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. Namely, "[t]he Confrontation Clause bars the admission of out-of-court testimonial statements unless the defendant had a prior opportunity to cross-examine the witness."[4] However, *Crawford* also left many significant questions unanswered,[5] including the standard of proof necessary to establish forfeiture of the confrontation right by wrongdoing and the appropriateness of bootstrapping testimony in making a determination of forfeiture.

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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1. U.S. CONST., amend. VI.

2. White v. Illinois, 502 U.S. 346, 359 (1992) (Thomas, J., concurring). *See also* California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) ("History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause.").

3. 541 U.S. 36 (2004).

4. Joshua Deahl, Note, *Expanding Forfeiture Without Sacrificing Confrontation After* Crawford, 104 MICH. L. REV. 599, 600 (2005).

5. *See, e.g.*, *Crawford*, 541 U.S. at 51-52 (failing to define "testimonial").

introduce the chief exception to the confrontation right: forfeiture by wrongdoing. In Part II, I review the standard of proof in forfeiture determinations as it is currently applied in most jurisdictions. After examining the reasons for this rule, I discuss the rationale for the minority rule, and conclude both generally and especially in light of *Crawford*, that the minority rule is correct. In Part III, I review the phenomenon of bootstrapping testimony in determining forfeiture, including the Supreme Court's opinion in *Bourjaily v. United States.*[6] I will then recount some recent decisions and the underlying motivations that have led some state courts to come to different conclusions. After examining academic views on bootstrapping, I will attempt to reconcile the authorities and explicate the main concerns with bootstrapping and what can and should be done to allay those concerns. In Part IV, I consider the options available for both standards of proof and bootstrapping along side one another. I conclude that, ideally, under the extant governing law, a clear and convincing standard should be applied and bootstrapping should be allowed. Finally, I offer a peremptory response to those who might view the results of my analysis as a threat to victims of domestic violence or sexual abuse.

I. THE CONFRONTATION RIGHT

Before answers to the questions created in the wake of *Crawford* can be formulated—indeed before the questions themselves can be formed—it is necessary to review the reasons the Confrontation Clause came into existence and how it has evolved in American jurisprudence.

A. "Call My Accuser Before My Face"[7]

Despite the obscurity of the framers' conception of confrontation, it is clear that the origins of the clause are in English criminal proceedings of the Sixteenth and Seventeenth Centuries.[8]

6. 483 U.S. 171 (1987).

7. *Crawford*, 541 U.S. at 44 (quoting Trial of Sir Walter Raleigh, 2 HOW. ST. TR. 1, 15-16 (2000)).

8. *Id.*; White v. Illinois, 502 U.S. 346, 359 (1992); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 570-71 (1992); W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After Crawford v. Washington*: *Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 7 (2005); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022-24 (1998).

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 fabricating) *ex parte* testimonial evidence.[17] This concern may have prompted reforms in the English judicial system. These reforms were aimed at

9. *Trial of Sir Walter Raleigh*, 2 HOW. ST. TR. at 25.

10. *Crawford*, 541 U.S. at 44; Counseller & Rickett, *supra* note 8, at 7.

11. Counseller, *supra* note 8, at 7.

12. *See Crawford*, 541 U.S. at 44 (quoting *Trial of Sir Walter Raleigh*, 2 HOW. ST. TR. at 15-16).

13. *Id.*

14. Counseller, *supra* note 8, at 8.

15. *Id.*

16. Berger, *supra* note 8, at 572.

17. Counseller, *supra* note 8, at 8-9.

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).

21. *Id.* at 59-60.

22. *Id.* at 66. "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*

23. Crawford v. Washington, 541 U.S. 36, 68 (2004).

24. *Id.* at 40-41.

25. *See* Counseller, *supra* note 8, at 14-15.

procedural view of the Confrontation Clause.

Crawford both narrows and expands application of the Confrontation Clause. Post-*Crawford*, the right applies solely to "testimonial statements," rather than to hearsay statements generally.[26] However, where the Clause does apply, there must be an opportunity to cross-examine in order for the evidence to be admissible, and no substitute for cross-examination will suffice.[27]

Despite *Crawford*'s numerous renunciations of exceptions to the confrontation right, neither *Crawford* nor any other decision of the Supreme Court has ever held the right to be absolute. *Crawford* overturned only those exceptions which purported to address the reliability of *testimonial* out-of-court statements.[28] Equitable exceptions remain undisturbed,[29] and the Confrontation Clause may be satisfied in certain circumstances where either the witness or defendant is unable to be present in the courtroom. For example, a defendant who is so disruptive that the trial cannot continue in his presence may be deemed to have waived his right to confront witnesses against him.[30] Similarly, if a witness is unavailable at trial as a result of the actions of the defendant, the defendant will not be permitted to complain of the witness' absence, and prior testimony of the unavailable witness may be admitted despite the defendant's inability to cross-examine him.[31] This rule is known generally as "forfeiture by wrongdoing."[32]

B. "[A] Prophylactic Rule to Deal With Abhorrent Behavior"[33]

The doctrine of forfeiture by wrongdoing attempts to accommodate both the defendant's constitutional right to confront witnesses against him and the state's interest in admitting testimony of witnesses who are unable to testify at trial as a result of the

26. *Id.* at 17.

