COLORADO SUPREME COURT
EVIDENCE COMMITTEE

Agenda
Friday, November 2, 2007, at 2:30 pm
Supreme Court Conference Room, 5th Floor

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1. Approval of minutes of last meeting, February 14, 2007. Attached as pages 1-18.

2. Chairman's report.

   a. Rules 404 (a) and (b), 408 and 606 (b) (with comment) adopted September 27, 2007, effective immediately. Attached as pages 19-24.

3. Rule 804 (b) (6): Should the Committee recommend the adoption of the 1997 amendment to FRE 804 which added a hearsay exception on forfeiture by wrongdoing?

   a. CRE 804 and FRE 804 with 1997 committee comment. Attached as pages 25-26.

   b. Memo from Professor Mueller. Attached as pages 27-34.

   c. People v. Moore, 117 P. 3d 1, 5 (Colo. App. 2004) (recognizing doctrine of forfeiture by wrongdoing). Attached as pages 35-42.

   d. People v. Vasquez, 155 P. 3d 565 (Colo. App. 2004) (recognizing that Colorado has not adopted Rule 804 (b) (6); holding that defendant "forfeited had right to confrontation" and his hearsay objection by his wrongdoing), cert. granted 3/26/07. Attached as pages 43-48.

   e. People v. Moreno, 160 P. 3d 242 (Colo. 2007) (discussing doctrine of forfeiture by wrongdoing; because People failed to prove that defendant had any intent to prevent child from testifying against him, defendant did not forfeit his constitutional right of confrontation). Attached as pages 49-54.

COLORADO SUPREME COURT
COMMITTEE ON RULES OF EVIDENCE

MINUTES OF MEETING
February 14, 2007

David R. DeMuro called the meeting to order at 2:41 p.m. in the Supreme Court Conference Room on the fifth floor at the Colorado Judicial Building at Two East 14th Avenue in Denver, Colorado.

The following members were present:

Catherine P. Adkisson
Judge Rebecca Bromley
Philip A. Cherner
Justice Nathan B. Coats
Judge Janice Davidson
David R. DeMuro, Chair
Elizabeth F. Griffin
Professor Sheila Hyatt
Professor Christopher B. Mueller
Henry R. Reeve
Judge Robert M. Russel

The following members were excused:

Judge Harlan Bockman
Judge Martin Egelhoff
Carol M. Haller

APPROVAL OF MINUTES FROM LAST MEETING, MAY 19, 2005

The minutes from the May 19, 2005 meeting were approved as corrected. The corrections include Mr. Cherner's reference to the Shreck issue at the bottom of page one, and Mr. Cherner's question at the May 19, 2005 meeting pertained to who pays for the flight on a Shreck issue.

Ms. Griffin noted that she was a proponent, not an opponent on page two.

On page six, Professor Mueller added to the third paragraph from the bottom of the page in the second line, he thinks he said that Shreck has not adopted Dauber wholesale.

APPROVAL OF MINUTES FROM THE NOVEMBER 9, 2001 MEETING

The minutes from the November 9, 2001 meeting were approved as submitted.

CHAIRMAN'S REPORT

At the last meeting, the committee recommended adoption of rules 608 (b) and 405 (b). The Court has adopted those changes which took effect January 1, 2006.

The Court reappointed four Committee members to the Evidence Committee. Members of the committee serve staggered three year terms. Mr. DeMuro pointed out that

Ms. Adkisson, Ms. Griffin, Judge Bromley, and he were reappointed. Mr. DeMuro indicated that four members will be up for reappointment later this year. Mr. DeMuro will call those members and ask about reappointment.

Mr. DeMuro indicated that a membership list is included in the packet, pages eight and nine. Please submit all updates.

CRE 404 (a): SHOULD THE COMMITTEE RECOMMEND ADOPTION OF 12/1/06 AMENDMENTS TO FRE 404 (a) (1) and (2) LIMITING THE RULE TO CRIMINAL CASES?

Mr. DeMuro said changes made in the federal rule are related to CRE 404 (a) on character evidence not admissible to prove conduct. There are materials in the packet about the changes. The federal materials start on page 17 of the agenda packet. Materials for the Colorado rule are on page 21 of the agenda packet. Mr. DeMuro pointed out that the Colorado rule is similar to the old federal rule. The changes to the rule are small. The federal rule makes reference to Rule 412. Colorado does not have a Rule 412.

Suggested changes include the addition of language in CRE 404 (a) (1) and 404 (a) (2). The new language expressly indicates that the rule only applies in criminal cases, not in civil cases. Many people thought that these never applied to civil cases. However, there is a Court of Appeals decision, Knowles, that indicates that 404 (a) applies in administrative, civil, and criminal cases.

Mr. DeMuro asked the Committee if adoption of a rule similar to the federal rule 404 (a) (1) and (2) would be appropriate to limit character evidence to criminal cases.

Professor Mueller indicated that the state rule should not be changed. It is a good idea to clear up an ambiguous area. However, changing the state rule is not the right way to deal with this issue. A person should be able to defend himself or herself in a civil case. The federal rule distinctly addresses criminal conduct.

Mr. DeMuro thought the rule may speak to civil cases on excessive force by police officers.

Ms. Hyatt said that the rule allow has been used to allow for civil defendants charged with criminal acts to put on character evidence. The biggest challenge is determining which cases are like criminal cases. There is a bias in all the rules against character evidence. If the Committee decides to honor precedent in Colorado then perhaps the rule should be limited to criminal like cases.

Judge Bromley asked what type of footnote or advisory comment the group could write. Mr. DeMuro wondered if the language could be fine-tuned.

Professor Hyatt indicated that currently in criminal like cases there is the thought that civil defendants should be able to offer character evidence. If the Committee leaves the

rule as it stands, then something similar will survive in Colorado. The Colorado Supreme Court has not yet made a ruling. If the rule is left as is, the Committee is still faced with what are like criminal cases. These types of cases don't seem to come up that much. If changes are made to the rule, precedent is erased.

Mr. Cherner asked if the federal change would overrule Knowles. Several members responded in the affirmative.

Professor Mueller commented that the Committee has not acted as a reform body. He agreed with all of the comments that Professor Hyatt made. This rule would require many changes. The current CRE 404 (a) allows for some room in interpretation. Courts make the rules. If the Committee amends the rule as the federal government has, than the possibility of flexibility and the courts making their own rules is gone.

Professor Mueller wants to start again and draft a new Rule 404. The Committee will most likely not draft a new rule. He urged the Committee to at least not change the rule in the same manner as the federal government. He has a growing sense that the rules related to character evidence have application in the civil rules. Using differences between civil and criminal cases is not the way to draw the line.

Professor Hyatt indicated that Knowles and Lombardi, and other civil cases where character evidence may be ok, have been around for a long time.

Professor Mueller indicated that another change in FRE 404 (a) (2) are references to rape shield provisions. There is a rape shield statute in Colorado. Perhaps the rule should be amended to refer to the Colorado statute.

Professor Mueller indicated that he prefers changing the language to indicate it is subject to the limitations in the Colorado rape shield statute, rather than including references to criminal cases.

Mr. Cherner asked about both the civil and criminal rape shield statute. Professor Hyatt indicated that 18-3-407 is the Colorado Rape Shield statutes and 13-25-131 is the Civil Sexual Assault statute.

Mr. DeMuro pointed out that the federal rule is structured such that criminal cases are subject to the limitations of rule 412, Colorado's version of the federal statute. He recommends that if the Committee makes changes in the Colorado rule that references to the statute should be included for criminal cases.

Professor Hyatt commented that the federal rule 412 covers both civil and criminal rape shield. If the Committee only refers to criminal cases then a reference is not needed to the civil statute.

Professor Mueller prefers to leave the state rule CRE 404 (a) (1) alone and add reference to criminal cases in CRE 404 (a) (2). He prefers that the rule refer only to criminal cases. Professor Hyatt commented that reference should be made to the statute.

Mr. Cherner asked about other factors that are moving the proposed change, other than changes in the federal rule. Professor Mueller responded that changes to CRE 404 (a) (1) and (2) is not a burning issue. Mr. DeMuro indicated that there are a small number of these types of cases. Judge Bromley agreed with Mr. DeMuro.

Professor Hyatt identified the case types as civil damage for any kind of assault, sexual assault, and fraud.

Mr. DeMuro asked the Committee for additional thoughts on changes to CRE 404 (a) (1) and (2). Mr. DeMuro indicated that the federal government is merely clarifying the rule and saying that they always meant for it to be a specific way. They identify the changes as a housekeeping issue. If the Committee creates an exception and indicates that the rule does not apply to civil cases, then the rule must be sent to subcommittee for work. He indicated that the committee could send the rule to subcommittee or choose to adopt the federal changes.

Judge Russel voiced that he prefer that the Committee not change the state rule. Several other members agreed. Mr. DeMuro indicated that if no changes are made there may be a group of people that question the decision and decide to raise the issue in civil cases.

Mr. Cherner pointed out that the federal rule is not the law in Colorado. The Knowles case is the precedent. Mr. DeMuro commented that in a book on evidence the author indicated that the court acted without authority in Knowles.

Ms. Hyatt indicated that in reading Knowles and the citations as to how the decision was arrived at regarding good character evidence in civil cases there really was no analysis of the situation. Mr. DeMuro commented that character evidence was not the court's focus. The case was decided on other issues.

Judge Davidson commented that the decision to leave CRE 404 (a) as it is would not be based on precedent. She indicated that there is no reason to change the rule. She is not aware of any conflict. The trial courts are not asking for guidance. Once there is an appeal, then there will be case law. This seems like a better way to handle the situation, rather than writing a rule.

Judge Bromley said that there is no need for guidance. She prefers that CRE 404 be left alone, rather than adopting the changes that were made in FRE 404. Many problems will be created by making the change.

Judge Davidson indicated that the first problem is changes to FRE 404 bring additional interpretation of the subject. The second problem is the two different categories of the rule. The first category is clarified and originally intended to apply to criminal procedures, based on the plain language. The issue is open to interpretation in Colorado. She suggested that the committee leave this issue alone. Let developments take place via case law. Judge Davidson indicated that CRE 404 (a) (2) should be more tightly drafted.

Mr. DeMuro asked the Committee if anyone else felt we should separate CRE 404 (a) (1) and 404 (a) (2)? Does anyone want to adopt changes to one rule and not the other?

Professor Mueller brought up an example. There are some issues in having CRE 404 (a) (2) only apply to criminal cases. He prefers that nothing be done to change CRE 404.

Ms. Griffin commented that she has never seen a case come through on CRE 404.

Professor Mueller commented that changes were made to the federal rule to clarify that rape shield controls an issue over FRE 404. CRE 404 may be clarified in the same manner. However, it is not a necessity to clarify it.

Judge Davidson said that people will read more into the change if only one rule is amended.

Mr. DeMuro indicated that the issue may be approached with two votes. First, the Committee may recommend no changes to the rule. Second, should the Committee wish to make a change, should the changes that were adopted in FRE 404 be adopted?

Judge Russel asked if it was possible as a Committee to not make any recommendations or does the Committee need to take action. Mr. DeMuro indicated that if the Committee decides to vote the rule down, then the Court should be informed.

Professor Hyatt pointed out that this subject is an agenda item and there is some question as to what should be done. Judge Russel indicated that the Committee could report that the issue was tabled to see how case law plays out.

Justice Coats indicated that the Court pays attention to what happens with this Committee. He informs the court of decisions, even if no recommendation is made.

A motion was made to recommend making no changes to CRE 404 (a), keeping the rule in its current form. The motion to make no changes to CRE 404 (a) passed 9:0. Mr. DeMuro indicated that the second motion regarding changes to CRE 404 (a) is moot, since the Committee voted not to change the rule.

CRE 404 (b): SHOULD THE COMMITTEE RECOMMEND ADOPTION OF 1991 AMENDMENT TO FRE 404 (b) REQUIRING NOTICE BEFORE USE OF SUCH EVIDENCE IN A CRIMINAL CASE?

Mr. DeMuro indicated that Ms. Griffin brought this issue related to CRE 404 (b) to the attention of the Committee.

Ms. Griffin provided history about the issue. This rule is used by prosecutors, but can be used by defendants. There is some case law on this issue. The defendant requests a showing of evidence. The court makes a finding and decision before a trial. A few years ago, a case was heard by the Court of Appeals where it was decided that there

was no requirement of notice. The court ruled that because changes to the federal rules were not adopted, reasonable notice was not required.

Ms. Griffin voiced a preference for placing the changes to the federal rule into the state rule. In some cases, parties are not being given notice, for example, People v. Warren.

Mr. DeMuro pointed out that CRE 404 (b) is similar to the federal rule before the change. The federal courts changed their rule in 1991. Mr. DeMuro indicated that he cannot recall if the change came before the Civil Rules Committee. Mr. DeMuro wondered if some of the changes may be related to motions in limine. Several Committee members responded in the affirmative. Judge Bromley indicated that this type of process has always been followed in her Court. Prosecution usually files a motion about the admissibility of the evidence.

Ms. Griffin said that some changes were made in practice after the Warren case.

Professor Hyatt asked if the defense ever files a motion in limine, indicating that if there is 404 (b) evidence it should be kept out of the case.

Mr. Cherner shared that he files a notice in every case, as CRE 404 (b) provides that he do so. He receives 404 (b) evidence in seventy five percent of the cases he is working on. If 404 (b) evidence is admitted he may lose the case, but if he is able to keep the evidence out he may win. This is part of the process. Mr. Cherner said that he always asks for this evidence. His practice is largely along the Front Range, but he's not sure what is happening elsewhere.

Professor Hyatt asked how frequently judges defer making a decision. Mr. Cherner responded about his experience. He files a number of motions in the beginning, asking for discovery. The state usually files a 404 (b) motion. The parties appear for a motions hearing, and that is usually a part of the motions hearing. This typically happens weeks before the trial.

Professor Hyatt pointed out that the judge may want to rule later when all evidence is in. She asked if it happens frequently that judge do not want to make an immediate ruling.

Mr. Cherner said that the last few judges he was in front of ruled on the motion. Some judges have said that they are not ready to rule, they want to see the big picture. Most of the time, judges make a ruling.

Judge Davidson wondered if the federal rule provides for sanctions. Ms. Griffin commented that the court determines what is reasonable. Sanctions are at the discretion of the court.

Professor Mueller indicated that there are appeals, but it is hard to get a reversal on this rule.

Judge Davidson inquired about discovery violations. How is this dealt with in the federal rules? Professor Mueller responded that notice must be given.

Ms. Griffin indicated that this is similar to the rape shield statute. Parties are required to give notice. This process promotes early resolution, prevents surprises, and is clearly required.

Mr. DeMuro pointed out the language from the Federal Committee. Notes from 1991 indicate that if proper notice is not received, evidence is inadmissible. Professor Mueller confirmed that if notice is not given evidence is inadmissible. He indicated that there are arguments about reasonable notice.

