No. _____

In The
Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

ANTHONY ROMERO,

Respondent.

On Petition For Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that testimonial statements of a witness absent from trial may be admitted only where the declarant is unavailable and the defendant had a prior opportunity to cross-examine. The Court stated, however, that "we accept" "the rule of forfeiture by wrongdoing," which "extinguishes confrontation claims on essentially equitable grounds." *Id.* at 62. The question presented is:

When the defendant kills a witness who had previously made testimonial statements against him, does he forfeit his constitutional right to confront her only if he killed her with the specific intent to prevent her from testifying at trial?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTION, STATUTES AND RULES OF COURT

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of New Mexico, respectfully prays that a writ of certiorari issue to the New Mexico Supreme Court to review the decision entered in this matter on March 15, 2007. The State filed a motion for rehearing that was denied on April 11, 2007.

OPINIONS AND ORDERS BELOW

State v. Romero, 133 P.3d 842 (N.M. Ct. App. 2006). Appendix 24.

Order Granting Petition for Writ of Certiorari, N.M. Supreme Court No. 29,690 (April 10, 2006).

State v. Romero, 156 P.3d 694 (N.M. 2007). Appendix 1.

Order (denying State's motion for rehearing), New Mexico Supreme Court No. 29,690 (April 11, 2007). Appendix 74.

JURISDICTION

The New Mexico Supreme Court rendered its opinion on March 15, 2007. App. 1. The court denied Petitioner's timely motion for rehearing on April 11, 2007. App. 74. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) (1988), and Supreme Court Rule 13.1. As in *Kansas v. Marsh*, 548 U.S. ___, 126 S.Ct. 2516, 2521, 165 L.Ed.2d 429 (2006), this Court has jurisdiction under the third *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), category of practical finality because later review

of the Confrontation Clause issue likely cannot be had. If the state prevails on remand and the evidence is admitted, the Confrontation Clause issue would be moot. If on remand the evidence were suppressed after the jury is sworn, as authorized in New Mexico practice, *see State v. Gutierrez*, 105 P.3d 332, ¶ 21 (N.M. App. 2005); *cf.* Fed. R. Crim. P. 12(b)(3)(C), the state would be prohibited from appealing the decision under the New Mexico Supreme Court's recent decision in *State v. Lizzol*, 2007 WL 1742190 (N.M. May 18, 2007). The state would be able to appeal an adverse ruling only if both defense counsel and the trial court cooperated to permit that procedure. N.M. Stat. Ann. § 39-3-3 (1978 comp.).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On October 12-13, 2001, in Santa Fe County, New Mexico, Respondent falsely imprisoned his estranged wife Jessica Romero de Herrera, choked her and threatened to

kill her with a knife. While the incident was ongoing, Ms. Romero de Herrera was able to telephone friends, who notified police. Ms. Romero de Herrera made an excited utterance to the police at the scene, and gave a full statement at the police station three and a half hours later. Some weeks later, she underwent an examination by a Sexual Assault Nurse Examiner, to whom she described the incident. She also testified before a grand jury investigating the incident. Respondent was indicted on numerous charges.

On December 28, 2001, Respondent beat Ms. Romero de Herrera severely. She died either during the beating or almost immediately thereafter. A forensic pathologist with New Mexico's Office of the Medical Investigator determined that her death was a homicide resulting from "being beaten about the head." *State v. Romero*, 112 P.3d 1113, 1114 ¶ 2 (N.M. App. 2005).

Respondent was tried separately, before different juries and judges, for domestic violence and for murder. Both juries convicted him.[1] At his domestic violence trial, which is the proceeding at issue in the present Petition, the jury was prevented from learning of Ms. Romero de

[1] The New Mexico Court of Appeals reversed Respondent's second-degree murder conviction on the basis that the jury was improperly instructed. In the course of its opinion, the state appellate court stated: "We do not believe that a jury would entertain any reasonable doubt as to the fact that [Respondent]'s acts were a significant cause of the victim's death." *Romero*, 112 P.3d at 1118, ¶ 20. But, the court concluded, although Respondent was a significant cause of Ms. Romero de Herrera's death, a jury could find that the beating was justified as self-defense or that his highest offense was involuntary manslaughter. Accordingly, it ruled that the trial court erred in refusing Respondent's tendered instructions on those theories. *Id.* at 1117, ¶¶ 15-16. *See* App. at 2-3, ¶ 2; App. at 25-26, ¶ 2.

Herrera's death, but it heard various hearsay statements she had made: to her friends, to police at the scene and at the station, during the SANE examination, and before the grand jury. The grand jury testimony was admitted by the defense rather than the prosecution.

After Respondent was convicted, but before his appeal was heard, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004). The New Mexico Court of Appeals ruled that some of Ms. Romero de Herrera's statements were testimonial and their admission violated the rule established by *Crawford.* The court rejected the state's argument that Respondent had forfeited his right to confront her by his act of killing her, explaining that it considered itself bound as a matter of *stare decisis* to follow the New Mexico Supreme Court's decision in *State v. Alvarez-Lopez*, 98 P.3d 699 (N.M. 2004), *cert. denied*, 543 U.S. 1177 (2005). *Alvarez-Lopez* involved co-defendants. The defendant jumped bail and remained a fugitive for several years. In the meantime, his co-defendant was deported. The latter had given a statement to police inculpating the defendant which was introduced at the defendant's trial. The New Mexico Supreme Court ruled that admission of the statement was *Crawford* error, and further held that the defendant had not forfeited his right of confrontation by remaining a fugitive.