27. *Id.*

28. Deahl, *supra* note 4, at 600.

29. *Id.*

30. Illinois v. Allen, 397 U.S. 337, 343 (1970).

31. *Crawford* does not reach this exception to the Confrontation Clause because it does not test the reliability of the evidence; it is an equitable exception to the rule. Crawford v. Washington, 541 U.S. 36, 62 (2004). "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." *Id. See also* Deahl, *supra* note 4, at 600.

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

33. FED. R. EVID. 804(b)(6) advisory committee's note.

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] On the third day of the trial, the witness was shot and killed as he left his daughter's house in the morning en route to testify.[47] After a mistrial, Mastrangelo was convicted on retrial and appealed the admission of the grand jury testimony.[48] The Second Circuit remanded the case to the district court for an evidentiary hearing to determine the involvement of Mastrangelo, and held that "[i]f the District Court finds that Mastrangelo was in fact involved in the death of Bennett through knowledge, complicity, planning or in any other way, it must hold his objections to the use of Bennett's testimony waived."[49] In both *United States v. Houlihan*,[50] and *United States v. Ochoa*,[51] courts concluded that statements made to law enforcement officers may be admissible under a forfeiture by wrongdoing analysis. In the case of *Houlihan*, the statements were admissible without

42. *See* Brookhart v. Janis, 384 U.S. 1 (1966) (discussing waiver by plea rather than forfeiture by wrongdoing); Snyder v. Massachusetts, 291 U.S. 97 (1934) (presenting a case of a disruptive defendant similar to Illinois v. Allen, 397 U.S. 337 (1970)); Diaz v. United States, 233 U.S. 442 (1912) (deciding the confrontation issue as a question of waiver by voluntary testimony rather than forfeiture by wrongdoing); West v. Louisiana, 194 U.S. 258 (1904) (construing confrontation as a Fourteenth Amendment right in a state court proceeding prior to incorporation); Eureka Lake & Yuba Canal Co. v. Superior Ct. of Yuba County, 116 U.S. 410 (1886) (discussing forfeiture of right to service of process in a civil case).

43. 547 F.2d 1346, 1359-1360 (8th Cir. 1976).

44. 693 F.2d 269, 271 (2d Cir. 1982).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 271-72.

49. *Id.* at 273.

50. 92 F.3d 1271, 1280 (1st Cir. 1996).

51. 229 F.3d 631, 639 (7th Cir. 2000).

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 may yet be determined. On the other hand, how much responsibility must be attributable to the defendant is a matter of some debate.[60] Professor Flanagan makes a compelling argument that "the courts have always required an intent to prevent testimony."[61] Federal Rule of Evidence

52. *Houlihan*, 92 F.3d at 1281. *See* Sleeter, *supra* note 34, at 1372.

53. Sleeter, *supra* note 34, at 1372-75. *Cf.* Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 454 (2006) (laying out a four-part test that also includes "intent to prevent testimony" and "declarant expected to be a witness" as factors).

54. *See* King-Ries, *supra* note 55, at 454 n.108.

55. *Id.* at 454 n.109.

56. *Id.* at 454 n.113.

57. *Id.* at 454 n.110.

58. *Id.* at 454 n.111.

59. *Id.* at 454 n.112.

60. *Compare* United States v. Mastrangelo, 693 F.2d 269, 273-74 (2d Cir. 1982) ("stating [b]are knowledge of a plot to kill [the witness] and a failure to give warning to the appropriate authorities is sufficient to constitute a waiver"), *with* United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001) (citing United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)) (government "need only show that defendant 'was motivated *in part* by a desire to silence the witness'"). Note first that *Mastrangelo* and *Dhinsa* are both Second Circuit cases, and also that while *Dhinsa* requires some intent on the part of the defendant, *Mastrangelo* declares silence without any particular state of mind to be sufficient to trigger forfeiture by wrongdoing if the defendant stands to gain by his silence. *See also* Richard Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 465 (2004) (asking "how is participation or acquiescence to be determined; is the mere fact that the accused benefited from the murder enough to raise a presumption that the accused acquiesced in it?"); James Markham, *The Forfeiture by Wrongdoing Exception to the Confrontation Rule*, 1, 7-10 (July 2006) (unpublished manuscript, *available at* http://www.iog.unc.edu/programs/crimlaw/crawfordforfeituremarham2006.pdf) (noting split in lower courts and collecting cases) and (quoting Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 518 & n.25 (1997) [hereinafter Friedman, *Confrontation and the Definition of Chutzpa*]) ("[it is not] . . . necessary, for the principle to apply, that rendering the declarant unavailable to testify have been the motivating, or the principle, purpose of the defendant's conduct").