Mr. Cherner indicated that the federal rule codifies current state practices. In his experience, notice is given. It's a routine matter. This is a matter that trial judges know they need to deal with.

Professor Mueller indicated that most judges would be upset if a prior ruling was not made on the evidence. Judge Bromley replied that without a ruling of some kind related to evidence there can be a mistrial.

Mr. Cherner said that giving notice is a good idea. Requiring notice adds another obligation to those already in existence.

Professor Mueller said that the rule seems loose enough that late notice could be excused.

Professor Hyatt wondered why the court would excuse pretrial notice without a good cause. Mr. Cherner indicated that the defendant may have committed another crime the day before the trial. Judge Bromley indicated that there may be a case where a witness finally comes forward. Testimony is taken because a witness was just found.

Judge Russel responded that if an ambiguity could be clarified, then he would recommend adopting changes to CRE 404 (b).

Mr. Reeve said that notice is appropriate. Making changes to CRE 404 (b) as a result of changes to the federal rule might not be right, as the rule is sixteen years old. Changes are being proposed due to the public defender's office and one case. He wants to give the prosecutors a chance to respond before changing the rule. The district attorneys in the state need an opportunity to respond. Mr. Reeve thinks this is the fair thing to do. There is no particular need to make changes immediately. He personally has no problem with the proposed changes.

Mr. DeMuro asked the Committee if there is no need to move quickly.

Professor Mueller asked whether sometimes the court invites comment if there is concern over a particular issue.

Mr. DeMuro shared that the Court sometimes asks for public comment, including written. Items were adopted without comment, too. This would be the Court's call. He is unsure what the Court will do if the Committee sends the rule to them. He is unsure if the district attorneys will have a chance to address the issue.

Professor Mueller said that he thinks most of the district attorneys are operating in a manner consistent with what was heard on this issue. This is not a major concern. He favors soliciting written comment. He doesn't think any complaints exist on this issue.

Judge Davidson voiced that notice has always been a part of the rule. The reason that this has become an issue is that a case has occurred that relates to interpretation of the rule. The rule doesn't specifically state notice; maybe this was an oversight. But, the rule codifies practice. She does not think that district attorneys should have input before the rule goes to the Court. The content of the rule is up to the Supreme Court. Typically, the Court allows comments, so the district attorneys may comment then.

Mr. Reeve voiced that changes to CRE 404 (b) are a sound idea. However, he feels some ambivalence. He is unsure of the district attorneys' opinions. Out of fairness, comments from district attorneys should be allowed.

Ms. Griffin indicated that she attempted to talk to the district attorneys a few years ago about this same issue.

Mr. Cherner voiced that he does not want to wait two years to resolve this issue. He hopes that the Court will allow public comment and that the Committee will recommend public comment.

Ms. Adkisson indicated that she can't remember a case where notice is not given pretrial. She offered to relay the question to district attorneys. Ms. Adkisson voiced that she cannot see a problem.

Judge Bromley said that she approves of changes to CRE 404 (b) on the condition that she does not hear too many negative comments.

Mr. DeMuro said that in recent years the Court was adopted most rules so that they take effect on a January 1 or July 1 date, at least from the Civil Rules Committee. There is enough time before July to send the rule to the Court and allow for public comment. Mr. DeMuro asked the Committee if it is appropriate to send the rule to the Court and ask for a public comment period.

Justice Coats indicated that the Committee could act in that manner. What typically happens is that he makes the recommendation to put the issue on the Court's calendar. Usually, the Court gets a sense of whether there are any problems. Once the Court reviews it comes to a consensus, sometimes public comments are necessary. Notice is given to the public; and the Court waits for any comments. A public hearing is not scheduled unless there are significant comments. Sometimes, there are big issues where a hearing is necessary, and those are scheduled for hearing right away.

Judge Davidson indicated that the Committee could make the appropriate recommendation. In the report, the Committee can voice a concern for district attorneys input. The Court may want short comments or they may ignore the suggestion. Even if the district attorneys did not like the change she would not change her mind about changes to the rule. Typically, groups do not come into the court for comment unless

they are an experts on a certain issue. She does not see this as a controversial or hot topic.

Mr. Cherner indicated that each member represents constituents. There is some responsibility to poll colleagues before attending the meeting. He asked that members poll people while doing their daily business before coming to Committee meetings.

Mr. Reeve voiced that he views his involvement in the Committee as confidential. Mr. Cherner asked if members are to act in confidential manner. Mr. DeMuro indicated that he doesn't think that there is a confidentiality requirement. Mr. DeMuro pointed out that meeting minutes are public.

Mr. DeMuro asked Judge Russel if he would like to add to the proposal that the court consider public comment. Judge Russel indicated that he does not think that public comment is necessary.

Mr. DeMuro asked the committee for other comments. He said that the other question is related to wording in the federal rule. Advance notice of evidence is required prior to trial. Once the trial begins reasonable notice is required. The timing seems inconsistent. However, the wording may be used in order to allow for circumstances that arise. He wondered if any one else senses that the timing is odd.

Ms. Adkisson said that the timing should be left open, as in the federal rule.

Judge Russel indicated that there are problems with pro forma motions and vague motions. He said that this issue may be dealt with later. He indicated that a subcommittee could work on the language. Other members discussed working on the language.

Judge Russel put forward a motion recommending that the Supreme Court adopt the 1991 language changes in the federal rule to CRE 404 (b). The motion to make changes to CRE 404 (b) passed 8:0.

Professor Hyatt indicated that she almost abstained from voting. She wants to know about the specific changes that Judge Russel is recommending. She recommended removing the word "general."

CRE 408: SHOULD THE COMMITTEE RECOMMEND ADOPTION OF 12/1/06 AMENDMENTS TO FRE 408 LIMITING THE ADMISSIBILITY OF SOME STATEMENTS AND OFFERS MADE IN COMPROMISE NEGOTIATIONS?

Mr. DeMuro reminded the Committee that the group talked about this issue in 2005. The changes are not small. The federal government rewrote the rule and added subsections. The basic principles are still included in the rule on offers of compromise. The biggest change relates to admissible conduct and statements. The changes may be seen on pages 46 and 47 of the agenda packet. Offers will not be admissible, but certain conduct and statements will be admissible.

As an example, a nurse's license is revoked by the State Board of Nursing. During negotiations, the nurse admitted she took drugs from the hospital pharmacy. Under the current rule, that admission may not be used in a criminal case. However, changes to the rule would allow the statement about drug use in a criminal case.

Professor Mueller pointed out that the big change in the federal rule is hidden in the language. He indicated that information from civil settlements is inadmissible in criminal cases. For example, in the Kobe Bryant case, the prior version of the rule makes it difficult to determine if anything is admissible into the criminal case from the settlement process. The FRE 408 wording is different. Civil settlement negotiations are not admissible. There is an exception for regulatory settlements. The exception is related to the Justice Department. The amended federal rule looks good. The change is constructive. If Professor Mueller had his way, he would take out the exception. He prefers the changes to what is being used now, as the current rule is ambiguous.

There are also changes that deal with statements in a civil settlement being used to impeach. That was ambiguous in the old rule.

Mr. Cherner asked if the rule keeps the fact of the settlement out or the statements. Professor Mueller responded that statements are kept out. The premise of the rule is that it does apply in criminal cases. The exception is for conduct and statements with a government agency. The intent is to apply the rule across the board in criminal cases. If there was a civil settlement with a government agency on a regulatory matter, then the information may be used. Professor Mueller indicated that he does not think that the exception is a good idea.

Mr. DeMuro commented that in crafting the federal rule, the exception came about because this was an area where multiple comments were received.

Professor Mueller isn't too familiar with state proceedings that revoke licenses. He wondered if there are many such proceedings. Mr. DeMuro responded in the affirmative. There may, also, be state tax issues and environmental issues where this would apply.

Professor Mueller indicated that he might advise the nurse not to settle the license case if she may face criminal charges. Mr. Cherner responded that many state agencies proceed with the revocation and will not wait for license holders who choose not to settle or participate in the process.

Professor Mueller indicated that CRE 408 does not cover testimony, it covers attempts to settle.

Mr. Cherner voiced that it is hard to apply the federal changes to the state practice. Negotiations are typically done lawyer to lawyer. Not much is generated in the negotiation process that can be used in a criminal proceeding. In the nurse example, if an agreement is reached, he doubts that the settlement paperwork would make its way to court.

Professor Mueller asked if clients typically participate in this type of negotiation process. Mr. Cherner pointed out that the client typically does not participate in the negotiation process on a personal level.

Professor Mueller indicated that the proposed rule is an improvement over the current rule. He pointed out another provision, obstruction of prosecution.

Professor Hyatt said that the worst part of the rule is to negate efforts to prove criminal obstruction. In the Kobe Bryant example, the negotiations could be viewed as a buy off. Using different language can assist in delineating between obstructing justice and a civil settlement.

Professor Mueller indicated that settling in civil cases is a good thing.

Mr. Cherner looked up a statute on this issue. Professor Hyatt indicated that there is a relationship between the witness statute and compromise statements made in negotiation.

Professor Mueller spoke to FRE 408 and the extension to criminal proceedings. There is a piece that indicates that you cannot impeach based on inconsistent statements. Does the committee want to make an exception for state agencies? The problem is that if the exception is removed, the reference to criminal cases is also removed.

Professor Hyatt indicated that the rule is trying not to deter the conversations. Mr. DeMuro wondered if that approach is chilling the opportunity to settle on the civil side.

Ms. Griffin said that in license revocations, the party has a right to counsel.

Mr. Cherner pointed out that this is treated in different ways. For example, in the parole statute, there is immunity. Nothing that is said during a parole board hearing may be used against the party. An administrative board may say we don't care if your client has a fifth amendment right we are going ahead with this licensing procedure. Mr. Cherner said that he has run into this situation with school boards.

Professor Mueller inquired about school board cases. Mr. Cherner gave an example that the client commits a crime and is expelled. Sometimes the board will wait until the criminal proceeding is finished. Some judges will stay civil actions while a criminal case is pending. Judge Bromley agreed with Mr. Cherner. Mr. Cherner said that there is variety in how this issue is dealt with.

Judge Bromley spoke of an example of an appeal from county court involving a request for a civil restraining order. The basis for requesting the restraining order was the same as five misdemeanors. These cases were filed at the same time. The case went to hearing on the civil matter. The restraining order was issued. The criminal case went to trial nine months later and the defendant was acquitted.

Professor Hyatt used the example of a lawyer pleading guilty to a criminal charge leading to revocation of the license to practice. The criminal action may happen first. Then the regulatory action occurs. This situation may be res judicata. A defense can't be made in the license hearing.

Professor Mueller specified that in the corresponding criminal rule this already applies in civil cases. In a negotiation for a plea bargain, nothing can be used in a civil case. At least on the settlement, Rule 410 takes care of the issue.

Professor Hyatt pointed out that CRE 410 allows a guilty plea to be withdrawn later.

Professor Mueller indicated for this purpose the Committee is dealing with settlement negotiations. Professor Mueller voiced that perhaps the Committee is saying that the rule would be better without the exception. He suggested that three words be added in the beginning of the state rule, in criminal or civil cases. The part about state agencies could be removed. All civil settlement negotiations would be excluded from criminal cases.

Mr. Cherner agreed. He did indicate that settlement negotiations usually don't come out in the case.

Mr. DeMuro confirmed that statements made in addition to the offer are excluded.

Professor Mueller said that one should be able to settle a civil case without getting into additional trouble.

Judge Bromley said that this will be a big issue. A public hearing will be necessary. Professor Mueller asked if government agencies will feel strongly about this issue. Judge Bromley responded in the affirmative. Professor Mueller asked why the government would settle on a civil case and then bring criminal charges. Mr. Cherner responded that a different agency files the criminal charges.

Professor Hyatt asked about a state equivalent for the Justice Department. Mr. Cherner said that occasionally he will see a criminal case from the Attorney General's office with a civil component. Ms. Griffin indicated that some environmental investigations lead to criminal charges.

Judge Davidson pointed out that there are differences between encouraging settlements in civil cases versus regulatory matters. The regulatory matter is the enforcement of something like, a nurse or doctor license. She wondered if during a license suspension process if statements are taken from the doctor or nurse. There seem to be major differences between court cases and regulatory matters.

Professor Hyatt asked if settlement is different in regulatory cases versus civil cases. Are conditions imposed? Mr. DeMuro indicated that the licensing board may need more facts before deciding on a settlement. Many times negotiations occur between attorneys, but many license holders don't have counsel.

Mr. Reeve pointed out that a problem arises when the exception is removed. Is the criminal statute being undermined? This may involve a situation where a statement from a public servant was deceiving. It is difficult to prosecute in matters related to influencing public employees. Professor Mueller pointed out that obstruction of justice may apply. Mr. Reeve indicated that there are different criteria for obstruction of justice.

Mr. Cherner indicated that it would be surprising if the statement and facts of settlement were different from testimony in a criminal case. Professor Mueller said that if you are under oath when speaking with the governing body there may still be ways of dealing with this issue.

Mr. Cherner indicated that it would be surprising if the statement and facts of settlement were different from testimony in a criminal case. Professor Mueller said that if you are under oath when speaking with the governing body there may still be ways of dealing with this issue.

Mr. Cherner pointed out that it would be tough to restrict a district attorney on cross examination on this. Professor Mueller indicated that many times in a criminal trial defendants are cautioned about statements that are made. Mr. Cherner said that in practice lawyers from both sides are talking and they understand what can and can't be said.

Mr. DeMuro indicated that there are other changes in the federal rule. For example, the introductory language in FRE 408 indicates that statements made in negotiation can't be admissible on behalf of any party to create a positive slant. The end of the introduction, also, indicates that evidence can't be used to impeach prior inconsistent statements. A full sentence was dropped from the original rule.

Professor Mueller indicated that the sentence did not make sense. The meaning of the sentence seems to indicate that you can't bring all of your evidence.

Mr. Cherner asked if any members have had real world experience with this type of problem. He has been through the process many times and usually there is resolution at settlement or statement.

Professor Mueller made a few comments about misconstrued cases.

Professor Hyatt shared that there is confusion about privilege. In settlement matters the assumption is confidence. However, these matters may not be held in confidence. If a party tells his/her lawyer that he/she was drunk in relation to an accident, it does not mean that the other side can't ask about the matter.

Mr. DeMuro indicated that he needs direction from the Committee as to whether CRE 408 should be changed to make the rule more similar to FRE 408 or if the matter bears further examination or should be left alone.

Professor Mueller moved that the Committee adopt the federal language for use in CRE 408, as the language seems to be better than what Colorado currently has in place. The motion was seconded by Judge Davidson.