In the course of its ruling, the *Alvarez-Lopez* court held that Federal Rule of Evidence 804(b)(6) and the constitutional forfeiture doctrine are coextensive. The court observed that in a pre-*Crawford* case, the Tenth Circuit Court of Appeals had relied on Rule 804(b)(6) to conclude that a defendant forfeited his constitutional right to confrontation. *Alvarez-Lopez*, 98 P.3d 699 ¶ 9 (citing *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000)).

The court interpreted the Tenth Circuit's ruling to mean the rule and the constitutional doctrine were coterminous:

> We recognize Rule 804(b)(6) is a federal rule of evidence that has not been adopted into our rules of evidence; however, we are bound to apply federal law in determining the minimum level of a criminal defendant's constitutional right to confrontation. Consistent with *Cherry*, we rely on the terms of Rule 804(B)(6) in determining whether Defendant has forfeited his federal right to confrontation[.]

Id.

Rule 804(b)(6) provides that a party forfeits his right to object to hearsay if the party "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Thus the Rule requires inquiry into the party's subjective state of mind. The proponent of the hearsay evidence must show not only that the party procured the declarant's unavailability, but did so with the specific intent to prevent the witness from testifying.

In the present case, considering itself bound by *Alvarez-Lopez*'s holding that the Rule and the federal constitutional forfeiture doctrine were coterminous, the Court of Appeals reversed Respondent's domestic violence convictions and remanded the case to the trial court for a hearing to determine if Respondent killed Ms. Romero de Herrera with the subjective intent to prevent her from testifying at his trial. If so, he forfeited his Sixth Amendment right to confront her. But if the State was unable to prove that he killed Ms. Romero de Herrera for that particular reason, he did not forfeit his right to confront her, even though he was the cause of her unavailability.

App. at 66, ¶ 76. Significantly, the Court of Appeals strongly recommended that the state supreme court reconsider its decision to meld the Rule and the constitutional forfeiture principle. *Id.* at 40-46, ¶¶ 30-39.

The state petitioned the New Mexico Supreme Court to review the decision and specifically asked it to hold that the constitutional doctrine did not include a specific intent element. However, the New Mexico Supreme Court rejected that argument: "we reaffirm our holding in *Alvarez-Lopez* that the prosecution is required to prove intent to procure the witness's unavailability in order to bar a defendant's right to confront that witness." App. at 19-20, ¶ 37. As a matter of federal constitutional law, merely killing a witness, without more, does not extinguish the killer's constitutional right to confront his victim at a subsequent trial.

REASONS FOR GRANTING THE PETITION

THE NEW MEXICO SUPREME COURT DECIDED A SIGNIFICANT ISSUE OF FEDERAL CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH THE RESULT REACHED BY NUMEROUS OTHER STATE AND FEDERAL COURTS.

I. The Lower Courts Are Deeply Divided Over the Question Presented.

A defendant's constitutional right to confront a witness against him can be forfeited. *Crawford*, 541 U.S. at 62; *Davis v. Washington*, 547 U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). One classic method of forfeiting the right is to kill the witness. Does it matter to the constitutional forfeiture analysis whether the killing "is motivated

by a desire to silence a witness, financial gain, or mere sadism"? *People v. Ruiz*, 2005 WL 1670426, *6 (Cal. App. 6 Dist. 2005). American courts that have considered the forfeiture by wrongdoing doctrine in the wake of *Crawford* and *Davis* have answered that question in at least three different ways. As shown below, the largest group – seven states, plus the Sixth Circuit Court of Appeals – holds that the defendant's motive does not matter. According to this group, the defendant's subjective state of mind is irrelevant to the constitutional forfeiture issue. Only the defendant's actions matter.

A second group, consisting of Illinois and Colorado, holds that the defendant's motive does matter, at least sometimes. In opinions issued in April and June of this year, the highest courts of those states held that a defendant who discourages a witness from testifying does not forfeit his right to confront the witness unless he acted with the specific intent to interfere with the judicial process. Those courts hold, in essence, that the constitutional forfeiture rule is coextensive with Federal Rule of Evid. 804(b)(6). In *dicta*, however, both courts suggested that a different rule might apply when the defendant has killed the witness.

New Mexico is alone in the third group. It is the only American jurisdiction to adopt the extreme position that the constitutional forfeiture rule is coextensive with Fed. R. Evid. 804(b)(6) even when the defendant kills the witness.

A. The Majority Rule: The Defendant's Subjective State of Mind Is Irrelevant.

Most courts that have addressed this issue post-*Crawford* reject the contention that the specific intent element of Rule 804(b)(6) is part of the constitutional forfeiture analysis. The leading case is *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005). The Sixth Circuit observed that *Crawford* reaffirmed the forfeiture principle's "essentially equitable" nature, which "strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive." *Id.* at 370. The court explained: "The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit." *Id.* at 370-371.[2]

The following post-*Crawford* decisions follow the Sixth Circuit in holding that the constitutional forfeiture principle does not require proof that the defendant acted with the subjective intent to prevent the out-of-court declarant from testifying. *People v. Giles*, 55 Cal.Rptr.3d 133, 145-146, 152 P.3d 433, 444-445 (Cal. 2007); *State v. Jensen*, 727

[2] It is universally accepted that evidence admissible under Rule 804(b)(6) is admissible under the Sixth Amendment. Thus, once a federal court has found evidence admissible under Rule 804(b)(6), there is no need for the court to consider whether the constitutional doctrine shares the Rule's specific intent loophole. *See*, *e.g.*, *United States v. Honken*, 378 F.Supp.2d 970, 994 (N.D. Iowa 2004). Many states, including New Mexico, have not adopted an analogue to the Rule. Consequently, the issue presented by this Petition arises with greater frequency in state than in federal courts. It may be noted, however, that no reported federal decision rejects *Garcia-Meza*'s reasoning or result.