61. Flanagan, *supra* note 35, at 1198-1203. Professor Flanagan argues that because the

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

convincing evidence is in fact the appropriate standard of review, and under that standard bootstrapping should be permitted. However, if courts continue to adhere to the preponderance standard, bootstrapping of evidence should not be permitted.

II. THE STANDARD OF PROOF

The purpose of a standard of proof is "to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[65] The question is: What standard of proof is required for a judge to determine that a criminal defendant forfeited his right to confront witnesses against him as a result of his own wrongdoing?

A. A Usual Evidentiary Standard?

Justice Scalia, writing for the majority in *Davis v. Washington*, noted that while the Court took "no position on the standards necessary to demonstrate . . . forfeiture, . . . federal courts using Federal Rule of Evidence 804(b)(6) . . . have generally held the Government to the preponderance-of-the-evidence standard" and that "[s]tate courts tend to follow the same practice."[66] Most federal courts do apply the preponderance standard to determinations of forfeiture.[67] However, by analogizing the constitutional requirement to the federal rules, Justice Scalia appeared to be backing away slightly from his

convincing standard because there is other evidence, (the act giving rise to the application of reflexive forfeiture) in addition to the challenged statement, on which the prosecution can seek a determination of forfeiture.

65. Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting In re Winship, 397 U.S. 358, 370 (1970).

66. Davis v. Washington, 126 S. Ct. 2266, 2280 (2006). In one of the first cases to address this issue, *United States v. Balano*, the court rejected both the "beyond a reasonable doubt" and the "prima facie" standards. 618 F.2d 624 (10th Cir. 1970), No case since has applied either of these standards. *Id.* at 629. The argument, then, is between the "preponderance of the evidence" and "clear and convincing evidence" standards.

67. *See infra* note 79 and accompanying text. It is also important to note at the outset that neither *Bourjaily v. United States*, 483 U.S. 171 (1987) nor *Lego v. Twomey*, 404 U.S. 477 (1972) control the question of the standard of proof. *See infra* notes 112-16 and accompanying text. *Bourjaily* was decided by reference to the Federal Rules of Evidence, which *Crawford* teaches is incorrect. 483 U.S. 171. *Lego* only stated that nothing more than the preponderance of the evidence standard is constitutionally required. 404 U.S. 477, 489. *Lego* neither mandated the use of the preponderance standard, nor deprived other courts protecting the rights of defendants more rigorously than the Constitution requires. *See, e.g.*, United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982) (requiring clear and convincing evidence); State v. Phinney, 370 A.2d 1153, 1154 (1977) (requiring beyond a reasonable doubt).

own opinion for the Court in *Crawford* which states that the requirements of the Confrontation Clause are not dictated by the rules of evidence.[68] Reading *Crawford* and *Davis* consistently in this regard suggests that while lower courts have yet to reconsider their standards in light of *Crawford*, the standards remain good law, and unless the constitutional issue is raised, the rules of evidence will continue to provide a default position that is not yet constitutionally suspect. It appears, however, that *Crawford* opened the door to reconsideration of the standard necessary to find forfeiture.

The Second Circuit case, *United States v. Mastrangelo*,[69] is the touchstone of much jurisprudence regarding the standard of proof in determinations of forfeiture by wrongdoing. The *Mastrangelo* court noted the difficulty of determining which burden of proof to place on the government in forfeiture questions.[70] The court conceded that "[s]ince the right of confrontation is closely related to the reliability of testimonial evidence, the clear and convincing test may well apply to issues of admissibility arising under it."[71] One judge on the panel went so far as to write a concurrence, stating (in full):

> While I agree with most of the majority's opinion as well as its disposition in the case before us, because I remain in doubt as to the appropriate burden of proof in respect to waiver in this case, in prudence I will await the findings of the court below on remand.[72]

Despite the established difficulty, the majority applied the preponderance of the evidence standard, giving two reasons. First, because they saw "no reason to impose upon the government more than the usual burden of proof by a preponderance of the evidence where waiver by misconduct is concerned" and second, because "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."[73] While the second reason may present a good argument for the preponderance standard, the first reason does not—or at least no

68. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) (stating "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence.").