Discussion on the motion to adopt federal language for use in CRE 408 ensued as follows:

- Professor Hyatt indicated that she will vote against the motion, as she is concerned about under-representation in regulatory proceedings.
- Ms. Griffin indicated that she would add wording regarding representation by counsel.
- Mr. DeMuro raised the issue of notes. For example, should we add a note indicating that it is inappropriate to use against unrepresented parties.

The motion to adopt federal language for use in CRE 408 was approved 7:2.

Professor Mueller suggested adding a note about those that are unrepresented, just as in federal rule.

Mr. Cherner pointed out that federal courts are not bound by state law or negotiations regarding state agencies. He has had the federal government issue subpoenas to state agencies for confidential documents.

CRE 606 (b): SHOULD THE COMMITTEE RECOMMEND ADOPTION OF THE 12/1/06 AMENDMENTS TO FRE 606 (b) SO THAT JURORS MAY TESTIFY AS TO MISTAKES ON THE VERDICT FORM?

Mr. DeMuro turned the Committee's attention to CRE 606 (b). There is plenty of case law on this subject. He attached Stewart v. Rice. This is related to jurors' signed affidavits. Jurors cannot testify, except on two limited issues.

The FRE 606 (b) created a third section and reorganized the rule. The third section speaks to mistakes related to entering a verdict on a verdict form. This change is related to clerical errors. The Stewart v. Rice case does address clerical mistakes, but in the context of the CRE 606 (b).

Mr. DeMuro asked the group for feedback and direction. Should a section be added to CRE 606 (b) regarding juror testimony in the case of mistakes made in entering a verdict on a form?

Mr. Cherner indicated that verdicts related to his cases are simple. The forms are not difficult.

Mr. DeMuro said that there are more complex situations, such as Stewart v. Rice where jurors are completing forms related to special verdicts and damages. He was not sure

about the necessity of the change. Mr. DeMuro asked if this situation happens frequently.

Professor Mueller said that there are many examples of mistakes on verdict forms, such as on the third line of a form where an independent amount should be entered and the amount is the sum of lines one and two.

Professor Hyatt asked if the proposed changes would affect the case law. Mr. DeMuro responded that the case law would probably not be affected. Professor Mueller suggested writing a note about the change to the rule being consistent with the case law.

Mr. Cherner wondered about the definition of a clerical error. Professor Hyatt pointed out that this type of an error is a mistake entering the verdict on the verdict form. Professor Mueller provided an example of a clerical error, Kading v. Kading related to damages of personal property and real property. The judge asked the jury if they accidentally reversed the amounts. The wrong sum was on the wrong form and the mistake was caught when the jury was polled.

Mr. DeMuro said that the Committee is looking at cases that are post verdict.

Professor Mueller indicated that the federal language is designed to cut back on the number of federal cases where juror verdicts were changed. For example, a jury awards one million dollars in damages and places liability at twenty percent. Was the damage amount applied before or after liability was assigned? Federal courts were allowing jurors to change the verdict. Jurors indicated that the one million dollars was the bottom line figure. There is a Colorado case statute that this situation is not a clerical error but a juror misunderstanding. The federal changes are trying to do the same thing. This narrows the number of cases that are classified as clerical errors.

Mr. DeMuro indicated that he is afraid that changes to the rule will have the opposite effect in Colorado. This change may open the door to a new class of arguments about verdicts.

Professor Mueller pointed out that the federal change is trying to be narrow. Mr. DeMuro agreed.

Professor Hyatt said that the verdict must be understood. What did the jury mean? Did what the jury meant to do end up on the form? The jury may have been confused.

Professor Mueller indicated that this involves cases where the jury meant to write the figures on the form and did not.

Judge Davidson identified clerical errors, such as mistakes in addition or inconsistent check marks. The mistake is on the face of the verdicts. The forms are not reconciled. In these cases, jurors are asked to correct forms.

Originally, Judge Davidson liked the language of the rule. She voiced that she is now unsure. How do you ascertain what the verdict is until it is written down? It's important to get to what the jurors intended. That is a different situation than receiving different forms or forms that do not add up. These types of problems are frequent, especially in complex civil cases. The trial courts should be able to fix errors. This change may unintentionally open the door to questions. This is the mental process of the jury. How does one arrive at the mental process?

Mr. DeMuro asked that if you bring the jury back and put them on the stand, what questions will they be asked? It would be hard to get at what number did the jury mean to write down and how did the jury arrive at the verdict without going into their mental processes. He indicated that he feels a little apprehensive about the change.

Judge Bromley voiced her understanding of the issue as a jury not fully completing the forms. The judge can hand the forms back to the jury for completion. The trial judge should not allow the jury to go until the forms are complete.

Judge Davidson indicated that she can approve changes to CRE 606 (b) in the case of clerical error. Professor Mueller said that the existing language does not speak to clerical errors. Mr. DeMuro asked if Rule 60 (a) in the Civil Rules may be used to correct this type of error.

Ms. Griffin asked about reading the verdict and polling the jury. Professor Mueller indicated that if you have to ask the jury about the meaning of the verdict, than there is already a risk. The issue can be dealt with by indicating that the verdict is not being challenged. You are trying to understand what the verdict is. Nothing in the rule prevents this type of action.

Judge Russel indicated that it is clear that until the verdict is accepted the court may send the jury back to create a verdict that all may understand.

Ms. Griffin voiced that she is not sure that a rule change is necessary. You may not know on its face what the verdict is. However, once the jury is polled, the verdict should be evident.

Professor Mueller indicated that the language of a verdict may be amended. The jurors may be brought back.

Ms. Griffin spoke of polling the jurors. Professor Hyatt indicated that it is appropriate to poll the jury. If a juror balks or doesn't understand the verdict than the jurors may be sent back to deliberations. The Civil Rules speak to sending jurors back to deliberations. Judge Bromley agreed. The entire verdict should be read. The jury should be polled. If any jurors balk, then the jury should be sent back to deliberations.

Judge Davidson pointed out that CRE 606 (b) corrects clerical errors after the fact. May clerical errors be corrected while the jury is still present? Judge Bromley said that she is uncomfortable trying to ascertain the meaning of a verdict or to correct a verdict after the fact.

Professor Hyatt pointed out that there is a vehicle to inquire about the validity of verdicts. Juror testimony would most likely occur if there is a hearing on a motion for a new trial. There is a lot of policy, practice, and procedure in this rule, more than there is evidence. If jurors are allowed to testify regarding a mistake on the verdict entry form, how is the verdict defined, the individual's verdict, the jury's verdict, etc? This could be a real invitation to challenge verdicts. One week later a juror may say "that is not what I intended." That may be grounds for a motion for a new trial.

Judge Russel moved that the Committee recommend that changes to CRE 606 (b) not be adopted. Mr. Reeve seconded the motion.

Discussion ensued as follows:

- Mr. Cherner indicated that in criminal cases this is a good policy. Attorneys do not receive much information on jurors.

- Professor Hyatt indicated that judges should be trained to work with juries. Judge Bromley indicated that she has the jury correct any clerical errors before discharge.

The motion to not adopt changes to CRE 606 (b) was approved 8:1.

CRE 609: THERE IS NO COLORADO RULE 609 BECAUSE A STATUTE ADDRESSES THE ISSUE, BUT SHOULD THE COMMITTEE RECOMMEND THE ADOPTION OF FRE 609 ON IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME, INCLUDING ITS 12/1/06 AMENDMENTS?

Professor Mueller addressed the issue, indicating that the statute is not good. He did some research to see if the Committee had the power to disregard the statute. In both the civil and criminal rules statutes, the Supreme Court may adopt any rule changes. If the changes are inconsistent with the statute the change supersedes the statute. The evidence rules statute does not say the same thing. Rule 609 is better than the statute, but he doesn't think the Committee has the authority for such an action.

Mr. Cherner voiced trouble in understanding changes to FRE 609. The old rule had time guidelines and there were exceptions for crimes of turpitude. The new rule doesn't appear to have the ten year limit.

Professor Mueller indicated that the ten year limit still exists. The change is in 609 (a) (2). If there is a crime or conviction for felony theft and the underlying facts show embezzlement from the employer, then the crime becomes dishonesty or false statement.

Judge Russell asked for confirmation that in the statute there is no discretion. Professor Hyatt indicated that the statute does not address the discretion, but the case law allows discretion.

Professor Mueller said that he does not think the Committee may adopt the rule. The Committee will have to wait for the legislature to act on the statute.

Mr. DeMuro voiced the assumption that the Committee does not want to take on changes to the statute. Professor Hyatt agreed with the assumption. Statutes like 609 have been upheld constitutionally.

Professor Mueller talked about public defenders lobbying for changes to Rule 609. Ms. Griffin indicated that no legislation is currently drafted. That is not something that is usually done.

Mr. Cherner pointed out that in the case that upheld the rape shield there was a mix of judicial and legislative power. In the absence of judicial decision the legislature spoke. He doesn't know that it's impossible to pursue a rule that clashes with the statute.

Mr. DeMuro asked if there is other business. Mr. DeMuro said that he will create a document regarding changes voted on during the meeting and pass those recommendations on to the Court.

The meeting was adjourned at 4:40 p.m.

Respectfully submitted,

April Bernard

Rule Change 2007 (13)

CHAPTER 33

COLORADO RULES OF EVIDENCE

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT, EXCEPTION; OTHER CRIMES

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE
And
RULE 606. COMPETENCY OF JUROR AS WITNESS

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** In a criminal case, evidence ~~Evidence~~ of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same or if evidence of the alleged victim's character for aggressiveness or violence is offered by an accused and admitted under Rule 404 (a) (2), evidence of the same trait of character of the accused offered by the prosecution;

(2) **Character of alleged victim.** In a criminal case, evidence ~~Evidence~~ of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness as provided in Rules 607, 608, and 13-90-101.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish~~, or (2)~~ accepting or offering or promising to accept~~,~~ a valuable consideration in compromising or attempting to compromise ~~a~~ the claim ~~which was disputed as to either validity or amount~~; and~~,~~ ~~is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority. ~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

(b) Permitted uses. This rule ~~also~~ does not require exclusion ~~when~~ if the evidence is offered for ~~another purpose, such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ~~of a witness,~~; ~~negativing~~ negating a contention of undue delay~~,~~; ~~or~~ and proving an effort to obstruct a criminal investigation or prosecution.

RULE 606. COMPETENCY OF JUROR AS WITNESS

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the

juror ~~he~~ is sitting ~~as a juror~~. No objection need be made in order to preserve the point.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith~~,~~. But ~~except that~~ a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. ~~Nor may his~~ A juror's affidavit or evidence of any statement by the juror ~~him concerning~~ may not be received on a matter about which the juror ~~he~~ would be precluded from testifying ~~be received for these purposes~~.

Committee Comment

Rule 606(b) has been amended to bring it into conformity with the 2006 amendments to the federal rule, providing that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The federal amendment responded to a divergence between the text of the Rule and the case law that had established an exception for proof of clerical errors. See Fed. R. Evid. 606(b) advisory committee notes (2006 Amendments); see also Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Amended and Adopted by the Court, En Banc September 27, 2007 effective immediately.

BY THE COURT:

Nathan B. Coats
Justice

Rule Change 2007 (13)

CHAPTER 33

COLORADO RULES OF EVIDENCE

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT, EXCEPTION; OTHER CRIMES

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE
and
RULE 606. COMPETENCY OF JUROR AS WITNESS

RULE 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) **Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** In a criminal case, evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same or if evidence of the alleged victim's character for aggressiveness or violence is offered by an accused and admitted under Rule 404 (a) (2), evidence of the same trait of character of the accused offered by the prosecution;

(2) **Character of alleged victim.** In a criminal case, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness as provided in Rules 607, 608, and 13-90-101.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim ; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

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(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Committee Comment

Rule 606(b) has been amended to bring it into conformity with the 2006 amendments to the federal rule, providing that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The federal amendment responded to a divergence between the text of the Rule and the case law that had established an exception for proof of clerical errors. See Fed. R. Evid. 606(b) advisory committee notes (2006 Amendments); see also Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Amended and Adopted by the Court, En Banc September 27, 2007, effective immediately.

BY THE COURT:

Nathan B. Coats
Justice

COLORADO

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) **Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(3) or (4) his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former Testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Committee Comment

The Federal rule is substantially the same as the Colorado Rule; except there is no reference to subsection (b)(2) in the Colorado Rule, as there is no Colorado subsection (b)(2). As to testimony given at a preliminary hearing, *see* People v. Smith, 198 Colo. 120, 597 P.2d 204 (1979). This rule expands upon the former rule of evidence in Colorado. For authorities on the use of such evidence in Colorado, *see:* Rule 32 of Colorado Rules of Civil Procedure; Emerson v. Burnett, 11 Colo. App. 86, 52 P. 752 (1898); Daniels v. Stock, 23 Colo. App. 529, 130 P. 1031 (1913); Woodworth v. Gorsline, 30 Colo. 186, 69 P. 705 (1902); Henwood v. People, 57 Colo. 544, 143 P. 373 (1914); Gibson v. Gagnon, 82 Colo. 108, 257 P. 348 (1927); Duran v. People, 156 Colo. 385, 399 P.2d 412 (1965); Insul-Wool Insulation Corp. v. Home Insulation, Inc., 176 F.2d 502 (10th Cir. 1949).

(2) [There is no paragraph (b)(2).]

Committee Comment

The Federal rule relates to a statement under belief of impending death. The admissibility of the dying declarations of a deceased person is governed by § 13-25-119, C.R.S.

(3) **Statement Against Interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Committee Comment

Colorado precedent concerning statements against interest is sparse, with possible limitation to statements against declarant's pecuniary or proprietary interest. Colorado had not applied this hearsay exception in criminal cases prior to the adoption of this rule. Moya v. People, 79 Colo. 104, 244 P. 69 (1926).

(4) **Statement of Personal or Family History.** (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Committee Comment

This rule expanded the former Colorado rule to admit statements of unrelated associates. Some independent proof of relationship under (B) will continue to be required.

(5) [Transferred to Rule 807]

Committee Comment

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Amended eff. April 1, 1985; Jan. 1, 1999.

FEDERAL

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) **Statement of personal or family history.** (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **[Transferred to Rule 807]**

(6) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

1997 Amendments

Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir.1982), *cert. denied*, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. *See, e.g., United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir.1992); *United States v. Potamitis*, 739 F.2d 784, 789 (2d Cir.), *cert. denied*, 469 U.S. 918 (1984); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir.1982), *cert. denied*, 460 U.S. 1053 (1983); United States v. Balano, 618 F.2d 624, 629 (10th Cir.1979), *cert. denied*, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1358–59 (8th Cir.), *cert. denied*, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. *Contra United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), *cert. denied*, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

GAP Report on Rule 804(b)(5). The words "Transferred to Rule 807" were substituted for "Abrogated".