N.W.2d 518, 534-535 ¶¶ 49-52 (Wis. 2007); *State v. Brooks*, 2006 WL 2523991, *8-9 (Tenn. Crim. App. Aug. 31, 2006), *appeal granted and pending* (Tenn. Jan. 22, 2007); *People v. Bauder*, 712 N.W.2d 506, 512-514 (Mich. App. 2005), *appeal denied*, 720 N.W.2d 287 (Mich. 2006); *Gonzalez v. State*, 155 S.W.3d 603, 610-611 (Tex. App. 2004), *aff'd on other grounds*, 195 S.W.3d 114, 125-126 (Tex. Crim. App. 2006), *cert. denied*, 127 S.Ct. 564 (2006).

Indiana and Kansas courts have found forfeiture without requiring proof of the defendant's subjective intent, but also without explaining their decision not to require it. *Boyd v. State*, 866 N.E.2d 855, 857 (Ind. App. 2007); *State v. Meeks*, 88 P.3d 789, 794-795 (Kan. 2004), *overruled in part on other grounds by State v. Davis*, 158 P.3d 317, 322 (Kan. 2006).

B. The Second Group: Proof of the Defendant's Specific Intent Is Required When the Defendant Has Not Been Killed.

In *People v. Stechly*, ___ N.E.2d ___, 2007 WL 1149969 (Ill. April 19, 2007), the Illinois Supreme Court held on a 3-1-3 vote that proof of the defendant's subjective intent to prevent the declarant from testifying is required when the declarant remains alive at the time of trial. But in *dicta* the plurality suggested that when the defendant is responsible for the declarant's murder, his or her wrongful specific intent may be inferred without more. *Id.* at *14-15.

In *People v. Moreno*, ___ P.3d ___, 2007 WL 1662641 (Colo. June 11, 2007), the Colorado Supreme Court wrote: "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." *Id.* at *5. In *Moreno*, the minor witness was still alive; indeed, it appears the defendant had done nothing to make her unavailable other than traumatize her by committing the very crime for which he was on trial. The state supreme court held that the commission of a traumatic crime, without more, was insufficient to establish forfeiture in the absence of evidence that the defendant intended to make the witness unavailable at trial. *Id.* at *6. However, the court left open the possibility of recognizing what it termed a "murder exception", citing *Stechly* as support. *Moreno* at *4.

C. The Third Group: New Mexico Is the Only American Jurisdiction to Hold that Fed. R. Evid. 804(b)(6) and the Constitutional Forfeiture Doctrine Are Coextensive in All Circumstances.

As described in the Statement of the Case, the New Mexico Supreme Court held that Rule 804(b)(6) and the constitutional forfeiture doctrine are coextensive. New Mexico thus became the only American jurisdiction to hold, post-*Crawford*, that a defendant can kill a witness and then claim a constitutional entitlement to all the courtroom benefits of that illegal and immoral act.

The New Mexico Supreme Court claimed to be following a "majority rule." *Id.*, ¶ 35. In fact, however, none of the thirteen cases it cited – which include six pre-*Crawford* cases – actually support its unique position.[3]

[3] Specifically, in five of the thirteen cited cases the court did not decide the issue. The court twice expressly declined to reach the issue

(Continued on following page)

II. The Issue Is a Recurring One of National Importance that Can Be Resolved Only by this Court.

In *Moreno*, the Colorado Supreme Court stated: "[B]oth 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." 2007 WL 1662641 at *5. The Colorado court resolved the case before it by minutely inspecting the language in *Crawford* and *Davis* to discover what hints this Court had dropped as to its intentions with regard to the forfeiture principle. For example, it found great significance in *Davis*'s use of the word "codifies", *id.* at *3 (quoting *Davis*, 126 S.Ct. at 2280), concluding that by employing that single word this

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in *Gonzalez v. State*, 195 S.W.3d 114, 125-126 (Tex. Crim. App. 2006), *cert. denied*, 127 S.Ct. 564 (2006). The following opinions did not directly address the issue: *State v. Mechling*, 633 S.E.2d 311, 326 (W. Va. 2006); *People v. Geraci*, 649 N.E.2d 817, 820-821, 85 N.Y.S.2d 359, 365-366 (N.Y. 1995); *State v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000); and *State v. Valencia*, 924 P.2d 497, 498 (Ariz. App. 1996). Four other cases were decided on the basis of evidentiary law, which was held to pass constitutional muster as described in footnote 2, *supra*: *United States v. Gray*, 405 F.3d 227, 242 and n.9 (4th Cir. 2005), *cert. denied*, 126 S.Ct. 275 (2005); *State v. Ivy*, 188 S.W.3d 132, 148 (Tenn. 2006); *Commonwealth v. Laich*, 777 A.2d 1057, 1062 n.4 (Pa. 2001); *State v. Wright*, 701 N.W.2d 802, 814-815 (Minn. 2005), *vacated*, 126 S.Ct. 2979, 165 L.Ed.2d 985 (2006), *on remand*, 726 N.W.2d 464 (Minn. 2007). A since-vacated Illinois case stated in *dicta* that it would reject the proposition for which the New Mexico court cited it. *People v. Melchor*, 841 N.E.2d 420, 433 (Ill. App. 1 Dist. 2005), *vacated*, 2007 WL 1650537 (Ill. June 07, 2007). *Devonshire v. United States*, 691 A.2d 165 (D.C. 1997), quoted several formulations without choosing between them. In *State v. Henry*, 820 A.2d 1076, 1087-1088 (Conn. App. 2003); *Commonwealth v. Edwards*, 830 N.E.2d 158, 168-172 (Mass. 2005); and *Valencia*, 924 P.2d at 499, the trial court's explicit factual findings made the defendant's intent a moot point on appeal.

