.

*Barber v. Page*<sup>6</sup> is the cornerstone of modern unavailability jurisprudence. In that case, the witness was incarcerated in another state. The prosecution never requested the attendance of the witness, but instead of requiring live testimony, the trial court admitted prior testimony of the witness from a preliminary hearing. The Supreme Court held that because the state did not make a good faith effort to secure the witness's presence, the witness was not unavailable. The introduction of the witness's prior testimony therefore violated the Confrontation Clause.

*Barber's* progeny extended the good faith requirement to numerous other situations. Refusal to testify, loss of memory, failed service of process, and inability to locate a witness all have been held valid reasons to admit prior confronted and cross-examined testimony.<sup>7</sup> The reason is obvious: in all of these situations, the attempt to secure the witness would be or had already proved futile, and requiring a futile act would be nonsensical.<sup>8</sup> Good faith, as far as admission of prior testimony is concerned, simply requires an attempt to procure the witness, and then only when the result of the attempt is not already a forgone conclusion.

The *Barber* rule allows for a second-best solution in those instances where the foremost purposes of the right to confrontation—presentation of testimony in the presence of the accused and cross-examination—have been largely satisfied.<sup>9</sup> Good faith efforts ensure that when possible the jury is able to observe the demeanor of the witness as she confronts the defendant.

<sup>5</sup> Raymond LaMagna, *(Re)Constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. CAL. L. REV. 1499, 1550 (2006).

<sup>6</sup> 390 U.S. 719 (1968).

<sup>7</sup> Aaron R. Petty, *Proving Forfeiture and Bootstrapping Testimony After Crawford*, 43 WILLAMETTE L. REV. 593, 600 (2007).

<sup>8</sup> *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (link) (“The law does not require the doing of a futile act.”); *see also Cary v. Curtis* 44 U.S. 236, 246 (1845) (link) (noting that the law never requires “a vain act”).

<sup>9</sup> *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990) (link); *see also* Matthew J. Tokson, *Virtual Confrontation: Is Videoconference Testimony By An Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1587 (2007) (link) (suggesting four distinct interests).

This may influence the jury's judgment of the witness's credibility and such observations promote accuracy.<sup>10</sup> But if confrontation cannot be had live before the jury, the *Barber* rule permits probative evidence to be admitted and considered without compromising the defendant's right to confront and cross-examine his accuser at some point during the proceedings. The absence of such probative evidence might otherwise deleteriously influence the jury's accuracy.

Unavailability of a witness is also a constitutional matter when the prosecution seeks to admit prior statements under the doctrine of forfeiture by wrongdoing. If the court determines that a witness is unavailable as a result of the defendant's own misconduct (or acquiescence in the misconduct of another), the court may admit the witness's prior statements without confrontation, cross-examination, or oath. But how much effort to procure witnesses should be required in this situation? If the purpose of forfeiture by wrongdoing is purely truth-seeking, as is the *Barber* rule, then the standard for unavailability in both contexts should be identical. That is, forfeiture should require good faith efforts as well. But if forfeiture by wrongdoing serves purposes other than or in addition to the admission of probative evidence, a different standard of unavailability may be more appropriate.

## II. DECONSTRUCTING FORFEITURE BY WRONGDOING

Like admission of prior testimony, admission of probative evidence via forfeiture by wrongdoing serves a truth-seeking function. The Supreme Court recently couched this interest in the language of process considerations:

[W]hen 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.<sup>11</sup>

Forfeiture, therefore, aims at least in part to improve the accuracy of criminal trials by admitting probative evidence in place of testimony that the jury would have heard but for the wrongful act of the defendant.

But it is the misconduct of the defendant, not the accuracy of the trial process, that is the most frequently invoked justification for the existence of the forfeiture doctrine. The misconduct rationale tends to be phrased in two ways. One construction takes the position that no one should be permitted

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<sup>10</sup> *Roberts*, 448 U.S. at 63–64 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) and *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)); *California v. Green*, 399 U.S. 149, 157–58 (1970) (link); *see also Barber v. Page*, 390 U.S. 719, 725 (1968); *Petty*, *supra* note 7 at 607–08.

