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Hon. Joseph F. Murphy, Jr., Chair
The Court of Appeals of Maryland Standing Committee
on Rules of Practice and Procedure
County Courts Building
401 Bosley Avenue
Towson, MD 21204

Dear Judge Murphy:

I understand from Lynn McLain that your Committee is considering proposing an amendment to the Maryland Rules of Evidence that would incorporate a rule akin to Fed. R. Evid. 804(b)(6) providing for a forfeiture of the hearsay objection. This is an area of intense interest of mine. I have written extensively on confrontation and hearsay, long advocating the testimonial approach to the Confrontation Clause that the United States Supreme Court adopted in *Crawford v. Washington*, 124 S.Ct. 1354 (2004), and exploring the nature of the forfeiture doctrine, *Confrontation and the Definition of Chutzpa*, 31 Israel L. Rev. 506 (1997), *available at* http//www-personal.umich.edu/~rdfrdman/Friedman.pdf. Accordingly, Prof. McLain thought it might be appropriate for me to offer some thoughts on the subject, and I am happy to comply.

First, I do not believe there is substantial doubt about the constitutionality of a rule such as Rule 804(b)(6). While *Crawford* precludes an argument that a judicial determination of reliability may not replace an opportunity for cross-examination as a basis for admitting a testimonial statement, it recognizes that the basis for the forfeiture doctrine has nothing to do with reliability. Thus, the Court says explicitly that "the 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." 124 S.Ct. at 1370. The categorical nature of the rule in *Crawford* thus does not render the forfeiture doctrine invalid. Forfeiture should not be considered an exception to the confrontation right, but rather a qualification on its exercise: If

the reason that the witness is unable to testify in court is that the accused's wrongdoing prevented her from doing so, then the accused has no valid complaint about his inability to cross-examine her. Just as the accused might forfeit the confrontation right if his wrongful conduct makes it impractical for him to be in the courtroom while the witness testifies, *Illinois v. Allen*, 397 U.S. 337 (1970), forfeiture can also occur if the way that the accused's wrongful conduct precludes confrontation is by preventing the witness from testifying at trial.

I am aware of the argument offered by John R. Kroger, in *The Confrontation Waiver Rule*, 76 B.U. L. Rev. 835, 893 (1996), that between 1692 and 1976 no Anglo-American court admitted testimony that had not been subject to cross-examination on a forfeiture theory. I have not done a full canvass of his sources, but his argument is unpersuasive. It was a longstanding principle that if the witness had testified subject to cross-examination and then become unavailable to testify at trial, the previously taken deposition could be used at trial – and, in general, if the statement had *not* been taken subject to cross-examination it could not be used at trial. But if the reason the witness was unavailable at trial was wrongful conduct of the accused, that changed the situation – and indeed, one of the cases quoted at length by Kroger explicitly says as much. *State v. Houser*, 26 Mo. 431, 1858 WL 5832 ("If the absence of the witness was procured by the prisoner the rule would be different."). Indeed, if an opportunity for cross-examination was necessary to render the statement admissible even though the witness's unavailability was procured by the wrongful conduct of the accused, then all of the discussion in the early cases of wrongful procurement would have been unnecessary: The rule would have been the same whether or not the unavailability of the witness was procured by the accused's wrongful conduct.

Moreover, as *Crawford* notes, it is absolutely clear that the dying declaration exception was well established by the time of the Sixth Amendment. In my view, which I argue in the *Chutzpa* article cited above, the best way of understanding the exception is as in instance of forfeiture doctrine. Although this is not the way the exception was usually justified, it sometimes was, *see McDaniel v. State*, 16 Miss.. 401, 1847 WL 1763 (Miss. Err. & App. 1847) ("It would be a perversion of [the Confrontation Clause's] meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness, by causing his death.").

In any event, it seems to me that the constitutional bounds of forfeiture doctrine are not a constraint on your Committee. Your Committee is charged with developing state laws of evidence, to be applied generally – with respect to civil as well as criminal cases, defense evidence as well as prosecution evidence, non-testimonial statements as well as testimonial statements. The constitutional constraints will be developed by the courts in deciding cases, and

the Confrontation Clause is a limitation only on prosecution cases in criminal cases, and, at least primarily, only on testimonial statements. Your Committee could, therefore, act without regard to the Clause, leaving it to courts in the process of adjudication to prevent the rules form being applied in an unconstitutional manner. But even if this is not your attitude – and I do not say it should be – it seems to me you can validly take the views that for a statement offered by the prosecution to be admitted into evidence it must pass both hearsay and confrontation tests, and in establishing a forfeiture rule you are only determining, and can only determine, when the hearsay objection is forfeited; when the confrontation right is forfeited is not a matter you can determine.

Furthermore, the Clause clearly has nothing to say about the forfeiture rule that should apply when – as in a civil case – introduction of the statement does not pose a confrontation issue at all, even apart from forfeiture.

I understand that there is also some thought to limiting the types of statements that are subject to the forfeiture rule. I do not believe there is any warrant to doing so. By hypothesis, the wrongful conduct of the accused prevented the witness from testifying under the conditions usually required for testimony, and so the witness's prior statement is accepted. The force of this argument is essentially unchanged no matter how informally the prior statement may have been given. If there is concern that the forfeiture doctrine will be applied too broadly, that concern can be addressed by requiring an elevated standard of proof that the accused's wrongdoing rendered the witness unavailable; I believe such an elevated standard is probably a good idea in this context.

Although I believe Fed. R. Evid. 804(b)(6) is a useful model for a forfeiture rule, I believe in one respect a better rule would be somewhat broader. The Federal Rule applies only if the wrongful conduct was intended to procure, and did procure, the unavailability of the declarant. But it should be enough if the wrongful conduct is the cause of the declarant's unavailability. Suppose a drug dealer, A, has been working with B, unaware that B is an informant, and A gets into an altercation over an unrelated matter and kills B. A should not be able to invoke the confrontation right to cause the exclusion of B's reports to the police. A more common situation occurs when a victim of a fatal blow makes a statement identifying the assailant. As I have indicated above, it is forfeiture doctrine, not the rather bizarre dying declaration exception, that best accounts for admission of these statements, notwithstanding that the fatal blow was presumably struck for reasons other than to render the declarant unavailable as a witness. I am pleased to say that several post-*Crawford* courts have adopted this theory, which is discussed in some length in the *Chutzpa* article. *See, e.g., State v. Meeks,* 277 Kan. 609, 88 P.3d 789(2004)*; People v. Giles*, 123 Cal.App.4th 475, 19 Cal.Rptr.3d 843 (2004); *People v. Moore*, 2004 WL 1690247 (Colo.App.).

Finally, I understand that there is some question of where in the Rules a forfeiture rule should be included. It seems to me clear that it should be within the Article devoted to hearsay –

the rule is a forfeiture of the hearsay objection, because the conditions that have prevented the declarant from testifying in a manner that would ordinarily be regarded as acceptable have been created by the wrongful conduct of the party opponent. In my view, it would be better to include the forfeiture rule as a freestanding Rule within the hearsay Article, because it is not really an exception to the rule against hearsay but rather a qualification on the circumstances in which the objection may be made. But this is a small point. It is certainly better to include it within Rule 804, as the Federal Rules do, than to put it anywhere outside the hearsay Article.

I hope you do not mind my offering my views, and I hope that they are helpful. If I can be of assistance, please do not hesitate to write or call. Meanwhile, thank you for your kind consideration.

Sincerely,

Richard D. Friedman

cc: Lynn McLain