69. *See* 693 F.2d 269 (2d Cir. 1982).

70. *Id.* at 273 (stating that "[t]he issue of the burden of proof in the waiver hearing is more difficult. While it is clear that the government bears the burden, the weight of that burden is in doubt").

71. *Id.*

72. *Id.* at 274 (Oakes, J., concurring).

73. *Id.* at 273.

longer does. Before turning to the continuing validity of the *Mastrangelo* decision in particular, it is necessary to review the cases that followed it to develop a full picture of the reasons courts apply the preponderance standard to forfeiture. Then it will be possible to fully evaluate the application of that standard in the forfeiture context.

Many courts have followed *Mastrangelo*—some for poor reasons, some for reasons that have since been rendered irrelevant, and some for no reason at all. Most have forgotten the difficulty in the determination with which the *Mastrangelo* court struggled. Several courts have applied *Mastrangelo* in a conclusory fashion without significant analysis of the standard they were applying. For instance, in *State v. Gettings*, the Kansas Supreme Court summarily stated "We hold that where waiver by misconduct is an issue the State's burden of proof is a preponderance of the evidence."[74] This is good to know, but not particularly helpful in determining if the standard is appropriate. Similarly, in the recent decision *United States v. Gray*, the Fourth Circuit simply stated that "statements were admissible only if the district court properly found [the elements of forfeiture by wrongdoing] by a preponderance of the evidence."[75]

Other courts have simply played follow the leader, adopting the reasoning of *Mastrangelo* or other opinions wholesale. In *State v. Sheppard*, the court applied *Mastrangelo* with a longwinded, but not particularly insightful, discussion.[76] The Massachusetts Supreme Judicial Court recounted the fact that "a majority of United States Courts of Appeals have applied the preponderance standard"[77] among its reasons for following the rule, and the Wisconsin Supreme Court held that *Bourjaily*'s interpretation of Federal Rule of Evidence 104(a) was controlling.[78]

Many courts have applied the general preponderance standard by reference to either the federal or state rules of evidence, or to *Mastrangelo* directly.[79] It was likely this general evidentiary standard

74. 769 P.2d 25, 29 (Kan. 1989).

75. 405 F.3d 227, 243 (4th Cir. 2005).

76. 484 A.2d 1330, 1347-48 (N.J. Super. Ct. Law Div. 1984).

77. Commonwealth v. Edwards, 830 N.E.2d 158, 172 (Mass. 2001). *See also* People v. Giles, 152 P.3d 433, 446 (Cal. 2007).

78. State v. Frambs, 460 N.W.2d 811, 814 (Wis. 1990).

79. *See* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001) (noting the codification of forfeiture by wrongdoing at Federal Rule of Evidence 804(b)(6) abrogated *Thevis* and required application of the preponderance standard); State v. Magourik, 561 So. 2d 801, 805 (La. 1990) (applying *Mastrangelo*); *Edwards*, 830 N.E.2d at 172 (noting a majority

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

of federal circuits and the Federal Rules of Evidence apply the preponderance standard); *Frambs*, 460 N.W.2d at 814 (quoting *Mastrangelo* and FED. R. EVID. 104(a)). *Cf.* Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982) (noting findings of preliminary fact necessary to an admissibility ruling are traditionally left to the trial judge without close supervision).

80. United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

81. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004). *See also* Deahl, *supra* note 4, at 621; Friedman, *Confrontation and the Definition of Chutzpa*, *supra* note 62, at 519; Markham, *supra* note 62, at 18.

82. *See, e.g.*, United States v. White, 116 F.3d 903, 912 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996); *Steele*, 684 F.2d at 1202; *Edwards*, 830 N.E.2d at 172; State v. Jensen, 727 N.W.2d 518, ¶ 56 (Wis. 2007);.

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*, 116 F.3d at 912.

84. *Mastrangelo*, 693 F.2d at 273.

85. Estelle v. Williams, 425 U.S. 501, 515 (1976) (Powell, J, concurring) (disfavoring inferred waivers of constitutional rights); Barker v. Wingo, 407 U.S. 514, 525-26 (1972) (holding that presuming waiver of a fundamental right is inconsistent with prior law); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) (holding courts should indulge every reasonable presumption against waiver of a fundamental constitutional right).

86. *Mastrangelo*, 693 F.2d at 273.

87. *White*, 116 F.3d at 912.

arguments in favor of a higher standard of proof.