<sup>11</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) (link) (emphasis in original); *see also Vasquez v. People*, 173 P.3d 1099, 1103–05 (Colo. 2007).

to take advantage of his own wrong,<sup>12</sup> and the Supreme Court's earliest pronouncement on the issue in *Reynolds v. United States* supports this position.<sup>13</sup> *Reynolds* also suggests a second, estoppel-based construction: a defendant cannot complain about the loss of a right when that loss is the result of his own misconduct.<sup>14</sup> But under either formulation, the distinguishing elements of forfeiture are the wrongdoing itself and the court's response to it (whether to ensure the defendant does not profit by his wrongful action or to turn a deaf ear to the defendant's complaints).

Forfeiture, therefore, has at least two purposes. Its initial objective is to effectuate some notion of corrective justice by admitting testimony as a remedy to the defendant's wrongdoing. This is not an interest in derogation of the truth-seeking function, but rather a preliminary inquiry aimed at determining what the court must do to effectuate that function. The remedy applied—admission of prior statements—will always serve a truth-seeking purpose as well. But whatever the extent of forfeiture's corrective function might be, because forfeiture is concerned with wrongfulness, whereas admission of prior testimony is not, there is room to consider whether application of the same standard for unavailability makes sense.

### III. THE (DYS)FUNCTION OF UNAVAILABILITY

Two considerations suggest that a standard less demanding than “good faith” should govern unavailability in the context of forfeiture. First, courts require unavailability to admit prior testimony because if the witness is available there is no basis for its introduction. Given that the witness was available to testify once, without a showing of unavailability, there is no reason to suspect why the witness could not be called to testify again—this time in front of the jury. In the forfeiture context, however, there generally is no prior testimony, only prior (usually unsworn) statements. Because the declarant has never testified, there is no reason to presume that she is now, or has ever been, available.

A second reason for a lower standard of unavailability concerns the relative burden to establish it. By requiring the prosecution in a forfeiture

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<sup>12</sup> See, e.g., *United States v. Johnson*, 495 F.3d 951, 972 (8th Cir. 2007); *Vasquez*, 173 P.3d at 1103; *People v. Stechly*, 870 N.E.2d 333, 349 (Ill. 2007); *State v. Romero*, 156 P.3d 694, 701 (N.M. 2007); *People v. Giles*, 152 P.3d 433, 442–43, 848 (Cal. 2007), cert. granted, 128 S. Ct. 976 (2008); *Comm. v. Edwards*, 830 N.E.2d 158, 167 (Mass. 2005).

<sup>13</sup> *Reynolds v. United States*, 98 U.S. 145, 159 (1878) (link) (“The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.”).

<sup>14</sup> *Id.* at 158 (“[I]f a witness is absent by his own wrongful procurement, [the defendant] cannot complain if competent evidence is admitted to supply the place of that which he has kept away.”); see also *State v. Jensen*, 727 N.W.2d 518, 529–30 (Wis. 2007); Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 517–18 (1997) (“[T]he accused should not be heard to complain about the consequences of his own conduct. Thus, the accused ought not be able to cause exclusion of the secondary evidence on the ground that he has been unable to confront and examine the declarant when his own conduct accounts for that inability.”) (emphasis in original).

case to prove unavailability to the same extent as it must when seeking to admit prior testimony *and* requiring him to prove the fact of the defendant's wrongdoing, the standard for forfeiture by wrongdoing is higher than that for admission of prior testimony. This seems anomalous. The prosecution's (and perhaps the court's) interest in admitting statements in the forfeiture context is stronger because of the defendant's wrongfulness, yet it is more difficult to admit them.<sup>15</sup> A lower standard of unavailability would serve the additional interests militating in favor of admission.