GAP Report on Rule 804(b)(6). The title of the rule was changed to "Forfeiture by wrongdoing." The word "who" in line 24 was changed to "that" to indicate that the rule is potentially applicable against the government. Two sentences were added to the first paragraph of the committee note to clarify that the wrongdoing need not be criminal in nature, and to indicate the rule's potential applicability to the government. The word "forfeiture" was substituted for "waiver" in the note.

MEMORANDUM

To: Evidence Rules Advisory Committee (David DeMuro, Esq., Committee Chair, Justice Nathan B. Coats, Honorable Janice Davidson, Honorable Robert Russel, Honorable Rebecca Bromley, Honorable Harlan Bockman, Honorable Martin Egelhoff, Catherine Adkisson, Esq., Henry Reeve, Esq., Carol Haller, Esq., Philip Cherner, Esq., Elizabeth Griffin, Esq., Professor Shiela Hyatt, Professor Christopher Mueller, April Bernard, State Court Administrator's Office).
Re: Hearsay Forfeiture Exception
Date: October 15, 2007
From: Christopher Mueller

A question that the committee may wish to consider is whether to recommend to the Court that it adopt the forfeiture exception to the hearsay doctrine, presently codified in the Federal Rules as FRE 804(b)(6), which took effect in the year 2000. That provision creates an exception that applies when the declarant is unavailable, and it reaches the following: "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

Shortly after the Federal Rule was adopted, the predecessor to this committee (a subcommittee of the Civil Rules Committee) considered the question whether to recommend something similar in Colorado, and there was no interest in doing so.

Since then, three things have happened: *First,* the United States Supreme Court has twice endorsed the principle underlying this exception, and in the process revived a decision from 130 years ago that seemingly adopted the principle. *Second,* interest in this idea has grown exponentially in Colorado and across the country, and the exception is being adopted and applied extensively. *Third,* Colorado now has three decisions that approve the forfeiture principle, including one decided by the Colorado Supreme Court in March and one now on review by the Supreme Court. These points are examined more fully below, followed by a discussion of some of the issues.

(1) Supreme Court endorsement. In both *Crawford* and *Davis,* the two key decisions on the new confrontation jurisprudence, the Court went out of its way to endorse the forfeiture principle. See Crawford v. Washington, 541 U.S. 36 (2004) (noting "rule of forfeiture by wrongdoing (which we accept)" and commenting that it "extinguishes confrontation claims"); Davis v. Washington, 126 S.Ct. 2266 (2006) (defendants "have the duty to refrain from acting in ways that destroy the integrity of the criminal trial system," and "one who obtains the absence of a witness by

wrongdoing forfeits the constitutional right to confrontation"). Both *Crawford* and *Davis* cite the century-old decision in *Reynolds* as the source of this principle. See Reynolds v. U.S., 98 U.S. 145, 158-160 (1878) (in bigamy trial, admitting second wife's testimony from the first trial; defendant was uncooperative with process server).

In its description of forfeiture, *Crawford* says it rests on "essentially equitable grounds." In *Davis,* the Court says defendants "have no duty to assist the State in proving their guilt," but "they *do* have a duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." The Court speaks of acts that "undermine the judicial process," and it speaks of "the integrity" of proceedings. In *Reynolds*, the Court spoke of "wrongful procurement" that removes a witness from a case, and it mentioned "concealing or keeping the witness away."

(2) Exponential growth. Prosecutors across the country have been keenly interested in the forfeiture doctrine because lots of hearsay that used to be admitted is now excludable as testimonial under *Crawford.* Prosecutors like the new exception because 911 calls and other accounts to police that used to be routinely admitted as excited utterances are now often excludable (unless the *Davis* "emergency" exception applies). Prosecutors like the new exception because the against-interest exception used to support use of statements by alleged co-offenders to police or in plea allocutions, and now these are excludable as testimonial. Finally, prosecutors like the new exception because statements by children describing abuse are now sometimes excludable, at least when made to police or social service people or in depositions.

Rulemakers and courts have risen to the occasion. Today at least 22 states plus the District of Columbia have adopted the forfeiture principle (including Colorado in the *Moreno* case that is described below). I know of five states that have rules like FRE 804(b)(6) (Delaware, Michigan, Ohio, Pennsylvania, Tennessee). In addition, 17 other states plus the District of Columbia have gone this way by judicial decision (Arizona, California, Colorado, Connecticut, DC, Illinois, Iowa, Kansas, Maryland, Minnesota, New Jersey, New Mexico, New York, Oregon, Texas, Vermont, Washington, Wisconsin).

(3) Colorado decisions. Colorado has three decisions that approve the forfeiture principle, including one decided by the Colorado Supreme Court in March and one now on review before the Court.

In People v. Moreno, 160 P.3d 242 (Colo. 2007) (opinion by Justice Coats), the trial court admitted statements made by a nine-year-old victim in a videotaped police interview, on the basis that she was unavailable because testifying would retraumatize her. The statements fit our child victim hearsay exception. The Court of Appeals reversed on the ground that the statements were testimonial under

Crawford (which was decided after the trial). The Court of Appeals also *rejected* the argument that defendant lost his right to exclude the child's statement by "causing her unavailability." In *Moreno,* the Supreme Court affirmed because forfeiture entails "intent," and intent had not been shown: A defendant loses the right to confront a person, said the Court in *Moreno,* only by "wrongful conduct" that is "designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends."

Moreno really rests on two grounds. One turns on interpreting what the United States Supreme Court said in *Davis.* There the Court said FRE 804(b)(6) "codifies" the constitutional forfeiture doctrine, which the Court in *Moreno* interprets to mean that intent must required as a constitutional matter: If the Rule requires intent and it "codifies" constitutional doctrine, then the Constitution requires intent.

The other ground of *Moreno* is an argument from policy and larger conceptual interpretation: A forfeiture doctrine requiring only *a wrongful act* that results in making the witness unavailable would "divorce" forfeiture "from its very reason for being," which is to "prevent criminal defendants from being rewarded for subverting the truth-seeking process." Moreover, forfeiture by *wrongful act alone* would "emasculate" the newly-articulated cross-examination guarantee: Why would the Court go so far in *Crawford* to guarantee a right to cross-examine if defendants could be "stripped of that guaranty so casually" in "entire classes" of cases (an apparent reference to child abuse cases, and perhaps domestic abuse cases)?

The case now on review is People v. Vasquez, 155 P.3d 565 (Colo. App. 2006), *cert. granted,* 2007 WL 884946 (Colo. 2007). This case really raises two questions. One is whether, in a trial involving the murder of a witness, misconduct by the defendant should forfeit *both* his confrontation rights *and* his right to exclude hearsay that fits no exception (it is very likely that the answer to this question will be Yes). The second question is whether, in a trial involving a defendant who killed a witness, forfeiture still requires intent. In *Vasquez,* defendant was charged with violating a no-contact order by placing threatening calls to his wife Angela. She called the Sheriff's Office and told a deputy (who was dispatched to see her) that she had gotten messages on her cellphone from Vasquez that she considered threatening. The deputy listened to recorded versions of some of the messages. Later Angela Vasquez repeated the same story to a Detective. Apparently the messages were erased from her phone. Still later Angela was murdered in a motel room. Vasquez was found outside the room and he confessed to killing her. The trial court ruled that he had forfeited his right to exclude what Angela said by killing her and the Court of Appeals agreed, concluding that intent should not be required.

The third Colorado case is People v. Moore, 117 P.3d 1 (Colo. App. 2004). There a 300-pound defendant was convicted of criminally negligent homicide when

he killed his wife by sitting on her chest. The trial court admitted the wife's statement to police, investigating an earlier incident of domestic violence, stating that defendant had stabbed her. Without citing *Crawford* (which was decided after the trial but before the appeal), the reviewing court found no error. Dealing with an argument resting on Confrontation Clause (raised for the first time on appeal), the Court of Appeals in *Moore* said that defendant had waived his confrontation rights by killing his wife, making no reference to intent.

Some Issues

(A) Should intent be required? If so, should it be required in all cases? These issues are probably the biggest ones. *Moreno* requires intent, and the two arguments adopted by the Court in *Moreno* do not suggest any basis for distinguishing cases involving the murder of a witness from cases involving conduct that frightens a witness or dissuades her from testifying. Notably too, FRE 804(b)(6) requires intent in all cases by stating simply that the party against whom hearsay is offered must have "intended to . . . procure the unavailability of the declarant." Indeed, the state of Ohio has gone even further to insure that the intent requirement is stated emphatically. See Ohio Rule 804(b)(6) (referring to wrongdoing by a party "for the purpose of preventing the witness from attending or testifying" and requiring the prosecutor to give notice to defendant).

It is arguable that *Moreno* leaves open the possibility of *not* requiring intent in cases involving the murder of a witness. *Moreno* does cite the California decision in *Giles* and others that do *not* require intent, and *Moreno* says that those cases involved "prior testimonial statements of a homicide victim." The Court in *Moreno* then alludes to the possibility that homicide cases "may be considered unique." *Moreno* also cites *Stechly* from Illinois as a decision "leaving open the possibility of a 'murder exception'" and comments that the "clear consensus in nonmurder cases" is that intent is required. We also have the two decisions by the Court of Appeals in *Moore* and *Vasquez* that do *not* require intent in cases involving killing witnesses. Finally, courts across the country split on intent. *Compare* People v. Giles, 152 P.3d 433 (Cal. 2007) (in trial for murder of defendant's ex-girlfriend, admitting her statements to police answering domestic disturbance call, where she described prior threats and abuse; forfeiture does not require intent) *with* People v. Stechly, 870 N.E.2d 333 (Ill. 2007) (in child abuse trial, forfeiture requires proof of intent).

Vasquez squarely places the question again before the Court. The State's brief in *Vasquez* is dated June 21, 2007 (ten days after *Moreno*), and the State argues that *Moreno* misconstrued *Crawford* and *Davis*, that intent should not be required in murder cases, but that in any event intent could be inferred in this case.

Apparently the thinking behind cases that do *not* require intent is that it is the *result* that counts – if a court is deprived of evidence by defendant's wrongful

conduct, then righting the balance requires taking away his confrontation rights with respect to the missing witness. Perhaps the thinking behind the murder-is-different theory is that (1) homicide is *such a serious crime* that defendants should be penalized with loss of confrontation rights regardless what they were trying to accomplish, even if intent is required in other cases, (2) if the witness is dead, proving intent on the part of the defendant is harder and the prosecutor should be excused from this burden, or (3) killing a witness necessarily makes him unavailable and defendant can foresee this fact, which is sufficient culpability to justify curtailing confrontation rights.

Parenthetically, one might note that the mere fact of killing by itself *sometimes* supports an inference of intent: In *Moreno,* the Court commented that one might conclude that wrongdoing was "intended" to cause unavailability because of "the manner in which [defendant] chose his victim, the nature of his criminal acts against her, or subsequent threats he made to her." In a somewhat extreme version of this idea, the Illinois Court said in *Stechly* that in homicide cases intent might be "presumed" because killing someone *always makes him unavailable*, prompting a vigorous dissent arguing that killers often don't even know whether their conduct will result in death and that this presumption is unrealistic.

(B) Is a hearsay forfeiture provision necessary? We can recommend a Rule governing forfeiture of the right to exclude hearsay, but not a Rule on forfeiture of rights under the Confrontation Clause. Is there reason to add a hearsay forfeiture provision if the confrontation waiver principle is already established? I can think of four points that merit consideration:

(1) In some cases, a witness is intimidated by the defendant and her prior statement fits no exception, so forfeiting confrontation rights does not *by itself* pave the way for hearsay. That happened in *Vasquez,* where no hearsay exception would embrace the wife's statement (the court admitted it under the catchall; on appeal the State conceded that her statement is testimonial under *Crawford*). See also Commonwealth v. Edwards, 444 Mass. 526, 830 N.E.2d 158, 170 (2005) (admitting grand jury testimony by witness who did not appear at trial; defendant's conduct waived rights under hearsay doctrine and confrontation clause). In *Giles* (as in *Vasquez*), the court dealt with a woman's complaints to police about abusive behavior (California has an unusual rifle-shot exception that is tailored for domestic abuse cases). In cases like *Edwards,* no obvious hearsay exception reaches grand jury testimony. In cases like *Giles* and *Vasquez,* no obvious hearsay exception embraces the woman's descriptions of abuse.

(2) A forfeiture provision such as FRE 804(b)(6) applies in civil cases too, and in civil cases there are hearsay issues but no confrontation issues. (I don't know of any civil case applying the forfeiture principle, but one is bound to appear some day.)

(3) A Rule can settle the intent question, one way or another, either across the board or some other way (as by making a special exception for murder cases).

(4) Without a Rule, a court could still decide that waiving confrontation rights *includes* a waiver of rights to exclude hearsay, perhaps on the theory that the tail goes with the dog. The Court of Appeals did that in *Vasquez*. But there are two points worth thinking about: First, a judge-made forfeiture exception leaves us with an elaborate hearsay code that says nothing about a critical exception – a code that purports to cover the ballpark but leaves a big subject untouched. See State v. Byrd, 2007 WL 1468551 (N.J. Super. 2007) ("because of the far-reaching nature of the principle proposed, we reject the invitation in favor of the statutory mechanism for the adoption of additional rules of evidence") (declining to adopt forfeiture principle).

(5) Is it so clear that forfeiting confrontation rights should also forfeit the right to exclude hearsay? Recall that confrontation rights under *Crawford* have nothing to do with reliability or necessity, which are the traditional bases of hearsay exceptions. We exclude hearsay because it is generally viewed as unreliable, and *Crawford* separated reliability considerations from confrontation jurisprudence. Arguably the view that waiving confrontation rights means waiving hearsay objections is more like saying that the family savings goes with the dog (not just the tail). If misbehavior justifies denying confrontation, does it also justify trying a defendant on unreliable evidence that we would exclude from most trials?

(C) What does "wrongful conduct" mean? Sometimes it's easy: The defendant killed a witness who is scheduled to testify, in a setting in which no other purpose appears. Or the defendant says, essentially, "if you testify against me I'll kill you or your family," or defendant says "I'll give you $20,000 not to testify." Those are pretty easy cases, and such behavior obviously amounts to an attempt to subvert justice. But many cases are not so easy:

(1) Courts have found forfeiture on *much lesser showings*. The Supreme Court's 1978 decision in *Reynolds,* for example, involved "wrongful acts" of much lesser seriousness. So far as we have them in *Reynolds,* all that the defendant did "wrong" was that he did not help the process server, and he mouthed off a bit. We learn in that case that one time an officer trying to subpoena the second wife came, and defendant said she was "not at home" and he then refused to tell him where to find her ("that will be for you to find out"). The officer replied that she would "get into trouble," but defendant said she wouldn't "till the subpoena is served," and later said "she does not appear in this case." The officer came another time and found the first wife, who said the second "was not there, and had not been there for three weeks," and the officer came yet again and could not ascertain where she was "by inquiring in the neighborhood." These are the facts on which the Court found wrongdoing. See Reynolds v. U.S., 98 U.S. 145, 158-160 (1878).

