

Forfeiture by Wrongdoing

New case law limits the right to confrontation in some cases.

BY NANCY COLLINS



The Washington Supreme Court recently adopted the doctrine of “forfeiture by wrongdoing,” which provides that the state does not need to

afford a criminal defendant the Sixth Amendment right of confrontation under certain circumstances. *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007) (Note that there is a pending motion for reconsideration in *Mason*, so there is a small possibility that the court’s ruling could be altered.) Forfeiture by wrongdoing means that a defendant may not complain about the inability to cross-examine when the defendant “bears responsibility” for the witness’s absence. *Mason*, 160 Wn.2d at 925.

Practically speaking, the upshot of *Mason* is that the state may introduce an out-of-court testimonial statement, without affording the defendant an opportunity to cross-examine, when it shows:

1. By clear, cogent, and convincing evidence that the defendant committed the act that prompted the witness to refuse to submit to cross-examination; and
2. The defendant knew that the foreseeable consequences of his or her actions included a witness’s unavailability at trial.

This is a broad doctrine that can apply to any case, and may arise often

in domestic violence cases. Some possible objections or unresolved aspects of the doctrine are discussed below.

Wrongdoing by a criminal defendant does not excuse the state from trying to bring the witness to court. If the witness is available, it violates the confrontation clause for the prosecution to fail to produce the witness in court. See, e.g., *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 1318 (1968) (in a confrontation clause case, “a witness is not ‘unavailable’...

ing, FRE 804(b) (6).² Forfeiture by wrongdoing became a favorite tool for prosecutors after the U.S. Supreme Court endorsed the doctrine without expressly ruling on its application in *Crawford* and in *Davis v. Washington*, 547 U.S. ___, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224, 237 (2006).³ Before *Mason*, Washington had no history — by common law, court rule, or statute — of using forfeiture by wrongdoing to find a waiver of the right of confrontation.⁴

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Background

unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.”); *State v. King*, 706 N.W.2d 181, 187-88 (Wis. App. 2005) (several trips by prosecution to witness’s residence to encourage testimony not adequate “good-faith effort” when witness not subpoenaed). *Mason*, and *Crawford v. Washington*, do not change the rules used for determining whether the witness is unavailable to testify.¹

The doctrine of forfeiture by wrongdoing gained credence in federal courts after a rash of witness tampering problems where a defendant, already charged with a crime, committed an act that kept a witness from testifying at trial. Courts used it “as a disincentive to keep organized crime affiliates from ‘knocking off’ witnesses” and a federal rule of evidence now governs forfeiture by wrongdo-

In *Mason*, Herberto Santoso accused Kim Mason of kidnapping and robbing him. Several months later, Santoso disappeared and his body was never located. Mason was accused of killing him. At Mason’s murder trial, the state introduced numerous statements Santoso had made to various police officers during the investigation of the initially-reported kidnapping/robbery. Because Mason had no opportunity to cross-examine Santoso, Mason claimed that Santoso’s out-of-court statements to police officers were testimonial and that their admission violated the Sixth Amendment’s confrontation clause.

The Washington State Supreme Court decision in *Mason* overturned a portion of the court of appeals’ ruling regarding whether Santoso’s statements to members of the police de-

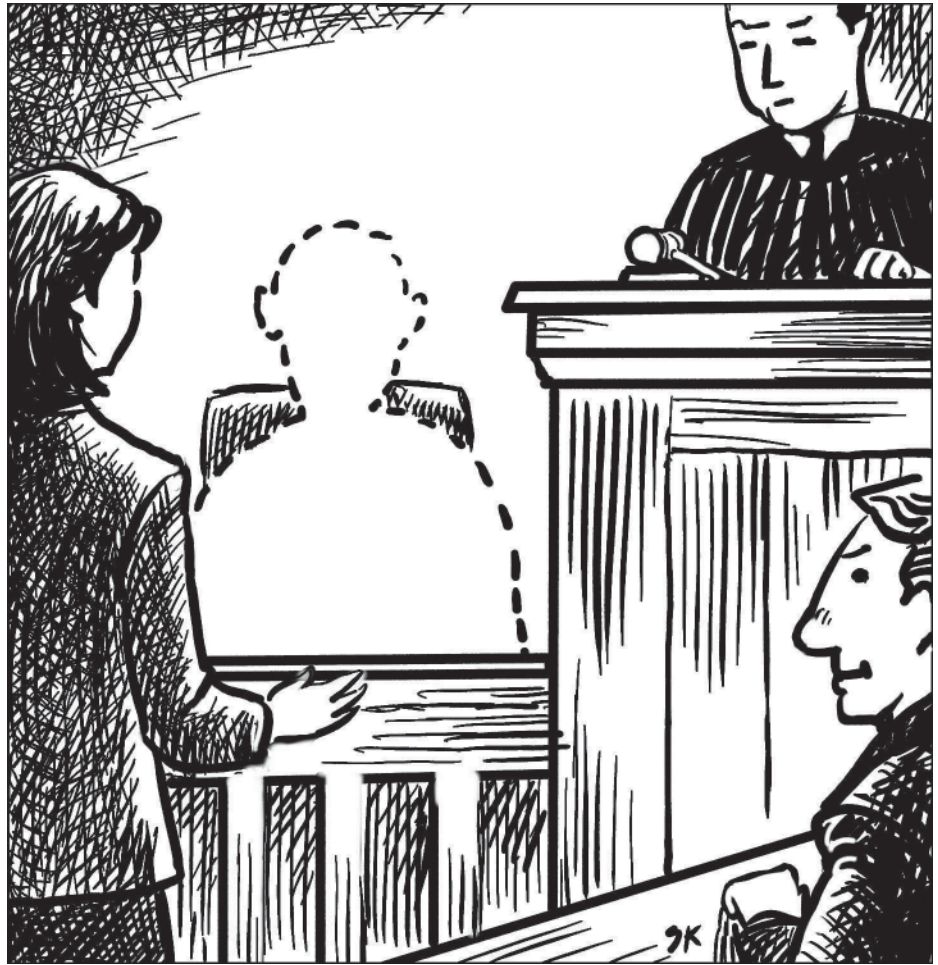
partment were “testimonial,” but found Mason forfeited his right of confrontation because he bore responsibility for the witness’s absence.