B. Current Minority Views

Although few in number, some courts and commentators have voiced concerns with the preponderance standard that are theoretically significant, and in the wake of *Crawford*, may soon be important in answering the questions left open by *Davis*. Professor Friedman has long advocated a standard of proof that is higher than preponderance of the evidence.[88] However, no court has thoroughly explored the arguments for one standard or the other post-*Crawford*. It appears that the arguments for the clear and convincing standard break down into two groups: those that are concerned with protecting the integrity and process of the criminal justice system, and those that are concerned with protecting the personal rights of the criminal defendant. *Stare decisis* arguments have also been made.

1. Process Considerations

It has long been recognized that confrontation is critically connected to the accuracy of the fact-finding process.[89] Confrontation operates to improve testimony by requiring the witness to stand face-to-face with the defendant against whom she is testifying. In this way, the fact-finder may judge the demeanor of the witness while the witness faces the accused to determine the credibility of the witness and the weight of her testimony.[90] It is assumed that when a witness

88. *See* Richard Friedman, *Forfeiture of the Confrontation Right After* Crawford *and* Davis, Address at the Regent Law School Symposium "*Crawford*, *Davis*, and the Right of Confrontation: Where Do We Go From Here?" (Oct. 4, 2006), at 5 [hereinafter Friedman, *Forfeiture of the Confrontation Right*] ("[the standard of persuasion] should probably be more than more likely than not."); Friedman, *Confrontation and the Definition of Chutzpa*, *supra* note 62, at 519 ("the court should not hold that the accused has forfeited [the confrontation right] unless the court is persuaded to a rather high degree of probability that the accused has rendered the declarant unavailable.").

89. Ohio v. Roberts, 448 U.S. 56, 64 (1980) ("the absence of confrontation at trial calls into question the ultimate integrity of the fact-finding process") (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)); California v. Green, 399 U.S. 149, 157 (1970); Mattox v. United States, 156 U.S. 237, 242-43 (1895); United States v. Houlihan, 887 F. Supp. 352, 360 (D. Mass. 1995).

90. *Green*, 399 U.S. at 157; *Mattox*, 156 U.S. at 242-43 (holding:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling

faces the defendant that it is more difficult to lie, and thus, confrontation helps to assure the accuracy and integrity of the criminal trial.[91] The Supreme Court has noted that "[a] witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts."[92] Additionally, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'. . . In the former context, even if the lie is told, it will be told less convincingly."[93]

Often, the right of confrontation is confused with the related right to cross-examination.[94] However, these rights are not equivalent.[95] Rather, they are complimentary rights which *independently* seek to improve the accuracy of the trial process.[96] Because testimony is less accurate when forfeiture is applied (and testimony is taken outside the presence of the defendant), it would be appropriate to set a relatively high bar to the exclusion of such an important element of the fact-finding process. A standard protective of the process would be more appropriate.[97]

Returning to the initial proposition that the purpose of a standard of review is to explain the level of factual confidence required for a particular type of adjudication,[98] it is also necessary to determine how much error society is willing to tolerate in determinations of forfeiture. "The size of the margin of error that law is willing to tolerate varies in inverse proportion to the importance to the party or

> him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives testimony whether he is worthy of belief.)

See also Barber v. Page, 390 U.S. 719, 725 (1968); United States v. Balano, 618 F.2d 624, 627 (10th Cir. 1979). *Cf.* LaMagna, *supra* note 19.

91. Coy v. Iowa, 487 U.S. 1012, 1019 (1988).

92. *Id.* (internal quotation marks omitted).

93. *Id.*

94. *See supra* notes 14-16 and accompanying text.

95. *Green*, 399 U.S. at 173; *Barber*, 390 U.S. at 725 (noting the right to confrontation has two constituent elements: the right to cross-examine, and the right to allow the jury to weigh the demeanor of the witness); Pointer v. Texas, 380 U.S. 400, 405 (1965) (describing the right as "the right of confrontation *and* cross examination") (emphasis added).

96. *Coy*, 487 U.S. at 1019-20; Kentucky v. Stincer, 482 U.S. 730, 736 (1987)

97. *See* People v. Geraci, 649 N.E.2d 817, 821-822 (1995). The ultimate protection afforded to the defendant by the "beyond a reasonable doubt standard" does nothing to ensure the accuracy of the testimony on which the trier of fact makes the ultimate determination of guilt or innocence.

98. *See supra* note 67 and accompanying text.