In the Massachusetts decision in *Edwards,* supra, the court found that defendant engaged in wrongdoing because he was heard on the phone "orchestrating [witness] Crockett's leaving the jurisdiction," and *Edwards* referred to yet another case where defendant "wrote letters encouraging the witness, his half-brother, to 'hang in there' and telling him not to discuss the case over the telephones," thus "encouraging and influencing him." *Edwards* pointedly said that wrongdoing "need not consist of a criminal act" and may include "collusion" or behavior that "somehow influenced" a decision not to testify. Does asking a witness not to testify constitute wrongdoing?

(2) The federal language says forfeiture results not only from "wrongdoing" but also when a party "acquiesced" in wrongdoing. That is a very broad idea. The Michigan rulemakers preferred a tighter principle See MRE 804(b)(6) (referring to one who "engaged in or encouraged" wrongdoing).

(D) How do courts decide forfeiture issues? Judges decide forfeiture issues without being bound by the Rules of Evidence. See CRE 104(a) (on question of admissibility, judge is not "bound by the rules of evidence" apart from privileges). That means that an intimidated witness need not appear to report what defendant did (understandably such persons don't want to do that). And some intimidated witnesses may not even want to tell prosecutors that defendant did anything to intimidate them, because saying *that* could *also* get them into trouble. So judges rely on statements by police or prosecutors relaying what their witnesses say. See, e.g., United States v. Zlatogur, 271 F.3d 1015, 1028 (11th Cir. 2001) (relying on statements by agent describing what witness told him). It is also settled among lower court opinions that the preponderance standard applies to these questions (*Davis* noted this issue and took "no position" on it).

(E) Bootstrapping. Nothing in the forfeiture doctrine prevents a prosecutor from saying that the very crime charged against the defendant is the operative wrongful act that brings into play the forfeiture principle. In such case, the judge decides whether (to take an obvious example) the defendant killed the victim, applying the preponderance standard by considering anything that seems probative. Thus if the judge thinks, on the basis of a preponderance of inadmissible evidence, that defendant committed the crime he is charged with, then anything the victim said that is relevant is admissible. Of course we do something similar in conspiracy trials: If the judge thinks, on the basis of anything she considers probative, that defendant committed the crime of conspiracy that he is charged with, the judge admits coconspirator hearsay that the jury can then use in deciding that defendant is guilty of the charged crime.

To return to the murder trial, if the judge decides that defendant murdered the victim, and if we apply a forfeiture principle that does not require intent, prosecutors can get into evidence everything the victim said that is relevant. Recall

the OJ Simpson trial: I think OJ Simpson killed Nicole Brown and Ron Goldman, and Judge Ito excluded hearsay statements by Nicole Brown about OJ Simpson's prior conduct, as was correct under existing law. If Colorado adopts a forfeiture principle *without* an intent component, all those statements would be admissible if the same case arose today in Colorado, as they would be today under the California Supreme Court's opinion in *Giles*.

If we adopt a forfeiture principle *with* an intent component, the right outcome is probably the one that Judge Ito reached in excluding what Nicole Brown said about OJ's prior conduct. (I don't think OJ Simpson did what he did with the purpose of preventing anyone from testifying. There were no pending charges and no expectation of any. I think he killed them in a drug induced jealous rage. I think he should have been convicted of the charged offense, but I don't admitting whatever Nicole said would have mattered.) Even if Colorado adopts a forfeiture rule requiring intent, a court might say that killing *always* removes a witness, hence that defendant must have intended this result (one kills victim to prevent them from testifying that one killed them). I think the Ohio language quoted above (defendant must have acted "for the purpose of preventing the witness from attending or testifying") reduces the likelihood of such an outcome.

Westlaw.

117 P.3d 1
(Cite as: 117 P.3d 1)

People v. Moore
Colo.App.,2004.

Colorado Court of Appeals,Div. III.
The PEOPLE of the State of Colorado,
Plaintiff-Appellee,
v.
Darrell Lassan MOORE, Defendant-Appellant.
No. 01CA1760.

July 29, 2004.

Background: Defendant was convicted by jury in the Arapahoe County District Court, No. 00CR1062,Robert H. Russell, II, J., of criminally negligent homicide and third degree assault. He appealed.

Holdings: The Court of Appeals, Dailey, J., held that:

(1) parties' offer of proof was sufficient for determination of admissibility of evidence of defendant's prior domestic violence towards homicide victim;

(2) trial court's failure to give limiting instructions concerning past-acts evidence was not plain error;

(3) victim's out-of-court statement implicating defendant in prior instance of domestic violence was admissible as excited utterance;

(4) defendant forfeited claim that admission of victim's out-of-court statement violated his rights to confront adverse witnesses; and

(5) consecutive sentences were not improper.

Affirmed.

West Headnotes
[1] Criminal Law 110 ⚿670

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k670 k. Offer of Proof. Most Cited Cases

Criminal Law 110 ⚿695.5

110 Criminal Law
110XX Trial
110XX(D) Procedures for Excluding Evidence
110k695.5 k. Hearing, Ruling, and Objections. Most Cited Cases
Parties' offer of proof was sufficient for determination of admissibility of evidence of homicide defendant's prior domestic violence towards his wife, the homicide victim; evidentiary hearing was not required. West's C.R.S.A. § 18-6-801.5; Rules of Evid., Rule 404(b).

[2] Criminal Law 110 ⚿374

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k374 k. Proof and Effect of Other Offenses. Most Cited Cases
Before evidence of prior acts of domestic violence is admissible in cases involving domestic violence, the trial court must find by a preponderance of the evidence that the prior acts occurred and that the defendant committed them. West's C.R.S.A. § 18-6-801.5; Rules of Evid., Rule 404(b).

[3] Criminal Law 110 ⚿1038.2

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General
110k1038 Instructions
110k1038.2 k. Failure to Instruct in General. Most Cited Cases
Trial court's failure to give statutory contemporaneous limiting instructions, concerning two witnesses' testimony of homicide defendant's past acts of domestic violence against victim, was not plain error; court alleviated any potential prejudice by (1) giving instruction during testimony of a third witness, (2) stating that instruction applied equally to testimony of other two witnesses, and (3) providing the jury with a written instruction at the close of the evidence.

[4] Criminal Law 110 ⚿1038.2

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.2 k. Failure to Instruct in General. Most Cited Cases

Criminal Law 110 ⚿1038.3

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.3 k. Necessity of Requests. Most Cited Cases
Reversal of homicide conviction was not warranted, in the absence of plain error, where defendant failed to object to lack of contemporaneous limiting instructions or to request additional ones concerning evidence of his past acts of domestic violence against victim. West's C.R.S.A. § 18-6-801.5.

[5] Criminal Law 110 ⚿1038.2

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.2 k. Failure to Instruct in General. Most Cited Cases
Plain error, requiring reversal, is not established simply because the trial court was required by statute to provide contemporaneous limiting instructions, which it did not give.

[6] Criminal Law 110 ⚿1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
"Plain error" requiring reversal occurs when an error so undermines the fundamental fairness of a trial as to cast serious doubt on the reliability of the judgment of conviction.

[7] Criminal Law 110 ⚿365(2)

110 Criminal Law
110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k365 Other Offenses Part of Same Transaction
110k365(2) k. Prior Offenses. Most Cited Cases
In prosecution for homicide of defendant's wife, wife's out-of-court statement implicating defendant in prior instance of domestic violence, as testified to by officer who had investigated stabbing incident and asked wife what happened as she was in ambulance, was admissible as excited utterance, notwithstanding officer's lack of independent recollection whether the wife was actually under the stress or excitement of having been stabbed.

[8] Criminal Law 110 ⚿363

110 Criminal Law
110XVII Evidence

110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k363 k. In General. Most Cited Cases
A hearsay statement is admissible as an excited utterance if its proponent shows (1) an occurrence or event was sufficiently startling to render inoperative the normal reflective thought processes of an observer, (2) the declarant's statement was a spontaneous reaction to the event and not the result of reflective thought, and (3) direct or circumstantial evidence supports an inference that the declarant had the opportunity to observe the startling event. Rules of Evid., Rule 803(2).

[9] Criminal Law 110 ⚿363

110 Criminal Law
110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k363 k. In General. Most Cited Cases

Criminal Law 110 ⚿1153(1)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence; Witnesses
110k1153(1) k. In General. Most Cited Cases
The trial court is afforded wide discretion in determining whether a statement is admissible as an excited utterance, and if the evidence supports the trial court's ruling, the Court of Appeals will not disturb it on appeal. Rules of Evid., Rule 803(2).

[10] Criminal Law 110 ⚿363

110 Criminal Law
110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k363 k. In General. Most Cited Cases
The excited utterance exception to the hearsay rule extends to statements made in response to questioning. Rules of Evid., Rule 803(2).

[11] Criminal Law 110 ⚿662.80

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.80 k. Waiver of Right. Most Cited Cases
Homicide defendant forfeited claim that admission of victim's out-of-court statement implicating him in past act of domestic violence violated his federal and state constitutional rights to confront adverse witnesses; victim was unavailable to testify because of her death, and her death was the result of defendant's actions. U.S.C.A. Const.Amends. 6, 14; West's C.R.S.A. Const. Art. 2, § 16.

[12] Criminal Law 110 ⚿662.80

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.80 k. Waiver of Right. Most Cited Cases
A defendant's misconduct may work a forfeiture of the constitutional right of confrontation with respect to a witness or potential witness whose absence the defendant wrongfully procures; thus, a defendant is not to benefit from his or her wrongful prevention of future testimony from a witness, regardless whether that witness is the victim in the case. U.S.C.A. Const.Amends. 6, 14; West's C.R.S.A. Const. Art. 2, § 16.

[13] Sentencing and Punishment 350H ⚿608

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(B) Consecutive or Cumulative Sentences
350HIII(B)3 Factors and Purposes
350Hk603 Offenses Committed in One Transaction, Episode, or Course of Conduct

350Hk608 k. "Same Evidence" Test; Sufficiency of Evidence of One Offense to Sustain Conviction for the Other. Most Cited Cases
Evidence supporting defendant's convictions for criminally negligent homicide and third degree assault of his wife was not identical, and thus consecutive sentences were not improper; pathologist testified as to two different categories of victim's injuries, permitting jury to infer that blows to head and other body areas constituted assault, and pressure on chest caused victim's death. West's C.R.S.A. § 18-1-408(3).

[14] Sentencing and Punishment 350H ⇐608

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(B) Consecutive or Cumulative Sentences
350HIII(B)3 Factors and Purposes
350Hk603 Offenses Committed in One Transaction, Episode, or Course of Conduct
350Hk608 k. "Same Evidence" Test; Sufficiency of Evidence of One Offense to Sustain Conviction for the Other. Most Cited Cases
Under sentencing statute, a defendant's right to concurrent sentencing turns upon whether the multiple convictions are supported by identical evidence; if they are so supported, then concurrent sentences must be imposed, and if they are not, then concurrent sentences need not be imposed. West's C.R.S.A. § 18-1-408(3).

***2** Ken Salazar, Attorney General, Anthony J. Navarro, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee.
David S. Kaplan, Colorado State Public Defender, Keyonyu X O'Connell, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant.
Opinion by Judge DAILEY.
Defendant, Darrell Lassan Moore, appeals the judgments of conviction entered upon jury verdicts finding him guilty of criminally negligent homicide and third degree assault. He also appeals the sentences. We affirm.

After fighting with his wife about her loud music, her spending money, and her drinking, the 300-pound defendant restrained her and sat on her chest until she died of asphyxiation.

At trial, the prosecution introduced evidence of three prior instances of domestic violence by defendant as relevant to the second degree murder and second degree assault charges against him. Ultimately, ***3** however, the jury found him guilty of only criminally negligent homicide and third degree assault, and the trial court sentenced him to consecutive terms of five years in the Department of Corrections for the homicide and one year in county jail for the assault.

I. Admissibility of Domestic Violence Evidence

[1] Defendant contends that the trial court erred in admitting evidence of his prior domestic violence towards his wife. Specifically, he asserts that the People's foundational requirement of proving that he committed the prior acts by a preponderance of the evidence could not be satisfied solely based on an offer of proof. We disagree.

[2] In cases involving domestic violence, the admissibility of evidence of prior acts of domestic violence is governed by § 18-6-801.5, C.R.S.2003, and CRE 404(b). *People v. Raglin,* 21 P.3d 419, 424 (Colo.App.2000). Before such evidence is admissible, the trial court must find by a preponderance of the evidence that the prior acts occurred and that the defendant committed them. *See People v. Garner,* 806 P.2d 366, 373 (Colo.1991) (applying CRE 404(b)); *People v. Ma,* 104 P.3d 273, 274, 2004 WL 1690255 (Colo.App. No. 02CA1848, July 29, 2004)(applying CRE 404(b) and § 18-6-801.5).

In *People v. Groves,* 854 P.2d 1310, 1313 (Colo.App.1992), a division of this court rejected the contention that the preponderance of evidence determination could be made only after an evidentiary hearing. The division concluded that the "trial court possesses the discretion to make this determination in any reasonable manner," including by giving each party the opportunity to present all

the evidence in the case using offers of proof. *People v. Groves, supra,* 854 P.2d at 1313.

We agree with the decision in *Groves* and find it equally applicable here. In this case, as in *Groves,* both parties were given the opportunity to present all the evidence in the case by offers of proof, and the trial court considered all the evidence and made the requisite findings.

As to the first incident, the court found that " although there may be difference of opinion as to ancillary matters, the fact that ... the defendant banged the head of the victim into the trailer four or five times would be established by [two witnesses] by a preponderance of the evidence." The court also found that, despite the victim's later recantation, the second incident was sufficiently " established by virtue of the [victim's] excited utterance to the police ... that ... she had been stabbed by the defendant." Finally, the court found that the third incident, for which defendant had been convicted, had been "established by the appropriate standard of proof."

Upon our review of the record, we conclude that the trial properly made its preponderance of evidence determination based solely on the parties' offers of proof.

II. Lack of Contemporaneous Limiting Instructions

[3] Defendant contends that the trial court erred in failing to give contemporaneous limiting instructions in connection with testimony about two of the prior instances of domestic violence. We are not persuaded.

Section 18-6-801.5(5), C.R.S.2003, requires that a trial court instruct the jury on the limited purposes for which other domestic violence evidence may be considered at the time the evidence is admitted and again in the closing charge to the jury.

[4] We note, however, that, because defendant failed to object to the lack of the contemporaneous limiting instructions or to request additional ones, reversal is not warranted in the absence of plain error. *See People v. Warren,* 55 P.3d 809, 815 (Colo.App.2002).