But how low should the standard be? Forfeiture, as a general matter, precludes a party from asserting a right when the party has done something inconsistent with maintaining that right, not just when it has succeeded in its objective.<sup>16</sup> Any act by the defendant that makes testifying in court more burdensome on a particular witness than it would otherwise be is inconsistent with maintaining the right to confronted by that witness. The degree of that difficulty—a measure of the extent of the defendant's wrongdoing—is entirely irrelevant. The bravery of the witness and the ineptitude of the defendant in procuring the witness's silence say nothing about the wrongfulness of the defendant's conduct.

Could it be that forfeiture does not require unavailability at all? Such a standard would certainly be a boon to victims of domestic violence and child sexual abuse—two recurrent areas of concern post-*Crawford*.<sup>17</sup> To reach this conclusion, we would have to determine that unavailability is not a constitutionally required element of forfeiture, and that it is not worth retaining in the forfeiture analysis.

The first question is easily answered. As a general matter unavailability requirements simply effectuate the law's preference for live testimony.<sup>18</sup> And live testimony itself is obviously not a *per se* constitutional requirement, otherwise prior testimony would never be allowed.

<sup>15</sup> Although the defendant has a stronger interest in keeping out statements that have not been given under oath or subjected to confrontation and cross-examination, if the prosecution proves wrongfulness, this consideration dissolves. As explained below, relevant wrongdoing alone is sufficient to trigger forfeiture. Once forfeited, the defendant has no legitimate interest in keeping prior statements out. Therefore, it is only necessary to consider the relative burdens on the prosecution of proving unavailability to evaluate the standards.

<sup>16</sup> Joshua Deahl, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 MICH. L. REV. 599, 600 (2005) (link); see also James F. Flanagan, *Confrontation, Equity and the Mismixed Exception for "Forfeiture" by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1202 (2006); Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214 (1977); BLACK'S LAW DICTIONARY 667 (8th ed. 2004) ("The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.")

<sup>17</sup> Most commentary on *Crawford* falls into this category. See, e.g., Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005) (link); Robert P. Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411 (2005) (link).

<sup>18</sup> See *White v. Illinois*, 502 U.S. 346, 356 (1992) (link); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1026 n.76 (1998).

Whether unavailability is a jurisprudentially sound inquiry is a more difficult issue, but there is at least one reason why unavailability should be retained in the forfeiture analysis, albeit at a lower standard. The unavailability inquiry serves to distinguish those wrongful acts sufficiently related to the proceedings to warrant the attention of the court (i.e., those that result in forfeiture) from those that are not. For example, under the current regime, if the witness refuses to testify because the defendant has threatened his family, we say the witness is unavailable and that because the unavailability results from the defendant's wrongdoing, the defendant has forfeited confrontation.

But a defendant may commit wrongful acts sufficiently unrelated to the proceedings or to the individual witness that do not impact the witness's ability to testify. In these instances, we say the witness is available, and as a result, there has been no forfeiture. Unavailability thus serves to distinguish relevant wrongdoing, for which defendants forfeit confrontation, from other, irrelevant wrongdoing. It is this function of unavailability, and this function only, that should be retained in the forfeiture analysis. Limited to this essential role, the concept of unavailability and even the term itself lose their utility. Given what is left of unavailability, it would perhaps be more useful to speak of "relevant wrongdoing" as forfeiture's sole criterion.

#### CONCLUSION

Professor Flanagan has noted that "[t]he term forfeiture connotes an automatic and unintentional loss of a right upon the happening of a specified condition."<sup>19</sup> The question now is what constitutes that condition. Rather than focusing on whether a particular witness is unavailable, courts should inquire only whether the defendant engaged or acquiesced in wrongful conduct, the natural result of which might reasonably inhibit the witness's testimony. This determination of relevant wrongdoing should be all that is needed to establish whether the defendant has forfeited his right to confrontation.

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<sup>19</sup> James F. Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant's Intent to Intimidate the Witness*, 15 J.L. & POL'Y 863, 867 (2007) (link).