Court "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 criminal justice system of evidence against him." *Id.* The New Mexico Supreme Court in the present case similarly found hidden meanings in *Davis*. *Romero*, 156 P.3d 694, ¶ 36.

With all due respect, this form of constitutional analysis resembles nothing quite so much as conspiracy theorizing, in which any stray tidbit of information is seized upon as evidence of a secret master plan. Yet because the recurring issue of constitutional forfeiture is so peculiarly the unique province of this Court, there is little lower courts *can* do except try to guess what this Court will eventually decide.

III. The New Mexico Supreme Court's Federal Constitutional Decision Is Wrong as a Matter of Doctrine and Dangerous as a Matter of Public Policy.

A. The New Mexico Supreme Court Misapprehended the Federal Constitutional Issue Before It, Inappropriately Treating Waiver and Forfeiture as One and the Same.

This Court has squarely stated that "[w]aiver is different from forfeiture." *United States v. Olano*, 507 U.S. 725, 733 (1993). *See also Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (waiver and forfeiture "are really not the same"). As many courts have noted, the showing required by Rule 804(b)(6) establishes classic waiver: the voluntary relinquishment of a known right.

The distinction between waiver and forfeiture in this context is thoroughly discussed in *People v. Costello*, 53 Cal.Rptr.3d 288, 295-302 (Cal. App. 2007), *review granted*, 57 Cal.Rptr.3d 540, 156 P.3d 1013 (Cal. 2007), perhaps the most scholarly post-*Crawford* decision on the topic. In contrast to the sophisticated discussions in *Costello* and other cases, the New Mexico Supreme Court's majority opinion describes waiver and forfeiture as mere "analog[ies]" and states that distinguishing between them has not "proved helpful". App. at 16, 19, ¶¶ 29, 35. These pronouncements strongly suggest the majority failed to understand the nature of the federal constitutional issue before it.

B. The New Mexico Supreme Court's Decision Tolerates and Even Encourages Violence Against Witnesses and the Consequent Undermining of the Legal System Itself.

In Professor Richard D. Friedman's view, the proper basis for the forfeiture principle is not the accused's wrongful intent but simply that he "should not be heard to complain about the consequences of his own conduct." Richard D. Friedman, "Confrontation and the Definition of Chutzpa," 31 ISR. L. R. 506, 516 (1997). This is the rationale of *Reynolds v. United States*, 98 U.S. 145 (1878), the foundational case, which held: "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Id.* at 158. As recently summarized by the California Supreme Court, "wrongfully causing one's own inability to cross-examine is what lies at the core of the forfeiture rule." *Giles*, 55 Cal.Rptr.3d at 143, 152 P.3d at 442. In this case, the New Mexico Supreme Court held that a defendant can cause

his own inability to cross-examine a witness, and then turn around and assign responsibility for his own act to the state. In essence, the New Mexico Supreme Court held that Respondent should be granted a "windfall", *Davis*, 126 S.Ct. at 2280, because the state failed to prevent him from killing his estranged wife.

In 1943, Justice Jackson expressed a second, even more fundamental public policy that also counsels in favor of adopting a constitutional forfeiture rule without regard to the defendant's subjective intent or motive:

> The influence of lawless force directed toward parties or witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with indifference or shelter it from exposure and inquiry. The remedies of the law are substitutes for violence, not supplements to violence[.]

N.L.R.B. v. Indiana & Michigan Electric Co., 318 U.S. 9, 29 (1943). The New Mexico Supreme Court's opinion in this case holds that in some circumstances the federal Constitution requires our judicial system not only to tolerate but to reward its own undermining.

Finally, by rewarding the intimidation and even murder of witnesses, the New Mexico Supreme Court's decision can only have the unintended effect of encouraging those practices. It is difficult to conceive of any result more sadly perverse than that.

CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review the judgment and opinion of the New Mexico Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Opinion Number: 2007-NMSC-013

Filing Date: March 15, 2007

Docket No. 29,690

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ANTHONY ROMERO,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI

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OPINION

MINZNER, Justice.

{1} The State appeals from an opinion by the Court of Appeals remanding a judgment and sentence following Defendant's convictions of aggravated battery against a

household member, contrary to NMSA 1978, § 30-3-16(C) (1995); aggravated assault against a household member with a deadly weapon, contrary to NMSA 1978, § 30-3-13(A)(1) (1995); false imprisonment, contrary to NMSA 1978, § 30-4-3 (1963); and bribery or intimidation of a witness, contrary to NMSA 1978, § 30-24-3(A)(3) (1997). *See State v. Romero,* 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, *cert. granted,* 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120. After the trial, the United States Supreme Court issued its opinion in *Crawford v. Washington,* 541 U.S. 36 (2004). While this case was pending on appeal to this Court and during briefing, the United States Supreme Court issued its opinion in *Davis v. Washington,* 547 U.S. ___, 126 S.Ct. 2266 (2006). We address three general issues: (1) whether two of the victim's out-of-court statements were inadmissible, because they were testimonial under *Davis* and *Crawford*; (2) whether, even if inadmissible, their admission was harmless error; and (3) whether Defendant forfeited his right to object to the admission of those statements. *See State v. Alvarez-Lopez,* 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699 (holding the doctrine of forfeiture by wrongdoing inapplicable when a witness had been deported during the period of time the defendant had been a fugitive). We affirm.