[5] Contrary to defendant's assertion, plain error is not established simply because the trial court was required by statute to provide contemporaneous limiting instructions. *See People v. Underwood,* 53 P.3d 765, 772 (Colo.App.2002)(quoting *People v. Wilson,* 838 P.2d 284, 290 (Colo.1992), and noting that *People v. Roberts,* 738 P.2d 380 (Colo.App.1986), did not establish a per se rule requiring automatic reversal upon the ***4** court's failure to sua sponte give a contemporaneous limiting instruction under § 16-10-301(4), C.R.S.2003, concerning similar transaction evidence in sex assault cases: "The plain error cases continue to 'turn on their particular facts.' ").

[6] Plain error occurs when an error so undermines the fundamental fairness of a trial as to cast serious doubt on the reliability of the judgment of conviction. *People v. Garcia,* 28 P.3d 340, 344 (Colo.2001).

Here, although the trial court did not give the limiting instruction during the testimony of two witnesses, it alleviated any potential prejudice by (1) giving the instruction during the testimony of a third witness; (2) stating, at that time, that the instruction applied not only to the testimony of that witness, but also to the testimony of the other two witnesses; and (3) providing the jury with a written instruction at the close of the evidence explicitly reminding it that the testimony of the three witnesses had been admitted only for a limited purpose.

Under these circumstances, we conclude that the court's failure to give contemporaneous limiting instructions did not cast a serious doubt on the reliability of defendant's conviction and, thus, was not plain error. *See People v. Warren, supra,* 55 P.3d at 815 (oral limiting instruction given following cross-examination of witness and written instruction given in final charge); *People v. Marion,* 941 P.2d 287, 293-94 (Colo.App.1996)(limiting instruction given on rebuttal, but not earlier on cross-examination).

III. Hearsay and Confrontation

[7] Defendant contends that the trial court improperly admitted into evidence, as an excited utterance, the wife's out-of-court statement implicating him in a prior instance of domestic violence. He also contends that the admission of this statement violates his constitutional right to confront adverse witnesses. We perceive no error.

A. Hearsay

[8] Under CRE 803(2), a hearsay statement is admissible as an excited utterance if its proponent shows (1) an occurrence or event was sufficiently startling to render inoperative the normal reflective thought processes of an observer; (2) the declarant's statement was a spontaneous reaction to the event and not the result of reflective thought; and (3) direct or circumstantial evidence supports an inference that the declarant had the opportunity to observe the startling event. *People v. Dement,* 661 P.2d 675, 678-79 (Colo.1983); *People v. Martinez,* 18 P.3d 831, 835 (Colo.App.2000).

[9] The trial court is afforded wide discretion in determining whether a statement is admissible as an excited utterance, and if the evidence supports the trial court's ruling, we will not disturb it on appeal. *People v. Martinez, supra,* 18 P.3d at 835.

Here, a police officer testified that (1) he arrived at defendant's home to investigate a stabbing just as the wife was being transported out of her house towards an ambulance; (2) the wife had been stabbed; (3) inside the ambulance, he asked her what happened; (4) she told him that her boyfriend, defendant, stabbed her; and (5) based on the circumstances reflected in his report, he thought the victim was still under the stress or excitement of having been stabbed.

Defendant erroneously asserts that the police officer's lack of independent recollection whether the victim was actually under the stress or excitement of having been stabbed required exclusion of the statement. Being stabbed is a startling event, *see People v. Martinez, supra,* 18 P.3d at 835 (an assault is "clearly a 'startling event' "), and it was within the trial court's discretion to determine that the wife, on her way to an ambulance immediately after being stabbed, was still under the excitement or stress of the stabbing. *See United States v. Golden,* 671 F.2d 369, 371 (10th Cir.1982)("[t]he facts presented indicate that there was no reason to suspect that the victim was no longer 'under the stress of excitement caused by the event' " when he made the statement).

[10] Because the excited utterance exception extends to statements made in response to questioning, *People v. Hulsing,* 825 P.2d 1027, 1032 (Colo.App.1991), and because the ***5** record here supports the trial court's application of the excited utterance exception, we find no abuse of discretion in the admission of the victim's statement into evidence. *See People v. Martinez, supra,* 18 P.3d at 835; *People v. Fincham,* 799 P.2d 419, 423 (Colo.App.1990)(no error in admitting statement where court is satisfied that the event was sufficient to cause adequate excitement); *Kielsmier v. Foster,* 669 P.2d 630, 633 (Colo.App.1983)(admitting, as excited utterance, statement made by injured biker to ambulance driver at scene of accident).

B. Confrontation

[11] We also reject defendant's argument that reversal is required because the statement was admitted in violation of his federal and state constitutional rights to confront adverse witnesses.

Because defendant did not object at trial to the admission of the statement on confrontation grounds, reversal is warranted only upon a finding of plain error. *See People v. Kruse,* 839 P.2d 1, 3 (Colo.1992).

To qualify as plain error, an error must not only seriously affect the substantial rights of the accused, it must also be obvious error. *Moore v. People,* 925 P.2d 264, 268 (Colo.1996).

Both the United States and the Colorado Constitutions guarantee persons accused of crimes the right to confront witnesses presented against

them. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16.

[12] However, a defendant's misconduct may work a forfeiture of the constitutional right of confrontation with respect to a witness or potential witness whose absence the defendant wrongfully procures. *See Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 1370, 158 L.Ed.2d 177 (2004)(rule of forfeiture by wrongdoing extinguishes an otherwise viable confrontation claim); *see also, e.g., State v. Henry,* 76 Conn.App. 515, 820 A.2d 1076, 1086 (2003).

Under this rule, a defendant is not to benefit from his or her wrongful prevention of future testimony from a witness, regardless whether that witness is the victim in the case. *See United States v. Emery,* 186 F.3d 921, 926 (8th Cir.1999); *see also People v. Pappalardo,* 152 Misc.2d 364, 369, 576 N.Y.S.2d 1001, 1004 (Sup.Ct.1991)("the specific method used by a defendant to keep a witness from testifying is not determinative").

Here, there is no dispute that the victim was unavailable to testify because of her death and that her death was the result of defendant's actions. Therefore, we conclude that defendant forfeited his right to claim a confrontation violation in connection with the admission of the victim's statements into evidence. *See State v. Meeks,* 277 Kan. 609, 88 P.3d 789, 794-95 (2004)(defendant forfeited right of confrontation by killing victim).

Thus, we perceive no cognizable confrontation error, much less plain error, here.

IV. Consecutive Sentences

[13] Finally, defendant asserts that the trial court erred in sentencing him to consecutive terms because, as in *People v. Page,* 907 P.2d 624, 637 (Colo.App.1995), "it is possible that the jury relied on the same evidence to convict" him of both the criminally negligent homicide and third degree assault charges. We disagree with defendant.

In *People v. Page, supra,* 907 P.2d at 637, a division of this court recognized that (1) concurrent sentencing is required under § 18-1-408(3), C.R.S 2003, when criminal counts are based on the same act or series of acts arising from the same criminal episode and the evidence supporting the counts is identical; and (2) whether the evidence supporting two or more offenses is identical turns on whether the charges result from the same discrete act, so that the evidence of the act is identical, or from two or more acts fairly considered to be separate acts, so that the evidence is different.

The division in *Page* found that separate and discrete acts supported the charges in that case. Nonetheless, the division concluded that, because the prosecution lumped the acts together in closing argument and the instructions did not direct the jury to use one act for one charge and the other act for the other charge, "the prosecutor failed to establish a basis for depriving defendant of his *6 right to concurrent sentencing under § 18-1-408(3)." *People v. Page, supra,* 907 P.2d at 638.

We decline to follow the *Page* division's view with respect to the lengths to which the prosecutor or the court must go to preserve the court's traditional authority to impose concurrent or consecutive sentences where the accused was convicted of separate offenses occurring during the same criminal episode. *See People v. Anderson,* 187 Colo. 171, 174-75, 529 P.2d 310, 312 (1974); *see also People v. Montgomery,* 669 P.2d 1387, 1389 (Colo.1983).

[14] Under § 18-1-408(3), a defendant's "right" to concurrent sentencing turns upon whether the convictions "are supported by identical evidence." If they are so supported, then concurrent sentences must be imposed; if they are not, then concurrent sentences need not be imposed. *See Qureshi v. Dist. Court,* 727 P.2d 45, 47 (Colo.1986). Nothing in either the text of § 18-1-408(3) or numerous cases decided before *Page* supports the view that the traditional power of a court to impose consecutive sentences was limited by the prosecution's argument or the instructions in a particular case.

The *Page* division turned the purely evidentiary test

of § 18-1-408(3) into a prosecutorial argument-instruction test. Because *Page* converted the pertinent statutory test of whether counts *are* supported by identical evidence into one of whether the counts *could possibly be* supported by identical evidence, we decline to follow it.

We note that the supreme court has recently granted certiorari review of this very issue. *See People v. Muckle,* 2004 WL 877654, (Colo. No. 03SC775, granting cert. Apr. 26, 2004).

Even if the supreme court ultimately decides that a *Page* analysis is appropriate, relief would nonetheless not be warranted in this case: the circumstances here foreclose the possibility that defendant was found guilty of both counts based on the same evidence.

A forensic pathologist testified that the injuries he saw "can be divided up into two different categories. " He described the first category as "blunt impact type of injuries," such as "scratches and bruises," that result from "some sort of concussion when someone suffers a blow to the head." He related that the victim had several blunt impact injuries on her head, neck, face, shoulder, and elbow and that her head injury was consistent with a hard punch or being slammed against the floor. The pathologist then described the internal injuries that resulted from "mechanical chest compression" or the application of pressure on the victim's chest, which prevented her from breathing and ultimately caused her death.

This evidence was sufficient to permit the jury to infer that defendant assaulted his wife through blunt force to her head and body and then killed her by exerting the pressure of his body weight on her chest. Indeed, defendant argued to the jury that the wife's head injury and other abrasions to her skin constituted a third degree assault. The prosecution did not, as in *Page,* argue otherwise or combine these acts with the act that caused her death.

Because the evidence supporting the separate counts cannot reasonably be viewed as identical, we conclude that the trial court properly acted within its discretion in imposing consecutive sentences. *See Qureshi v. Dist. Court, supra,* 727 P.2d at 47; *People v. Martinez,* 36 P.3d 154, 165 (Colo.App.2001)(different acts).

The judgments and sentences are affirmed.

Judge GRAHAM and Judge STERNBERG [FN*] concur.

FN* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S.2003.

Colo.App.,2004.
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117 P.3d 1

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People v. Vasquez
Colo.App.,2006.

Colorado Court of Appeals,Div. II.
The PEOPLE of the State of Colorado,
Plaintiff-Appellee,
v.
Jimmy J. VASQUEZ, Defendant-Appellant.
No. 04CA0729.

Nov. 30, 2006.
Certiorari Granted March 26, 2007.

Background: Defendant was convicted in a jury trial in the District Court, Adams County, No. 03CR190,Harlan R. Bockman and John J. Vigil, JJ., of violation of bail bond conditions and violation of a restraining order. Defendant appealed.

Holdings: The Court of Appeals, Taubman, J., held that:

(1) admission of out-of-court statements by defendant's wife prior to her death did not violate defendant's right to confront witnesses under doctrine of forfeiture by wrongdoing, and

(2) defendant forfeited his hearsay claim by his wrongful conduct.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇐662.80

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.80 k. Waiver of Right. Most Cited Cases

Out-of-court statements made by defendant's wife prior to her death were admissible against defendant in prosecution for violations of bail bond conditions and restraining order, inasmuch as defendant waived his Confrontation Clause rights under the doctrine of forfeiture by wrongdoing; clear and convincing evidence showed that defendant killed his wife, and he could not be permitted to benefit from his wrongdoing, whether he killed her to prevent her from testifying in the present case, another case, or for some other purpose altogether. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 ⇐662.80

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.80 k. Waiver of Right. Most Cited Cases

A defendant waives his or her Confrontation Clause rights under the doctrine of forfeiture by wrongdoing where he or she procures the unavailability of a witness against him or her. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ⇐419(6)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(6) k. Statements of Persons Since Deceased. Most Cited Cases

Defendant's wrongful conduct in killing his wife resulted in his waiver of a hearsay objection to the admission of wife's hearsay statements in prosecution against defendant for violations of bail bond conditions and restraining order.

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(Cite as: 155 P.3d 565)

***565** John W. Suthers, Attorney General, Laurie A. Booras, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee.
***566** Douglas K. Wilson, Colorado State Public Defender, Todd E. Mair, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant.
Opinion by Judge TAUBMAN.
Defendant, Jimmy J. Vasquez, appeals the judgment of conviction entered upon jury verdicts finding him guilty of violation of bail bond conditions and violation of a restraining order. We affirm.

In June 2002, Vasquez was placed under a restraining order, prohibiting contact with his wife. The following month, he was arrested for criminal trespass, harassment, and criminal mischief committed against his wife (the harassment case) and released on bond with a condition of no contact with his wife.

In August 2002, Vasquez's wife telephoned the police, asserting that Vasquez had left messages on her voice mail. A sheriff's deputy testified that he responded to the wife's call, listened to nine messages on her phone, and, because of a subsequent meeting with Vasquez, recognized the caller's voice as belonging to Vasquez. In the telephone messages, Vasquez stated he was going to look for his wife and that he knew which laundromat she frequented.

A few days later, another deputy went to the wife's home to record the messages. She had deleted those nine messages, but had recorded another four messages and identified the caller as Vasquez. A tape of those messages was introduced into evidence at trial. However, Vasquez's wife was killed two days before she was to testify against Vasquez in the harassment case.

Vasquez admitted to an officer arriving at the scene of her homicide that he had killed his wife because " she set [him] up." The court sentenced Vasquez in this case before he was to be tried for the first degree murder of his wife.

I. Forfeiture by Wrongdoing

[1] Vasquez argues the trial court erred in admitting statements by his wife under the doctrine of forfeiture by wrongdoing because it denied him his right to confront witnesses against him. We disagree.

In *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that admitting testimonial hearsay at trial, absent the unavailability of the declarant and a prior opportunity for cross-examination by the defendant, violates the defendant's confrontation right under the Sixth Amendment to the United States Constitution. *See People v. Vigil,* 127 P.3d 916, 921 (Colo.2006); *Compan v. People,* 121 P.3d 876, 880 (Colo.2005). Although the Supreme Court did not precisely define "testimonial" statements, *see People v. Vigil, supra,* the prosecution here does not dispute that Vasquez's wife's statements were testimonial in nature.

[2] However, a defendant waives his or her Confrontation Clause rights under the doctrine of forfeiture by wrongdoing where he or she procures the unavailability of a witness against him or her. *Crawford v. Washington, supra* (citing *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1878)).