Forfeiture Discussion

Mason adopted, for the first time in Washington, the principle that a person may forfeit the Sixth Amendment right to confrontation and set the parameters of applying this doctrine to particular cases. The principle of forfeiture by wrongdoing is rooted in a notion of equity — that it is simply unfair for a defendant to keep a witness from testifying against him or her and then bar the admission of that witness’s out-of-court statements on the ground that the witness has not testified in court.

Mason claimed to place strict standards on the trial court’s forfeiture determination based on the important rights at stake. See e.g., 160 Wn.2d at 926 (“we conclude the stakes are simply too high to be left to a mere preponderance standard.”). However, the rule announced in *Mason* does not require, as many other jurisdictions do, that the accused person acted with the intent or purpose of keeping the witness from testifying.

Mason does not explain the procedures that should be used to determine forfeiture. There is some debate in other courts whether the proof may rely on the same hearsay statements at issue, or if that is improper bootstrap-



presence, on the grounds that the taint of such testimony would be impossible to remove, but the *Mason* court did not address the proper procedures for determining forfeiture.⁶ In *Davis*, Justice Scalia noted that the hearsay statements of the declarant could be

statements may be critical evidence in a case, it is worth demanding procedural protections, such as a pretrial hearing at which the court considers whether the prosecution has proven the defendant’s forfeiture, rather than waiting to sort out the admissibility of the evidence until the middle of trial.

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ping.⁵ Some courts have ruled that the trial judge should determine the forfeiture issue outside of the jury’s

used to determine forfeiture, although this statement is dicta. 126 S.Ct. at 2280. Because these missing witness

Some Thoughts About *Mason* and Forfeiture by Wrongdoing

Hearsay rules still apply. *Mason* did not rule that forfeiture of the constitutional right of cross-examination also extinguishes the requirement to comply with hearsay rules. Thus, statements must be admissible under the rules of evidence. See *State v.*

Melchor, 226 Ill.2d 871 N.E.2d 32, 34 (Ill. 2007).⁷

The underlying principles support a more stringent mens rea requirement than Mason adopts:

In deciding whether and how to adopt a forfeiture standard, the *Mason* court emphasized the importance of the right of confrontation. See 160 Wn.2d at 926. As evidence of the court's intent to protect the right of confrontation, it adopted what it called the "minority view" of forfeiture, requiring the state to prove the accused person committed the act that caused him or her to forfeit the right of confrontation by clear, cogent, and convincing evidence, and rejects the preponderance of the evidence standards used in some other jurisdictions. 160 Wn.2d at 926. Therefore, the prosecution must prove by clear, cogent, and convincing evidence that the defendant performed the act that prevents the witness from testifying.

Despite claiming the importance of using a stringent evidentiary standard before finding forfeiture, the court in *Mason* did not require that the accused person intended or acted with the

actions. Specific intent to prevent testimony is unnecessary. Knowledge that the foreseeable consequences of one's actions include a witness's unavailability at trial is adequate to conclude a forfeiture of confrontation rights.

160 Wn.2d at 926. A number of other courts, and the federal rules of evidence, require that the accused person intended, or acted with the purpose of, keeping the witness from testifying.