I. Background

{2} The facts underlying this appeal are stated clearly and thoroughly in the Court of Appeals' Opinion. *Romero,* 2006-NMCA-045, ¶¶ 2-11. We do not restate them. We ought to emphasize, however, that Defendant was charged not only with domestic violence, which is the subject of this appeal, but also with the death of the victim, his wife. *See State v. Romero,* 2005-NMCA-060, 137

N.M. 456, 112 P.3d 1113, *cert. granted,* 2005-NMCERT-005, 137 N.M. 523, 113 P.3d 346, *cert. quashed,* 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039 (*Romero I*). The domestic violence charges arose out of an incident that occurred in mid-October 2001; Defendant was charged with murder after the victim was found dead in his bed in late December 2001. Defendant was convicted of second-degree murder, but the Court of Appeals reversed his conviction, on the basis that he was entitled to but had not received instructions on nondeadly force self-defense and on involuntary manslaughter. *Romero I,* ¶¶ 22-23.

{3} In this appeal the Court of Appeals may have reasoned that if the doctrine of forfeiture by wrongdoing applied, the issues of whether testimonial evidence had been admitted erroneously under *Davis* and *Crawford* and, if so, whether the error was harmless would be moot. *See Romero,* 2006-NMCA-045, ¶ 45. For whatever reason, the Court of Appeals first addressed the doctrine of forfeiture by wrongdoing. In addressing the doctrine of forfeiture by wrongdoing, the Court appropriately indicated its concern that *Alvarez-Lopez* may have stated the doctrine too narrowly. *Id.* ¶ 37.

{4} We address the issues in the order Defendant briefed them. Defendant had the benefit of *Davis* by the time his answer brief was due, and *Davis* illuminates *Crawford.* Further, the preliminary questions ordinarily would seem to be whether Defendant has established an error at trial and, if so, whether that error is harmless. Therefore, we begin with a discussion of the evidentiary errors on which Defendant relied in arguing to this Court and the effect of *Davis* on the analysis of testimonial hearsay for purposes of the Confrontation Clause.

II. Discussion

{5} *Davis* consolidated two appeals, each arising from a state conviction. Each appeal presented the issue of when a victim's out-of-court statements are subject to the Confrontation Clause of the Sixth Amendment. Each appeal stemmed from police investigation of a domestic dispute, and in each appeal, the declarant was unavailable at trial. *Id.* at ___, 126 S.Ct. at 2270-73. The first case, *Davis,* involved the admissibility of questions posed to the victim by a 911 operator during an emergency call about a domestic dispute, while the second case, *Hammon v. Indiana,* involved the admissibility of the victim's written statements in an affidavit given to a police officer after an alleged domestic dispute. *Id.* The Court held that the *Davis* 911 call was admissible but that admitting the *Hammon* affidavit would be a violation of the defendant's Sixth Amendment rights. *Id.* at ___, 126 S.Ct. at 2277-80.

{6} *Davis* further clarified the rule promulgated by *Crawford,* which held the Confrontation Clause bars the use of out-of-court statements made by witnesses that are testimonial, unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine, regardless of whether such statements are deemed reliable. *Davis,* 547 U.S. at ___, 126 S.Ct. at 2273-74 (discussing the holding in *Crawford* concerning the phrase "testimonial statements"). In deciding *Crawford,* the Court deliberately chose not to adopt a comprehensive definition of "testimonial," but stated:

> The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused – in other words, those who 'bear testimony.' 2 N. Webster, An American Dictionary of the English Language

> (1828). 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid.* (alteration in original). An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

Crawford, 541 U.S. at 51.

{7} As part of an ongoing discussion of the Confrontation Clause and its application to the admission of out-of-court witness statements, *Davis* explored and defined the meaning of testimonial hearsay, holding:

> Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at ___, 126 S.Ct. at 2273-74 (footnote omitted) (emphasis added). *Davis* confined its discussion of interrogation to situations involving law enforcement officers and their agents, concluding that actions of 911 operators, while not law enforcement officers themselves, qualified as actions of the police. *Id.* at ___, 126 S.Ct. at 2274. The Court did not address further the scope of police interrogation, stating that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.* n.2.

{8} The Court distinguished *Crawford,* which considered an interrogation by police officers of a witness hours after the event she described, from *Davis,* which considered an interrogation by a 911 operator during an ongoing emergency, based on the immediacy of the event. "[T]he nature of what was asked and answered in *Davis,* again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Davis,* 547 U.S. at ___, 126 S.Ct. at 2276. "[T]he difference in the level of formality between the two interviews is striking." *Id.* at ___, 126 S.Ct. at 2276-77.

{9} On appeal to this Court, Defendant argues that when the Sexual Assault Nurse Examiner (SANE nurse) examined the victim, she was acting as a proxy for law enforcement officers and conducting a police interrogation. Defendant notes the victim's visit was a result of her grand jury testimony and the help of a law enforcement officer working on the criminal case against Defendant. He argues the trial court erred in permitting the nurse to recite the victim's statement as if the nurse had been the victim.

{10} At trial, Officer Lewandowski testified about the victim's appearance and demeanor and his initial interaction with her at the scene on October 13, 2001. *Romero,* 2006-NMCA-045, ¶ 5. The State played for the jury a taped interview of the victim, conducted the same afternoon as the incident. *Id.* ¶ 6. While the admissibility of the victim's statements to the officer at the scene are not an issue on appeal to this Court, Defendant argues the taped interview was admitted as testimony in violation of his Sixth Amendment right to confrontation. He does not

contend the officer's testimony about the victim's appearance and demeanor and his interaction with her on October 13 should have been excluded.