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.

confrontation is a critical element of the truth-seeking process, the clear and convincing standard is appropriate. In *Brookhart v. Janis*, the Court held that in cases of waiver of the confrontation right, the waiver "must be *clearly* established" to be effective.[106] However, no court has yet recognized *Brookhart* as dispositive or even significant.[107] Moreover, the clear and convincing standard would bring the confrontation right into line with other rights—including many non-constitutional rights—where the Supreme Court has mandated the use of the clear and convincing standard.[108]

In *Lego v. Twomey*, the Court suggested that the Constitution only demands findings of predicate facts by a preponderance of the evidence.[109] The petitioner in that case sought to suppress a confession on the ground that it was obtained involuntarily.[110] The Court held that the prosecution must prove by at least a preponderance of the evidence that the confession was voluntary.[111] However, *Lego* is inapposite for two reasons. First, the Court stated that: "Since the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of *In re Winship*." The right, in contrast, has *everything* to do with improving the reliability of jury verdicts. The Supreme Court has repeatedly said that confrontation improves fact-finding.[112] This alone suggests the inapplicability of *Lego* to the confrontation right.

In *Lego*, the Court went on to hold that, in a criminal trial, constitutional challenges to the admissibility of evidence must be determined under the reasonable doubt standard to "give adequate protection to those values that exclusionary rules are designed to

Wade, 388 U.S. 218, 240 (1967)).

106. Brookhart v. Janis, 384 U.S. 1, 4 (1966) (emphasis added).

107. *See* John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 886 n.291 (1996). The most significant analysis of *Brookhart* to date has been one paragraph in a recent California Court of Appeals case, People v. Costello, 53 Cal. Rptr. 3d 288, 294 (Cal. Ct. App. 2007).

108. *See infra* notes 117-20 and accompanying text.

109. 404 U.S. 477, 484 (1972) (holding the Constitution only demands application of the preponderance burden to determine voluntariness of confession).

110. *Id.* at 480.

111. *Id.* at 489.

112. *See supra* notes 91-95 and accompanying text.

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 made in the course of and in furtherance of the conspiracy."[126] Therefore, the statements were not hearsay and were admitted.[127] The circuit court affirmed the admission of the statements as they satisfied the Federal Rules of Evidence.[128]

On review, the Supreme Court held that a court is allowed to

121. Glasser v. United States, 315 U.S. 60, 75 (1942).

122. *Cf.* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 808-809 (2005).

123. *See* Deahl, *supra* note 4, at 620 & n.100.

124. 483 U.S. 171 (1987).

125. *Id.* at 174.

126. *Id.*

127. *Id.*

128. *Id.*

consider co-conspirator statements as evidence of the existence of a conspiracy.[129] The Court noted: "We think that there is little doubt that a co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy."[130] However, it is doubtful that *Bourjaily* is controlling in the post-*Crawford* analysis of bootstrapping testimony to determine forfeiture of confrontation.

First, *Bourjaily* held that the Federal Rules of Evidence superseded the Court's previous holdings rejecting bootstrapping.[131] However, because *Crawford* rejects the position that the Federal Rules define the constitutional limits of the Confrontation Clause, *Crawford* apparently abrogated *Bourjaily*'s central holding insofar as it applies to hearsay that also triggers the confrontation right.[132] Moreover, the Federal Rules of Evidence governing bootstrapping hearsay generally carry no more than persuasive weight in determining what the Clause means in this context.[133]

Second, and surprisingly little noted in the literature, are the facts of the case itself.[134] "The District Court found that, considering the events in the parking lot *and* [the informant's] statements over the telephone," the government had established the existence of a conspiracy.[135] Thus, *Bourjaily* was not in fact a case of pure bootstrapping where the statement itself serves as its ticket to admission. Rather, as the Supreme Court noted, the defendant sought to exclude a statement "corroborated by independent evidence."[136] The Court explicitly reserved the question of "whether the courts below could have relied solely upon [the informant's] hearsay

129. *Id.* at 180.

130. *Id.*

131. *See* Deahl, *supra* note 4, at 620-21.

132. *Id.* at 621. *See also* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence.").

133. *See* FED. R. EVID. 104(a) (allowing a court to consider all non-privileged evidence); FED. R. EVID. 801(d)(2) (providing that a court will consider the contents of the statement the defendant seeks to exclude in determining whether it should be excluded).

134. *See* Sleeter, *supra* note 34, at 1377 ("The Supreme Court ostensibly resolved the debate in *Bourjaily v. United States.*"). *But see* RICHARD D. FRIEDMAN, ELEMENTS OF EVIDENCE 188 n.2 (3d ed. 2004) (noting what *Bourjaily* did *not* hold in addition to what it did hold).

135. *Bourjaily*, 483 U.S. at 174 (emphasis added).