For example, the Illinois Supreme Court recently ruled that *Davis* "clearly states that not all conduct which happens to result in a witness' unavailability will constitute forfeiture by wrongdoing. Rather, only that conduct through which a defendant 'seek[s] to undermine the judicial process' or 'destroy the integrity of the criminal trial system' qualifies." *People v. Stechly*, 870 N.E. 2d 333, 350 (Ill. 2007) (quoting *Davis*, 126 S.Ct. at 2280)). In *State v. Romero*, 156 P.3d 694, 702 (N.M. 2007), the New Mexico Supreme Court ruled, "requiring proof of wrongdoing intended to prevent a witness from testifying before a defendant will be viewed as having

forfeiture "requires a showing of an intent on the part of the defendant to prevent the declarant from testifying at trial." *People v. Moreno*, 160 P.3d 342, 246 (Col. 2007) (emphasis added). Preventing the witness from testifying need not have been the only motive for the acts. See *United States v. Dhinsa*, 243 F.3d 635 (2nd Cir. 2001) (forfeiture rule will apply if the defendant is motivated, at least in part, by a desire to silence the witness).

The United States Supreme Court has not expressly sanctioned a "foreseeability" standard like the one the Washington Supreme Court has now adopted. In *Davis*, the U.S. Supreme Court affirmed the principle of forfeiture by wrongdoing even though it was careful to say it was not giving an opinion as to how it should be applied. *Davis* cited three authorities as examples of the constitutional application of forfeiture by wrongdoing: *Reynolds v. United States*, 98 U.S. 145, 158, 25 L.Ed.244 (1879); FRE 804(b)(6); and *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005). Each of these authorities requires a defendant to act with the intent to keep the witness from testifying.

In *Reynolds*, the Court stated that forfeiture applied only when the defendant, "wrongfully," "through his voluntary acts," and by "seek[ing] to undermine the judicial process," kept the witness from testifying. 98 U.S. at 158. Thus, "the rule laid down by the Supreme Court in *Reynolds* contemplates an accused intentionally procuring a witness' absence." *Stechly*, 870 N.E. 2d at 350.

The federal rule of evidence cited favorably in *Davis*, similarly commands that the accused acted with the intent to keep the witness from testifying. 126 S.Ct. at 2280. The federal rule provides that the defendant must have, "engaged or acquiesced

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purpose of keeping the witness from testifying. Regarding the accused person's mental state, the court says:

Forfeiture is grounded in equity — the notion that people cannot complain of the natural and generally intended consequences of their

forfeited the right of confrontation, is *the majority rule*" (emphasis added). The Colorado Supreme Court also recently surveyed the authorities and concluded that "*the clear consensus*," at least in cases where the witness is not murdered, is that the doctrine of

in wrongdoing that was *intended* to, and did, procure the unavailability of the declarant as a witness.” Fed. ER 804 (b) (6) (emphasis added). The Supreme Court said in *Davis* that Fed. ER 804(b) (6) “codifies the forfeiture doctrine.” *Davis*, 126 S.Ct. at 2280. The federal courts adopted forfeiture by wrongdoing as a rule of evidence in response to some witness tampering cases in the 1990s, and the rationale was initially considered confined to cases of actual witness tampering.

Similarly, in *Edwards*, the Massachusetts Supreme Court ruled that a defendant forfeits objections to an unavailable witness’s out-of-court statements if the defendant was involved in causing the unavailability and he or she “acted with the intent to procure the witness’s unavailability.” 830 N.E.2d at 170.

Finally, in *Davis*, the Supreme Court indicated that forfeiture should apply “when defendants seek to *under-*

mine the judicial process by procuring or coercing silence from witnesses and victims.” *Id.* at 2280 (emphasis added). This is because defendants have a duty “to refrain from acting in ways that destroy the integrity of the criminal-trial system.” *Id.*

Based on this language from the U.S. Supreme Court, there is a basis for asking a court to require the prosecution to prove the defendant intended that the witness not appear in court to testify, rather than the witness’s failure to appear being merely a foreseeable consequence. Of course, a heightened mental state requirement may not prove to be much of a barrier in many cases where the issue arises.

Confining Mason to a murder

case: Some courts have noted that cases that have excused the prosecution from proving that a defendant acted with the intent to keep the witness from testifying in court are

all — like *Mason* — murder cases. When the defendant kills the witness, the witness’s unavailability to testify would be an obvious consequence. See *Stechly*, 870 N.E.2d at 352-53 (authorities “uniformly” require intent for forfeiture by wrongdoing unless defendant murdered the witness). A defendant who is accused of threatening, assaulting, or abusing another may not have done so with the intent “to undermine the judicial process.” *Davis*, 126 S.Ct. at 2280. The cases cited above, and the language of *Davis* itself, can be used to argue that the Sixth Amendment requires the intentional relinquishment of the right of confrontation, not merely a by-product of the charged acts.