{11} We address each evidentiary issue separately. Then we address the question of whether any error in admitting evidence was harmless. Finally, we address the question of whether the doctrine of forfeiture by wrongdoing is applicable.

A. The SANE Nurse's Testimony

{12} Defendant argues the statement given by the victim during the SANE interview was testimonial in three respects. First, the statement was the product of an investigation by authorities. Second, the victim subjectively knew her statement was testimonial in nature. *See Davis,* 547 U.S. at ___, 126 S.Ct. at 2274 n.1 ("[E]ven when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."). He also reasons a reasonable person would have objectively understood it to be testimonial. "[What is testimonial is] in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford,* 541 U.S. at 51 (internal citation omitted). Finally, as Defendant reasons in his answer brief, the statement was testimonial on its face because it was "clearly intended as a criminal accusation directed at Anthony Romero" and is a testimonial narrative supporting that accusation.

{13} The State argues, on the other hand, that the victim's statement to the SANE nurse was for the purposes of medical treatment and not sufficiently formal to qualify as "testimonial" or, in the alternative, that the "testimonial" portions should be redacted to accommodate *Davis*.

> [T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

Id. at ___, 126 S.Ct. at 2277.

{14} We need not decide whether an examination by a SANE nurse is analogous to a 911 call, within the meaning of the Confrontation Clause, because a SANE nurse examination is not typically "designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance." *Id.* at ___, 126 S.Ct. at 2276 (internal quotation marks omitted). On the facts in this record, Defendant's arguments that the evidence was "testimonial" within the meaning of *Davis* have merit.

{15} The victim's narrative, read verbatim by the SANE nurse, includes two portions, that while relevant to medical treatment, accuse Defendant of specific criminal acts. For example, the narrative includes the following:

> "That's when he sexually assaulted me on the floor. He took off my pants and underwear and penetrated me." I asked Jessica, and this is me

> asking Jessica, "I asked Jessica what she meant by penetrated me. Jessica replied, and this is her words, 'penis in my vagina.'" End quote. Then Jessica continued, and this is in quotes, "I kept telling him no and to stop. I don't remember after that." End quote. I asked Jessica if Anthony was wearing a condom and she replied no.

Other portions of the statement also could be viewed as relevant to seeking medical treatment, but also accuse Defendant of specific criminal acts:

> "Then he started to choke me. He put his hands around my neck and was on top of me. I was on the bed. I don't remember what happened after that. I might have passed out. . . . He kissed me and told me to tell the police the marks on my neck were from rough sex."

{16} In *Davis,* the jury did not hear the entire 911 call. The Court suggested that the questions posed to the victim by the 911 operator might have evolved into an interrogation and those answers should have been redacted or excluded, but that any error was harmless. *Id.* at ___, 126 S.Ct. at 2277-78. The victim in *Davis,* however, was responding to individual, specific questions posed by the 911 operator. *Id.* Here, the victim was asked to tell the SANE nurse what happened, so the SANE nurse would know how to proceed. Her narrative identifies Defendant and accuses him of specific criminal acts. A different sort of redaction is necessary.

{17} *Davis* emphasized that the victim's answers arose out of an ongoing emergency, while the Hammon statements arose out of an after-the-fact inquiry. *Id.* at ___, 126 S.Ct. at 2276-79. In this appeal, the examination occurred several weeks after the assault and with the

assistance and encouragement of Officer Lewandowski, who made the appointment. Under these circumstances, the portions of the victim's narrative specifically accusing Defendant of sexual assault and other charges should have been excluded. The facts in this record are more analogous to the facts of *Hammon* than *Davis*.

{18} We agree with the State that redaction of portions of the narrative might have been appropriate, but the State has not identified portions of the narrative that might have been likely candidates for redaction. Under these circumstances, we affirm the Court of Appeals' determination that the portion of the SANE nurse testimony that recited the victim's narrative should have been excluded. No basis for redaction of that narrative has been identified.

B. Officer Lewandowski's Testimony

{19} The officer testified at trial that when he encountered the victim at the scene on October 13, "she was upset, she was crying, she was shaking, she was continually crying." This exact language does not appear in the officer's police report. Instead, the report states, "I observed Ms. Romero with no shoes on her feet and crying for help. I observed redness and numerous cut marks on her neck. I observed Ms. Romero's voice changing and she was struggling to talk and continually clearing her throat." When Defendant attempted to impeach the officer on this issue, the officer testified the taped interview was part of his report, and the victim's emotional state was evident during that interview. The Court of Appeals held the victim's statements to the officer at the scene were not

"testimonial" under *Crawford*. *Romero,* 2006-NMCA-045, ¶ 68.

{20} The State does not challenge that holding. The State does challenge the Court of Appeals' failure to permit the officer to testify about his observations of the victim during the taped interview. In a sense, this challenge is similar to the challenge the State has raised with respect to the SANE nurse testimony.

{21} *Crawford* held that testimonial out-of-court statements are barred under the Confrontation Clause of the Sixth Amendment, unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 68. Although *Crawford* declined to create a definitive list of statements that will always qualify as testimonial, the Court did say, "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52. *Davis* further developed the concept of testimonial, and said that when an interrogation, as part of an investigation, about potentially criminal past conduct is conducted, a declarant's statements are "testimonial." *Davis,* 547 U.S. at ___, 126 S.Ct. at 2278. *Davis* further explained that the level of formality of the interrogation is a key factor in determining whether statements are "testimonial" within the meaning of *Crawford*. *Id.* Under *Crawford* and *Davis,* the victim's taped, station-house interview was clearly "testimonial" for the purposes of the Sixth Amendment.