136. *Id.* at 180-81.

statements to determine that a conspiracy had been established."[137] Therefore, even if *Bourjaily* was not entirely abrogated by *Crawford*, it is still inapplicable to cases of pure bootstrapping, which lack any corroborating evidence tending to show the guilt of the defendant.[138]

Third, *Bourjaily* occurred at the height of the *Roberts* regime.[139] It seems likely that, given the originalist tone of *Crawford*, the Court could plausibly overrule *Bourjaily* as an aberration dictated by the error of *Roberts*. At common law, bootstrapping was prohibited.[140] Beginning with *Glasser*, courts concluded that a hearsay statement a prosecutor sought to admit was insufficient to make the initial showing of conspiracy required to trigger the co-conspirator exception to admit the hearsay.[141] The only other Supreme Court decision referring to bootstrapping between *Glasser* and *Bourjaily* is *United States v. Nixon*.[142] Like *Bourjaily*, *Nixon* did not confront a question of pure bootstrapping.[143] Regardless, the Court stated that the conspiracy must be established by independent evidence.[144] Given the present doubts about the breadth of *Bourjaily*'s applicability in light of *Crawford*, it seems likely that the Court has a fairly clean slate on which to determine this issue anew.

B. Bootstrapping Decisions

Several courts made pre-*Crawford* attempts at determining the

137. *Id.* at 181.

138. Professor Duane has suggested that such a case may not exist because there will always be some small piece of evidence that may have only miniscule relevance to a material proposition, but nevertheless makes a proposition more or less likely. *See* James Joseph Duane, *Some Thoughts on How the Hearsay Exception for Conspirators' Statements Should—And Should Not—Be Amended*, 165 F.R.D. 299, 353 (1996). Even if Professor Duane's statement is accurate, it is still highly plausible that a prosecutor would fail to proffer and a court would fail to find such additional evidence. *See, e.g.*, People v. Leach, 541 P.2d 296, 304-05 (Cal. 1975) (holding hearsay evidence of co-conspirators erroneously admitted under conspiracy exception to hearsay rule for lack of any other evidence tending to establish a prima facie conspiracy).

139. *See generally* United States v. Nixon, 418 U.S. 683 (1974), Glasser v. United States, 315 U.S. 60 (1942); Patrick J. Sullivan, Note, *Bootstrapping of Hearsay Under Federal Rule of Evidence 801(d)(2)(E): Further Erosion of the Coconspirator Exception*, 74 IOWA L. REV. 467, 482-83 nn.96-101 (1989).

140. *See* Sullivan, *supra* note 141, at 471 n.21.

141. *Id.* at 471.

142. 418 U.S. 683.

143. *See* Sullivan, *supra* note 141, at 483.

144. *Id.*

propriety of bootstrapping and reached mixed results.[145] The Florida Supreme Court declined to follow the *Bourjaily* rule because of differences between the Federal Rules of Evidence and the Florida Evidence Code.[146] Under the Florida Code, independent evidence must prove the participation of each member of a conspiracy.[147] However, this decision based on both rules of evidence and the reliability of evidence does not appear to provide much post-*Crawford* guidance.[148]

The Wisconsin Supreme Court also passed on the question of bootstrapping testimony in *State v. Dorcey*.[149] Relying on *Glasser*, the court held that "[t]he conspiracy upon which admissibility [of the statement] depends must be proven independently of the hearsay testimony at issue."[150] The Wisconsin Court of Appeals later clarified this position, noting that the *Dorcey* rule "stems from the proposition that objected-to evidence should not be admitted when the *only* foundation for its admission is the evidence itself."[151]

The Supreme Court of California has also suggested that bootstrapping may not be proper when there is no corroborating evidence. In *People v. Leach*, the defendant complained of the admission of tape recordings a co-conspirator made to an undercover deputy sheriff after the crime.[152] The California Supreme Court held that the California Evidence Code required independent evidence.[153] The court confirmed its holding in *People v. Hardy*, stating that "[h]earsay statements by coconspirators . . . may nevertheless be admitted against a party if, at the threshold, the offering party presents 'independent evidence to establish prima facie the existence of . . . [a] conspiracy.'"[154]

Other courts have not found independent evidence necessary for

145. *Compare* People v. Herrera, 98 Cal. Rptr. 2d 911 (Cal. Ct. App. 2000), Romani v. State, 542 So. 2d 984 (Fla. 1989), People v. Persico, 556 N.Y.S.2d 262 (N.Y. App. Div. 1990), *and* State v. Blalock, 442 N.W.2d 514 (Wis. Ct. App. 1989) (all rejecting bootstrapping), *with* United States v. Emery, 186 F.3d 921 (8th Cir. 1999), *and* State v. Meeks, 88 P.3d 789 (Kan. 2004) (both permitting bootstrapping).