Relying on *Crawford,* a division of this court adopted the common law doctrine of forfeiture by wrongdoing. *People v. Moore,* 117 P.3d 1 (Colo.App.2004). Recently, the supreme court granted a petition for certiorari in a case that relied on *Moore* in rejecting the defendant's Confrontation Clause challenge to the victim's out-of-court statements based on the forfeiture by wrongdoing doctrine. *People v. Kelly,* 2005 WL 3547982 (Colo.App. No. 02CA1839, Dec. 29, 2005)(not published pursuant to C.A.R. 35(f)) (*cert. granted* Nov. 6, 2006).

In *Moore,* the division held that "a defendant is not to benefit from his or her wrongful prevention of future testimony from a witness, regardless whether that witness is the victim in the case." *People v. Moore, supra,* 117 P.3d at 5.

Nonetheless, Vasquez argues the division in *Moore*

did not adequately analyze the limitations and requirements of the forfeiture by wrongdoing doctrine and, thus, we should not follow it. Specifically, Vasquez argues the doctrine requires the prosecution to show (1) the defendant intended to procure the unavailability of a witness to prevent the witness from testifying against the defendant, and (2) ***567** the defendant acted to prevent the witness from testifying in the particular case in which the hearsay evidence is offered. Further, Vasquez contends that the prosecution could not show he killed his wife to prevent her from testifying in this case because this case was not pending when he killed his wife. He contends, therefore, that he could not have formed the intent to prevent her from testifying in this case when he did not even know such a case would be filed. He argues that even if he specifically intended to prevent his wife's testimony, that intent applied to a separate check fraud case and not to this case. We disagree.

By the 1970s, numerous federal courts, following *Reynolds v. United States, supra,* had adopted the forfeiture by wrongdoing doctrine, and, in 1997, it was codified in Federal Rule of Evidence 804(b)(6). Fed.R.Evid. 804(b)(6) makes admissible "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." The plain language of the federal rule requires that the defendant intend to prevent the witness from testifying in the same case in which the hearsay testimony is offered, and federal courts have interpreted the federal rule accordingly. *See, e.g., United States v. Gray,* 405 F.3d 227 (4th Cir.2005).

Furthermore, a majority of state courts has adopted that requirement. *See People v. Melchor,* 362 Ill.App.3d 335, 299 Ill.Dec. 8, 841 N.E.2d 420 (2005) (collecting cases), *appeal allowed,* 218 Ill.2d 551, 303 Ill.Dec. 6, 850 N.E.2d 811 (2006); *see also Commonwealth v. Edwards,* 444 Mass. 526, 830 N.E.2d 158 (2005) (noting the doctrine has been adopted in fourteen states and the District of Columbia, with varying requirements).

Most of those courts relied upon either a state rule of evidence patterned after Fed.R.Evid. 804(b)(6) or this federal rule and federal decisions interpreting it. *State v. Henry,* 76 Conn.App. 515, 820 A.2d 1076 (2003) (relying on federal rule and federal cases interpreting the federal rule); *Commonwealth v. Santiago,* 822 A.2d 716 (Pa.Super.Ct.2003) (relying on state rule of evidence identical to Fed.R.Evid. 804(b)(6)); *cf. Commonwealth v. Edwards, supra* (distinguishing between requirements under the federal rule and under state law while adopting an intent requirement). Those courts not expressly relying upon the federal rule did not analyze the issue. *Commonwealth v. Edwards, supra; State v. Wright,* 701 N.W.2d 802 (Minn.2005), *vacated,* --- U.S. ----, 126 S.Ct. 2979, 165 L.Ed.2d 985 (2006) (mem.) (remanded to state court for reconsideration in light of hearsay analysis in *Davis v. Washington,* --- U.S. ----, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

In contrast, a minority of courts adopting the forfeiture by wrongdoing doctrine has not required the prosecution to show that the defendant's intent in procuring the unavailability of the witness was to prevent him or her from testifying in the same case in which that witness's hearsay testimony is offered. *See United States v. Garcia-Meza,* 403 F.3d 364 (6th Cir.2005)(rejecting view that federal rule requires that defendant procured witness's unavailability with specific intent to prevent his or her testimony); *United States v. Emery,* 186 F.3d 921 (8th Cir.1999); *People v. Bauder,* 269 Mich.App. 174, 712 N.W.2d 506 (2005); *see also Gonzalez v. State,* 155 S.W.3d 603 (Tex.App.2004), *aff'd on other grounds,* 195 S.W.3d 114 (Tex.Crim.App.2006). In *Gonzalez, supra,* the Texas Court of Appeals held:

A defendant whose wrongful act renders a witness unavailable for trial benefits from his conduct if he can use the witness's unavailability to exclude otherwise admissible hearsay statements. This is true whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.

Gonzalez v. State, supra, 155 S.W.3d at 611.

We agree with the minority view because (1) Colorado has not adopted a rule of evidence similar to the federal rule; (2) the common law doctrine of forfeiture by wrongdoing did not impose a requirement that the defendant intended to prevent the witness from testifying in the same case in which the hearsay testimony is offered; and (3) the ***568** rationale of the doctrine is consistent with not requiring such a showing.

First, Colorado courts have not adopted the federal rule. Instead, the division in *People v. Moore* relied upon the common law in adopting the forfeiture by wrongdoing doctrine. Therefore, we are not bound by the language of the federal rule or subsequent decisions interpreting that rule.

Second, the common law doctrine of forfeiture by wrongdoing, as adopted by *Reynolds v. United States, supra,* and affirmed in *Crawford v. Washington, supra,* does not require that the defendant intend to procure the witness's unavailability to prevent him or her from testifying.

The *Reynolds* Court did not impose an intent requirement. The Court stated: "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege." *Reynolds v. United States, supra,* 98 U.S. at 158.

This language shows the Supreme Court adopted the forfeiture by wrongdoing rule as an equitable doctrine. It did not limit the doctrine to cases where the defendant intended to prevent a witness from testifying in the same case in which the hearsay testimony is offered.

Likewise, the Supreme Court did not impose an intent requirement when, earlier this year, it reaffirmed the forfeiture by wrongdoing doctrine in *Davis v. Washington, supra.* Although the Court expressly declined to adopt standards necessary to demonstrate forfeiture, it held:
[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.... We reiterate what we said in *Crawford:* that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds." That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

Davis v. Washington, supra, --- U.S. at ----, 126 S.Ct. at 2280 (citations omitted) (quoting *Crawford v. Washington, supra,* 541 U.S. at 62, 124 S.Ct. at 1370).

This language does not impose a requirement that the defendant intend to prevent a witness from testifying in the same case in which the hearsay testimony is offered. Thus, the cases interpreting the common law doctrine of forfeiture by wrongdoing have not required a showing that the defendant intended to procure a witness's unavailability to prevent him or her from testifying in the same case in which the hearsay testimony is offered.

Finally, the purpose of the forfeiture by wrongdoing doctrine is to prevent a defendant from benefiting from his or her own wrongdoing. *Reynolds v. United States, supra.* We agree with the court in *Gonzalez v. State, supra,* that the rationale for the doctrine of forfeiture by wrongdoing is applicable regardless of whether the defendant's purpose in procuring the witness's unavailability was to prevent him or her from testifying in the same case in which the hearsay testimony is offered.

Here, the trial court found, in ruling on the admissibility of the hearsay statements, that there was clear and convincing evidence that Vasquez killed his wife. The court relied on the testimony that, when the police arrived at the scene of the homicide, Vasquez told the first arriving officer that he had killed his wife because "she set [him] up." Further, the trial court found that statement was evidence that Vasquez was motivated, at least in part, to silence his wife.

Vasquez argues that his confession did not relate to this case because his other statements alluding to the FBI and to a check cashing scheme related to

yet another criminal case against him apart from the harassment and homicide cases. He argues that because the prosecution did not prove he killed his wife to prevent her from testifying in *this* case, the forfeiture doctrine may not act to extinguish his rights. We disagree.

***569** Basic equity prescribes that Vasquez may not benefit from his wrongdoing regardless of whether he intended to kill his wife to prevent her from testifying in this case. Whether he killed her to prevent her from testifying in this case, to prevent her from testifying in the check fraud case, or for some other purpose altogether, Vasquez cannot claim a right to confront a witness he intentionally killed.

Therefore, Vasquez forfeited his right to confrontation.

Because Vasquez did not raise the issue, we do not address the applicable standard of proof in determining forfeiture.

II. Waiver of Hearsay Objection

[3] Vasquez next argues that even if we apply the forfeiture by wrongdoing doctrine to this case, the trial court abused its discretion in admitting his wife's statements under the residual exception to the hearsay rule. We disagree.

An overwhelming majority of courts adopting the forfeiture by wrongdoing doctrine has held that the defendant's wrongful act also precludes a hearsay objection to the unavailable witness's testimony. *See United States v. White,* 116 F.3d 903 (D.C.Cir.1997); *United States v. Houlihan,* 92 F.3d 1271 (1st Cir.1996) (finding defendant's misconduct waived not only his confrontation rights but also his hearsay objections, rendering a finding of reliability superfluous); *United States v. Mastrangelo,* 693 F.2d 269 (2d Cir.1982) (holding if a defendant forfeits his or her right to confrontation, he or she *a fortiori* waives any hearsay objection).

State courts have also followed this approach. *See State v. Henry, supra; Devonshire v. United States,* 691 A.2d 165 (D.C.1997); *State v. Hallum,* 606 N.W.2d 351 (Iowa 2000); *Commonwealth v. Edwards, supra.*

In contrast, a minority of courts has analyzed a defendant's hearsay objection even where the defendant has forfeited his or her right to confrontation. *United States v. Rouco,* 765 F.2d 983 (11th Cir.1985); *United States v. Carlson,* 547 F.2d 1346 (8th Cir.1976). However, these courts did not analyze whether the application of the forfeiture by wrongdoing doctrine to deny a Confrontation Clause claim necessarily extinguished a related hearsay objection. *United States v. Rouco, supra; United States v. Carlson, supra.*

We find the majority view to be more persuasive and adopt it here. "[H]earsay rules and the Confrontation Clause are generally designed to protect similar values." *United States v. White, supra,* 116 F.3d at 913 (quoting *California v. Green,* 399 U.S. 149, 155, 90 S.Ct. 1930, 1933, 26 L.Ed.2d 489 (1970)). Further, the Confrontation Clause, as a constitutional right, provides more expansive protections than a court-promulgated hearsay rule. *See United States v. White, supra,* 116 F.3d at 913 (holding the same equity and policy considerations that apply to the Confrontation Clause, "apply with even more force to a rule of evidence without constitutional weight"). We agree with the reasoning of the court in *United States v. White, supra,* 116 F.3d at 912:

Because both the hearsay rule and the confrontation clause are designed to protect against the dangers of using out-of-court declarations as proof, a defendant's actions that make it necessary for the government to resort to such proof should be construed as a forfeiture of the protections afforded under both. Both the clause and the rule incorporate a preference for testimony tested by cross-examination, given under oath with the attendant penalty for perjury, and uttered before a jury able to observe the witness's demeanor.

Here, we conclude Vasquez forfeited his hearsay claim, as well as his Confrontation Clause claim, by his wrongful conduct. Therefore, we need not

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(Cite as: 155 P.3d 565)

analyze whether the court erred in ruling the hearsay was admissible under the residual hearsay exception, CRE 807.

The judgment is affirmed.

Judge VOGT and Judge TERRY concur.
Colo.App.,2006.
People v. Vasquez
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160 P.3d 242
(Cite as: 160 P.3d 242)

People v. Moreno
Colo.,2007.

Supreme Court of Colorado,En Banc.
The PEOPLE of the State of Colorado, Petitioner.
v.
Quentin Lobin MORENO, Respondent.
No. 06SC26.

June 11, 2007.
Rehearing Denied June 25, 2007.[FN*]

FN* Justice EID does not participate.

Background: Defendant was convicted in the District Court, El Paso County, Thomas L. Kennedy, J., of sexual assault on child. Defendant appealed, and the Court of Appeals reversed and remanded.

Holdings: On State's petition for certiorari review, The Supreme Court, Coats, J., held that:

(1) statutory exception to rule against hearsay for out-of-court statements made by child sexual assault victim violates defendant's right of confrontation if defendant is not afforded opportunity to cross-examine victim, and

(2) defendant did not forfeit Sixth Amendment right of confrontation with respect to child witness found to be medically unavailable to testify due to risk of further emotional or psychological trauma if forced to testify.

Affirmed.
West Headnotes
[1] Criminal Law 110 ⚿662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

Criminal Law 110 ⚿662.9

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.9 k. Availability of Declarant. Most Cited Cases
Statutory exception to rule against hearsay for out-of-court statements made by child sexual assault victims, including those made medically unavailable for trial because their emotional or psychological health would be substantially impaired if forced to testify about assaults, violates defendant's Sixth Amendment right of confrontation if defendant is not afforded opportunity to cross-examine victim. U.S.C.A. Const.Amend. 6; West's C.R.S.A. § 13-25-129.

[2] Criminal Law 110 ⚿662.80

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.80 k. Waiver of Right. Most Cited Cases
Causation of the witness' unavailability alone will be insufficient to work a forfeiture of the defendant's Sixth Amendment right of confrontation by wrongdoing; rather, to deprive a criminal defendant of the protection of the Confrontation Clause, his wrongful conduct must also be designed, at least in part, to subvert the criminal justice

system by depriving that system of the evidence upon which it depends. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ⇐662.80

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.80 k. Waiver of Right. Most Cited Cases
Defendant did not forfeit Sixth Amendment right of confrontation with respect to child witness who was found to be medically unavailable to testify regarding alleged acts of sexual abuse because of risk of further emotional or psychological trauma if forced to testify, as grounds for admitting witness' videotaped statement, in trial for sexual assault on child by one in position of trust and sexual assault on child as pattern of abuse; there was no showing that defendant had any intent to prevent or dissuade witness from testifying against him in order to subvert criminal process. U.S.C.A. Const.Amend. 6.
Held UnconstitutionalWest's C.R.S.A. § 13-25-129

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Justice COATS delivered the Opinion of the Court.
The People sought review of the judgment of the court of appeals reversing the defendant's convictions for sexual assault on a child. At trial, the district court admitted a videotaped interview with one of the child victims, in lieu of her live testimony. The court of appeals held that the Sixth Amendment Confrontation Clause, as subsequently construed by the United States Supreme Court in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), barred admission of the out-of-court interview, and the error was not harmless. It also rejected the People's claim that by causing her unavailability, the defendant forfeited his right to confront the child.

Because the People did not prove that the defendant had any intention of subverting the criminal justice system by preventing or dissuading the child from witnessing against him, the record fails to demonstrate that he forfeited his constitutional right to confront her. The judgment of the court of appeals is therefore affirmed.