{22} The State acknowledges that the admission of the taped interview in its entirety was an error under *Crawford*. However, the State argues that the officer's testimony about his subjective observations of the victim's

emotional state during the taped interview was not testimonial. Neither *Crawford* nor *Davis* address this argument. Nor did the Court of Appeals. The State contends that because the officer was available for cross-examination and because his testimony was based on firsthand observation, it was not hearsay and did not present a *Crawford* issue. We agree.

{23} Based on the Court of Appeals' analysis and the holdings of *Crawford* and *Davis,* the taped interview of the victim was "testimonial" and should not have been played for the jury and admitted at trial. *See Romero,* 2006-NMCA-045, ¶ 52. The officer's testimony regarding his observations of the victim during the taped interview was admissible under *Crawford* and *Davis.*

C. Harmless Error

{24} The discussion of harmless error is made more difficult by the fact that this case was tried before *Crawford* or *Davis* were decided. As a result, it seems very likely that objections were not made at trial that would have been made had either *Crawford* or *Davis* been available. Further, the case was briefed, in part, without the benefit of *Davis.* As a result, the written arguments on appeal probably differ from those the parties would have made with the benefit of *Davis.* In particular, we must decide what evidence we are entitled to consider in evaluating harmless error. In fairness to Defendant and in an effort to be consistent with comparable cases, we believe Defendant ought to be able to challenge not only the SANE nurse's testimony but also the taped interview with Officer Lewandowski. We recognize that Defendant cross-examined the nurse on the information we have concluded

should have been redacted. We also recognize that he did not object to the use of the victim's grand jury testimony, which essentially duplicated the taped interview, because he wished to rely on the grand jury testimony for purposes of impeachment. Nevertheless, we are persuaded that Defendant ought to be able to rely on *Crawford* and *Davis* on appeal to this Court, notwithstanding trial choices made prior to the time those opinions were available and after his initial objections at trial were overruled. *State v. Lopez,* 2005-NMSC-036, ¶ 29, 138 N.M. 521, 123 P.3d 754 ("We apply new rulings in criminal cases to all cases on direct review."); *see Romero,* 2006-NMCA-045, ¶¶ 13-16 (discussing State's arguments that Defendant waived or failed to preserve his Confrontation Clause arguments).

{25} The Court of Appeals decided, under *State v. Johnson,* 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, that the inadmissible evidence corroborated and strengthened the State's case and thus could not be viewed as harmless error. *Romero,* 2006-NMCA-045, ¶ 70. We have agreed with the Court of Appeals as to the exclusion of victim's narrative from the SANE nurse's testimony and also as to the taped interview of the victim by Officer Lewandowski. Because we have not been asked to review the Court of Appeals' analysis of the victim's grand jury testimony as inadmissible, nor its analysis of the victim's statement to Officer Lewandowski at the scene as admissible, we do not address the merits of the Court of Appeals' analysis.

{26} We are left with the Court of Appeals' conclusion that the jury properly heard evidence of the victim's statement at the scene, evidence of her appearance and demeanor at that time, and the testimony of other witnesses to past incidents of violence between Defendant and the victim. *Id.* ¶¶ 72-75. The jury should not have

heard the victim's grand jury testimony, the taped interview with Officer Lewandowski, or her narrative as testified to by the SANE nurse. The State had the burden to show there was no "'reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Johnson,* 2004-NMSC-029, ¶ 9 (quoting *Chapman v. California,* 386 U.S. 18, 23 (1967)). The State did not carry its burden.

{27} In the record of this appeal, there is sufficient evidence to support the conviction without the inadmissible evidence. Nevertheless, the victim's grand jury testimony, her taped interview with Officer Lewandowski, and the narrative to which the SANE nurse testified provided a consistent coherent narrative that supplemented and thus corroborated or strengthened the State's theory of what had happened. Had there been a single charge of battery or assault against a household member, our conclusion might be different, but we cannot say the inadmissible evidence did not contribute to the multiple charges of which Defendant was convicted. Thus, we conclude the Court of Appeals correctly held under *Crawford* and *Davis* that evidence was admitted erroneously, and the error was not harmless. We next address the question of whether Defendant should be precluded from raising the error pursuant to the doctrine of forfeiture by wrongdoing.

D. Forfeiture by Wrongdoing

{28} The Court of Appeals noted that in *Alvarez-Lopez* we indicated that a defendant does not forfeit or waive his or her right to confront a witness against him unless he or she procured the witness's absence with the

intent to prevent that witness from appearing at trial. *Romero,* 2006-NMCA-045, ¶¶ 22-25 (discussing this Court's opinion in *Alvarez-Lopez,* 2004-NMSC-030, ¶ 5, 7-10, 12-14). The Court of Appeals observed that we had relied on a federal rule of evidence that some courts have considered distinct from the requirements of the federal constitution. The Court of Appeals suggested that other jurisdictions have recognized a distinction between the requirements of a valid waiver of a right, which ordinarily is associated with intent, and forfeiture, which might require misconduct at a certain level. *Id.,* 2006-NMCA-045, ¶¶ 30-34. The Court of Appeals also noted that a rule of evidence might provide greater protection, as a matter of policy, than the constitutional right of confrontation mandates. *Id.* ¶ 36. These observations reflect case law we did not consider in deciding *Alvarez-Lopez*.