***Mason* and Testimonial Statements**

Beyond the forfeiture discussion, *Mason* contains some useful language regarding the post-*Crawford* right of confrontation.

Requiring an on-going emergency for statement to be non-testimonial:

Drawing directly from *Davis*, *Mason* stated that the focus in deciding whether a statement to law enforcement is testimonial is based on whether the incident at issue is over. Once the incident is over, interaction with police officers who are investigating the accusations is testimonial, even if the declarant may still be afraid. *Mason* recognized that when speaking to police after an incident, the complainant may remain “afraid” and “want [] protection from a very real threat.” 160 Wn.2d at 919-20. In fact, most people reporting crimes are seeking some sort of police protection. *Id.* at 920. However, “a prerequisite” for a non-testimonial statement to police is that “an emergency is ongoing.” *Id.*

Statements admitted “not for their truth”:

In *Mason* the prosecution used the “state of mind” hearsay exception as grounds for admitting Santoso’s statements to police officers, i.e., claiming the officers were explaining




their states of mind in the course of the investigation or were explaining Santoso's state of mind. 160 Wn.2d at 921-22. The court sidestepped the question of whether these statements should have been admitted, finding that it did not matter here because of either Mason's forfeiture by wrongdoing or harmless error.

However, *Mason* warns trial courts against thinking that a hearsay exception will also excuse a violation of the confrontation clause — such thinking on behalf of a court may result in “judicial abuse of the right of confrontation.” 160 Wn.2d at 922. Even if a court rules that a statement is not admitted for its truth, that evidentiary

Mason treated the victim advocate as a member of law enforcement and found that statements to her may be testimonial under the same general rules set out in *Davis* and *Crawford*. An objective witness would expect statements to the domestic violence victim's advocate to be available to the prosecution.

To decide whether Santoso's statements to the victim advocate were testimonial, *Mason* focused on whether the statements were given to the police to resolve a present emergency. The court of appeals had found that because Santoso said he was afraid of Mason and pled for police protection, his statements to the victim's advocate

on the *Crawford* blog, and its archive, available at: <http://confrontationright.blogspot.com>. 

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Notes

1. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court noted that historically, the witness must be “demonstrably unavailable to testify in person” to be considered unavailable. 541 U.S. at 44.
2. Joshua Deahl, “Expanding Forfeiture Without Sacrificing Confrontation After *Crawford*,” 104 *Mich. L. Rev.* 599, 601 (2005).
3. The U.S. Supreme Court referred to forfeiture by wrongdoing in both *Davis*, 126 S.Ct. at 2280, and *Crawford*, 541 U.S. at 62. *Davis* took “no position” on the standards necessary to demonstrate forfeiture. 126 S.Ct. at 2280.
4. Unlike Washington, some other states have forfeiture by wrongdoing standards set by statute or rule of evidence. The Washington Legislature considered a forfeiture bill at least once, in 2006, but it was not adopted.
5. For example, New York forbids using the charged acts as evidence of forfeiture. *People v. Maher*, 89 N.Y.2d 456, 462, 677 N.E.2d 728 (N.Y. 1997).
6. For example, by statute, Maryland requires a hearing out of the jury's presence before such evidence is admitted; and Massachusetts does the same by case law. Md. Code Ann., Ct. and Jud. Proc. 10-901 (2005); *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005).
7. States are divided on whether waiving the right of confrontation also waives hearsay objections. Compare *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004) (analyzing statements for admissibility under both hearsay rules and confrontation clause principles); with *State v. Meeks*, 88 P.3d 789 (Kan. 2004) (finding defendant forfeited his confrontation right and any hearsay objections by killing the victim/declarant).

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ruling is not the same as finding there is no confrontation clause problem. Id. (“[W]e are not convinced a trial court's ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis. To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge.”).

Statements to non-investigatory authorities, such as the victim's advocate:

Santoso made a number of statements to a “victim's advocate” employed by the police department. The prosecution argued statements to her were not testimonial because she was not an officer investigating the case and Santoso was not speaking to her for the purpose of providing law enforcement with information about the case. *Mason* rejected these rationales.

were nontestimonial. The supreme court rejected this analysis. Even though Santoso was still afraid of Mason and sought police protection when speaking to the victim's advocate, “he did not describe events as they happen ‘to resolve the present emergency.’” 160 Wn.2d at 924 (quoting *Davis*, 126 S.Ct. at 2276). The statements were testimonial because “these statements would be viewed by an ‘objective witness’ as ‘available for use at a later trial.’” 160 Wn.2d at 923-24 (quoting *Crawford*, 541 U.S. at 52).

In sum, there continues to be some changes, large and small, in the aftermath of *Crawford*. When a case raises a confrontation clause problem, it is worth checking the status of the law both in Washington and in other jurisdictions. In addition to the WACDL listserve, you may find information about pending *Crawford* issues