I.

Quintin Lobin Moreno was charged with two counts of sexual assault on a child by one in a position of trust and one count of sexual assault on a child as part of a pattern of abuse. He was convicted of all three counts and sentenced to terms of ten years to life, to be served concurrently.

An investigation began when B.B., an eight-year-old girl, reported to her mother that the defendant had inappropriately touched her during a visit to his home. When interviewed by the police, B.B. reiterated what she had told her mother. B.B. also disclosed that her friend, A.P., the nine-year-old stepdaughter of the defendant, had confided to her that he had previously touched her inappropriately as well. Two police officers and a special investigative officer subsequently interviewed A.P. at a facility specially-equipped for such interviews. During the videotaped interview, A.P. disclosed that the defendant had touched her inappropriately on numerous occasions.

Prior to trial, the district court heard and granted the People's motion to admit the videotape of A.P.'s interview, pursuant to the statutory hearsay exception in this jurisdiction for statements of child sexual assault victims. [FN1] In reliance on testimony from A.P.'s therapist to the effect that requiring her to testify would retraumatize her, the district court concluded that A.P. was medically unavailable for trial. It also found sufficient corroborative evidence of the charged acts and sufficient safeguards of reliability in the circumstances of A.P.'s videotaped statements, as required for the statutory exception.

FN1. *See* § 13-25-129(1), C.R.S. (2006).

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After the People's motion in limine had been granted and defense counsel had been denied permission to speak with A.P. by her mother and guardian ad litem, the defendant moved to depose her. Despite the defendant's willingness not to be present for the interview and his objections that he would otherwise be deprived of any opportunity to confront his accuser, the trial court denied ***244** the motions. At trial, B.B. testified, but A.P. did not.

On appeal the court of appeals reviewed the admission of the videotaped interview in light of the United States Supreme Court's reconsideration of the Confrontation Clause in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which had been announced after the jury verdict. Finding A.P.'s statements in it to be testimonial, the court of appeals held that admission of the videotaped interview violated the defendant's Sixth Amendment right to confront her, and it also found that the error was not harmless. It similarly rejected the People's alternate claim, raised initially on appeal, that the defendant forfeited his right of confrontation by causing A.P.'s unavailability, and it reversed all of the defendant's convictions.

This court granted the People's petition for a writ of certiorari, challenging the court of appeals' rejection of their assertion of forfeiture by wrongdoing.

II.

In *Reynolds v. United States,* the United States Supreme Court first indicated that certain conduct by a criminal defendant could result in the forfeiture of his Sixth Amendment confrontation protection. 98 U.S. 145, 158-59, 25 L.Ed. 244 (1878). The Court there indicated that although the Constitution grants a defendant a privilege of confrontation, "if he voluntarily keeps the witnesses away, he is in no condition to assert that his constitutional rights have been violated" by the admission of other evidence in "place of that which the defendant has kept away. " *Id.* at 158. Until the Supreme Court's recent opinions in *Crawford v. Washington* and *Davis v. Washington,* --- U.S. ----, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), *Reynolds* represented the Court's only significant statement on the doctrine of forfeiture by wrongdoing.

In *Crawford* and *Davis,* the Supreme Court substantially rethought the guaranty of the Confrontation Clause and overruled *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). *See Whorton v. Bockting,* ---U.S. ----, ----, 127 S.Ct. 1173, 1183, 167 L.Ed.2d 1 (2007). Instead of finding a general guaranty of reliability, the Court held that only a declarant of testimonial statements qualifies as a "witness" within the meaning of the Sixth Amendment, but that in all criminal prosecutions, the testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Davis,* 126 S.Ct. at 2276-78. Both *Crawford* and *Davis,* however, also expressly acknowledged the continuing viability of the doctrine of forfeiture by wrongdoing. *Id.,* 126 S.Ct. at 2279-80; *Crawford,* 541 U.S. at 62, 124 S.Ct. 1354. While the Court's opinion in *Crawford* included little more than a reference to *Reynolds,* making clear that the doctrine survived the rejection of *Roberts, see Crawford,* 541 U.S. at 62, 124 S.Ct. 1354 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds ...."); in *Davis,* the Court elaborated further. *See* 126 S.Ct. at 2279-80.

In addition to reaffirming the continued vitality of the doctrine, in *Davis* the Court alluded to its contours by characterizing it as having been codified by rule 804(b)(6) of the Federal Rules of Evidence. *Id.,* 126 S.Ct. at 2280. As an exception to the general exclusion of hearsay evidence, the federal rule permits the admission of the out-of-court statements of a declarant who is unavailable for trial, as expressly defined by the rule, *see* Fed.R.Evid. 804(a), whenever those statements are "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Whether or not the Court meant to hold that the federal hearsay exception and the Confrontation Clause forfeiture doctrine are precisely coterminous, its linkage of

the two in this way, along with its other comments about the applicability of the doctrine, strongly implied that a defendant does not subject his right of confrontation to forfeiture, according to the doctrine of forfeiture by wrongdoing, except by conduct that was designed, at least in part, to deprive the ***245** criminal justice system of evidence against him.

Beyond the Court's pointed use of the term " codifies," in reference to Fed.R.Evid. 804(b)(6), it made abundantly clear that the forfeiture doctrine, like the rule itself, serves to prevent criminal defendants from being rewarded for subverting the truth-seeking process. It characterized the doctrine as coming into play "[w]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims...." *Davis,* 126 S.Ct. at 2280. Further, it described the defendant's duty, a violation of which would extinguish his confrontation right, as "refrain[ing] from acting in ways that destroy the integrity of the criminal-trial system." *Id.* In fact, the *Davis* Court's entire discussion of forfeiture by wrongdoing, which had not been raised or relied on below, came in direct response to the assertion that the crime of domestic violence requires greater flexibility in the use of testimonial evidence because such crimes are notoriously susceptible to intimidation or coercion of the victims as a way of keeping them from testifying at trial; and its self-professed purpose was to make clear that " *Crawford,* in overruling *Roberts,* did not destroy the ability of courts to protect the integrity of their proceedings." *Id.*

Perhaps most revealing with regard to its purpose, however, the Court acknowledged that the *Roberts* approach to the Confrontation Clause made recourse to the forfeiture doctrine less necessary, for the reason that "prosecutors could show the ' reliability' of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence." *Id.* Had the Court intended by " the defendant's procurement of the witness's absence " nothing more than traumatizing a domestic violence (or child sexual assault) victim enough to cause her to be retraumatized by having to testify at his trial, this statement could hardly make sense. Clearly it would not be easier to prove that the risk of retraumatization rendered the victim unavailable and that her prior statements were reliable, as required by *Roberts,* than to prove her unavailability from retraumatization alone.

Rather than finding that a complete forfeiture of a defendant's right to confront results from sexually abusive conduct impairing his child-victim's ability to communicate, the Supreme Court had previously held merely that the Confrontation Clause does not prohibit procedures like the use of one-way closed circuit television, when needed to protect a child sexual assault victim from the debilitating trauma caused by testifying in the presence of the defendant. *See Maryland v. Craig,* 497 U.S. 836, 855-57, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); *but see id.* at 860, 110 S.Ct. 3157 (Scalia, J., dissenting) ("Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion."). In fact, the Supreme Court has never found a defendant to have forfeited his right to confront simply by committing a criminal act that results in a witness's unavailability to testify. *Cf. Motes v. United States,* 178 U.S. 458, 471-74, 20 S.Ct. 993, 44 L.Ed. 1150 (1900) (holding that the defendants did not forfeit their confrontation rights because "there was not the slightest ground in the evidence to suppose that [the witness] had absented himself from the trial at the instance, by the procurement, or with the assent of either of the accused"); *Reynolds,* 98 U.S. at 158-61 (defendant forfeited his right to confrontation when he secreted his alleged second wife to prevent her from being subpoenaed to appear at his polygamy trial).

Nevertheless, courts in other jurisdictions are divided on the question whether forfeiture requires a showing of the defendant's intent to prevent the declarant from testifying at trial. Opinions finding such a requirement include *People v. Stechly,* No. 97544, --- N.E.2d ----, ----, 2007 WL 1149969, at *13 (Ill. Apr.19, 2007); *State v. Wright,* 726 N.W.2d 464, 479 (Minn.2007); *State v. Romero,* 141 N.M. 403, 156 P.3d 694, 701-03 (2007); *State v. Mechling,* 219 W.Va. 366, 633 S.E.2d 311, 325-26 (2006); *State v. Ivy,* 188 S.W.3d 132, 145-48 (Tenn.2006); and *Commonwealth v.*

Edwards, 444 Mass. 526, 830 N.E.2d 158, 170 (2005). Those with the opposite perspective include *People v. Giles,* 40 Cal.4th 833, 55 Cal.Rptr.3d 133, 152 P.3d 433, ***246** 444 (2007); *Gonzalez v. State,* 195 S.W.3d 114, 125-26 (Tex.Crim.App.2006); and *State v. Jensen,* 727 N.W.2d 518, 535 (Wis.2007), although each involved the admissibility of prior testimonial statements of a homicide victim. Whether or not homicide prosecutions may be considered unique in this regard, *see, e.g., Stechly,* --- N.E.2d at ----, 2007 WL 1149969, at *15 (leaving open the possibility of a "murder exception"), the clear consensus in non-murder cases is that the doctrine requires a showing of an intent on the part of the defendant to prevent the declarant from testifying at trial.

III.

Much like its federal counterpart, Rule 802 of the Colorado Rules of Evidence bars the admission of hearsay except as otherwise permitted by rule or statute. Unlike the federal rules, however, this jurisdiction provides no general hearsay exception for statements offered against a party who has procured the unavailability of the declarant. The issue presented in this case therefore does not test whether a hearsay exception like Fed.R.Evid. 804(b)(6) is coextensive with the forfeiture by wrongdoing doctrine that remains applicable to the Sixth Amendment Confrontation Clause. Instead, the issue arises here only because out-of-court statements were admitted at the defendant's trial pursuant to a legislatively-created hearsay exception, thought to comply with the defendant's constitutional confrontation right before *Crawford* but now considered violative of that right, unless the right itself had been forfeited by the defendant's own wrongdoing.

[1] The absent child-victim's videotaped interview in this case was admitted into evidence pursuant to section 13-25-129, C.R.S. (2006), [FN2] an exception to the hearsay rule for certain out-of-court statements of child sexual assault victims, including some who are unavailable for trial only because their emotional or psychological health would be substantially impaired were they forced to testify. *See People v. Diefenderfer,* 784 P.2d 741, 750 (Colo.1989). To the extent that the statute allows for the admission of out-of-court testimonial statements without the defendant being afforded an opportunity to cross-examine the declarant, it is now clear that the statute violates the confrontation guaranty of the Sixth Amendment. *Crawford,* 541 U.S. at 68, 124 S.Ct. 1354; *People v. Vigil,* 127 P.3d 916, 929-30 (Colo.2006). In effect, the People assert, however, that a defendant has forfeited his right to confront any witness whose absence is caused by the defendant's own wrongdoing, regardless of his purpose; that a witness is absent if medically unavailable according to the standard recognized in *Diefenderfer;* and that acts of sexual assault committed against a child victim who becomes medically unavailable according to that standard are sufficiently the cause of her absence to work a forfeiture of the defendant's right to confront.

> FN2. The statute provides, in relevant part:
> (1) An out-of-court statement made by a child, ... describing any act of sexual contact, intrusion, or penetration, ... performed with, by, on, or in the presence of the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal ... proceeding[ ] in which a child is a victim of an unlawful sexual offense ... when the victim was less than fifteen years of age at the time of the commission of the offense ..., if:
> (a) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and
> (b) The child either:
> (I) Testifies at the proceedings; or
> (II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

To find the forfeiture of a protection so integral to

the truth-seeking process, quite apart from any design or attempt by the defendant to subvert that process, would not only divorce the forfeiture by wrongdoing doctrine from its very reason for existing but would emasculate the newly articulated cross-examination guaranty of the Confrontation Clause. It seems hardly conceivable that the Supreme Court would understand the Confrontation Clause to guarantee so absolutely a particular method of testing the reliability of testimony, *see Crawford,* 541 ***247** U.S. at 68, 124 S.Ct. 1354, and yet allow criminal defendants to be stripped of that guaranty so casually, and virtually by definition in entire classes of prosecutions. Nor does it seem likely that the Supreme Court would so emphatically criticize the practice of subjecting a defendant's confrontation right to the "open-ended balancing tests" that preceded its announcement of *Crawford,* 541 U.S. at 67-68, 124 S.Ct. 1354, only to similarly subject a defendant's entitlement to the privilege of confrontation to a judicial determination whether his own conduct could be considered, in some ill-defined way and by some unspecified degree of proximity, a cause of the declarant's absence from trial.

[2] In light of its apparent lack of importance or development before *Crawford,* both the scope of the doctrine of forfeiture by wrongdoing and the way it will ultimately interface with the Confrontation Clause itself must be considered peculiarly the property of the Supreme Court. While it would be presumptuous to anticipate, any more than necessary, the Court's further development of the doctrine, it is clear enough from the Court's own post-*Crawford* comments that causation alone will be insufficient to work a forfeiture. To deprive a criminal defendant of the protection of the Confrontation Clause, his wrongful conduct must also be designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends.

We have long held that on appeal a party may defend the judgment of the trial court on any ground supported by the record, whether or not that ground was relied upon or even contemplated by the trial court. *See People v. Quintana,* 882 P.2d 1366, 1371 (Colo.1994) (quoting *Dandridge v. Williams,* 397 U.S. 471, 475 n. 6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)). Nevertheless, because the People failed to raise the doctrine of forfeiture by wrongdoing as a ground for admission, the trial court's findings focused solely on the child's unavailability rather than the defendant's role in causing her absence from the trial. The trial court found only that if the child were required to testify, she could be retraumatized; she could suffer enhanced anxiety, fear, and humiliation; and the " trauma bond" between her and the defendant could be renewed.

[3] Even if these findings would be sufficient to establish the child's absence within the meaning of the forfeiture doctrine, and the defendant's conduct was sufficiently a cause of her absence, the trial court made no finding (and in fact there was no clear evidence) that wrongdoing by the defendant-because of, for example, the manner in which he chose his victim, the nature of his criminal acts against her, or subsequent threats he made to her-was intended, even in part, to subvert the criminal process by preventing or dissuading the victim from testifying at trial. Whether or not a finding of such intent would be sufficient in itself, in the absence of any finding beyond the risk of retraumatization of the victim, the record is inadequate to support a finding of forfeiture by wrongdoing.

IV.

Because the People failed to prove that the defendant had any intent to prevent or dissuade the child from witnessing against him, the record fails to demonstrate that he forfeited his constitutional right to confront her. The judgment of the court of appeals is therefore affirmed.

Justice EID does not participate.
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