146. *See generally Romani*, 542 So. 2d 984.

147. *Id.* at 986.

148. *See supra* Part II.

149. 307 N.W.2d 612 (Wis. 1981).

150. *Id.* at 615.

151. State v. Blalock, 442 N.W.2d 514, 518 (Wis. Ct. App. 1989) (emphasis added).

152. 541 P.2d 296, 301-302 (Cal. 1975).

153. *Id.* at 308-309.

154. 825 P.2d 781, 809 (Cal. 1992).

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.

It has also been suggested that "a court should not make a forfeiture finding based solely on unconfronted testimony."[160] Because *Crawford* rejected the position that the content of the Confrontation Clause was determined by the Rules, both the holding of *Bourjaily* and the argument in favor of bootstrapping, based on Federal Rule of Evidence 104(a), at first appear questionable.[161] However, Rule 104(a) is not essential to the *constitutional* argument in favor of bootstrapping; such consideration is *both* constitutional *and* not prohibited. In fact, such considerations are expressly permitted by the Rules of Evidence. Regardless, the predicate argument is strong enough as a constitutional matter to stand on its own without the support of either *Bourjaily* or the Rules. Although some significant structural changes to the analytical framework are in order, it appears as though bootstrapping is not inherently problematic, and certainly not when there is independent evidence supporting the forfeiture determination. As there will almost always be at least *some* independent evidence, and it is simply up to prosecutors to recognize it, bootstrapping does not appear to be problematic as a rule.

IV. RESULTS

A. Results Under the Clear and Convincing Standard

Ideally, courts should apply a clear and convincing standard to the forfeiture determination while simultaneously permitting trial judges to consider bootstrapped testimony in making that determination. As outlined above, each approach independently has the appropriate weight of authority, and together they provide the most sensible framework for this determination. First, by employing the clear and convincing standard, much of the bootstrapping question becomes moot. In most cases there will probably be sufficient evidence to establish wrongdoing *regardless* of whether the statement is bootstrapped or not. Cases like *Leach*, where the only evidence is the statement itself, are rare, and a clever prosecutor should usually be able to come up with *some* other evidence. Moreover, meeting this burden will likely require more than the statement itself, and probably

160. Deahl, *supra* note 4, at 620.

161. As the Sixth Circuit noted, "[i]f there is one theme that emerges from *Crawford*," it is that the confrontation right "is no longer subsumed by the evidentiary rules." United States v. Cromer, 389 F.3d 662, 679 (6th Cir. 2004).

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

The confrontation right is undergoing a period of significant reconstruction after the *Crawford* decision. This is an opportune moment for the Court to reconsider earlier precedents in light of its recent jurisprudence. Forfeiture by wrongdoing, as the chief exception

165. *See, e.g.*,King-Ries, *supra* note 55; Jennifer A. Lindt, Comment, *Protecting the Most Vulnerable Victims: Prosecution of Child Sex Offenses in Illinois Post* Crawford v. Washington, 27 N. ILL. U. L. REV. 95 (2006); Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271 (2006); Lininger, *supra* note 125; Stephanie McMahon, Note, *The Turbulent Aftermath of* Crawford v. Washington*: Where Do Child Abuse Victims' Statements Stand?*, 33 HASTINGS CONST. L.Q. 361 (2006); Thomas Robertson, *NAPC National Association of Prosecutor Coordinators*, 40-Dec PROSECUTOR 10 (2006); Kristine Soulé, Notes and Comments, *The Prosecution's Choice: Admitting a Non-Testifying Domestic Violence Victim's Statements Under* Crawford v. Washington, 12 TEX. WESLEYAN L. REV. 689 (2006); Deborah Tuerkheimer, Crawford*'s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006); Erin Thompson, Comments, *Child Sex Abuse Victims: How Will Their Stories Be Heard After Crawford v. Washington*?, 27 CAMPBELL L. REV. 279 (2005).

to the confrontation right, has already been seized upon by both prosecutors and courts seeking to limit its application. The importance of forfeiture cannot be underestimated, and clear answers to questions concerning the permissibility of bootstrapping testimony and the appropriate standard of proof for making determinations of forfeiture are essential to clarifying a field of law that has recently become a series of open questions.[166] This Article has attempted to provide some preliminary guidance on how these questions ought to be approached in light of *Crawford* and each other.

166. For a series of such questions, *see* Richard D. Friedman, *Pending* Crawford *Issues*, http://confrontationright.blogspot.com/2006_11_01_archive.html (last visited June 2, 2007).