{29} Neither *Davis* nor *Crawford* addressed this issue, although *Crawford* referred to the doctrine as an equitable limitation on the right of confrontation. *Crawford,* 541 U.S. at 62. In *Davis,* furthermore, the United States Supreme Court said that

> when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford:* that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62, 124 S.Ct. 1354 (citing *Reynolds,* 98 U.S. at 158-59). That is, one who obtains the

> absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

Davis, 547 U.S. at ___, 126 S.Ct. at 2280. This language in *Davis* seems consistent with an intent requirement, whether waiver or forfeiture provides the better analogy.

{30} There is case law to the effect that when a defendant has murdered a witness whose out-of-court statements the prosecution wishes to introduce at the defendant's trial for the murder, that defendant will not be allowed to claim the constitutional right of confrontation, even if the prosecution cannot prove he or she killed to prevent the witness from testifying. *See United States v. Garcia-Meza,* 403 F.3d 364 (6th Cir. 2005); *State v. Meeks,* 88 P.3d 789 (Kan. 2004). In this context, evidence that murder was committed to prevent the victim from testifying might be less strong than in more typical witness-tampering cases. It has been argued, as the State does in this appeal, that the doctrine of forfeiture by wrongdoing should be expanded beyond witness-tampering cases so that forfeiture applies "whenever a defendant's wrongdoing caused a witness's unavailability." Joshua Deahl, Note, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford,* 104 Mich. L. Rev. 599, 602 (2005). This argument views the rationale underlying the rule as estopping a defendant from complaining that he or she is unable to cross-examine a witness, when the defendant caused the inability. "It seems clear that causing one's own inability to cross-examine is what lies at the heart of the forfeiture rule." *Id.* at 616. Yet even this argument is tempered by the view that "forfeiture should apply infrequently and only when there is strong evidence of its occurrence" and that we need "limitations that are designed to consistently achieve that end." *Id.* at 615.

{31} The more traditional rationale reflects the view that such a defendant otherwise would be permitted to "benefit" from his or her wrongdoing. "'[W]hen confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived. The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him.'" *Meeks,* 88 P.3d at 794 (quoting *State v. Gettings,* 769 P.2d 25, 28 (Kan. 1989)). These opinions must be premised on the view that the federal rules of evidence do not limit, even if they help define, the forfeiture by wrongdoing rule, nor do they determine the "constitutional right to confrontation." *Alvarez-Lopez,* 2004-NMSC-030, ¶ 9. *See generally Garcia-Meza,* 403 F.3d at 370-71 (distinguishing the right secured by the Sixth Amendment and the protection of the rules of evidence). To the extent these opinions do not deal with typical witness-tampering cases, however, it may be that the intent requirement is unworkable. That would not be a reason to abandon it in cases where it helps provide a strong basis for finding waiver or forfeiture.

{32} Defendant has argued on appeal that the right of confrontation is not the sort of benefit to which the traditional rationale ought to be applied. Rather, confrontation is a vehicle for ensuring that the jury is exposed not only to the strength of the evidence against a defendant in a criminal trial but also to the weaknesses in that evidence. Defendant makes a compelling argument that we are being asked to balance a constitutional right against a somewhat vague and amorphous sense of what ought to be permitted. For example, the doctrine might be said to encompass premeditated murder within the scope of intentional wrongdoing but not vehicular homicide.

{33} Further, the same rationale seems to underlie the federal rule of evidence on which we relied in *Alvarez-Lopez,* making clear that the same rationale can support a narrow or a broad test or something between narrow and broad. We do not see any clear or easy distinction among degrees of homicide if the emphasis is on wrongdoing and believe that if the federal rules of evidence do not limit the doctrine, then a determination must be made on a case-by-case basis, with the risk of inconsistent results from different district courts and different appellate panels. Moreover, that determination ought to reflect the elements, even if constructive, of waiver or help identify conduct that merits the sort of condemnation associated with the concept of forfeiture.

{34} The stated rationale serves an important public policy of deterring intentional wrongdoing that threatens the strength of the process in which the constitutional right operates. Nevertheless, we believe the emphasis must be not only on wrongdoing but on intentional wrongdoing, from which an inference of waiver might be appropriate or in which an equitable conclusion of forfeiture is justified. Anything else appears to diminish the constitutional right *Crawford* and *Davis* have been developing with such care.

{35} We have reviewed many opinions from other jurisdictions that have addressed the doctrine of forfeiture by wrongdoing. We conclude that our opinion in *Alvarez-Lopez,* requiring proof of wrongdoing intended to prevent a witness from testifying before a defendant will be viewed as having forfeited the right of confrontation, is the majority rule. *See, e.g., United States v. Gray,* 405 F.3d 227 (4th Cir. 2005); *State v. Valencia,* 924 P.2d 497 (Ariz. Ct. App. 1996); *State v. Henry,* 820 A.2d 1076 (Conn. App. Ct. 2003);

Devonshire v. United States, 691 A.2d 165 (D.C. 1997); *State v. Hallum,* 606 N.W.2d 351 (Iowa 2000); *Commonwealth v. Edwards,* 830 N.E.2d 158 (Mass. 2005); *State v. Wright,* 701 N.W.2d 802 (Minn. 2005), *vacated and remanded in light of Davis,* ___ U.S. ___, 126 S.Ct. 2979 (2006); *People v. Geraci,* 649 N.E.2d 817 (N.Y. 1995); *Commonwealth v. Laich,* 777 A.2d 1057 (Pa. 2001); *State v. Ivy,* 188 S.W.3d 132 (Tenn. 2006); *Gonzalez v. State,* 195 S.W.3d 114 (Tex. Crim. App. 2006); *State v. Mechling,* 633 S.E.2d 311 (W. Va. 2006). *See also People v. Melchor,* 841 N.E.2d 420, 433 (Ill. App. Ct. 2005) (noting that except in situations in which the defendant is on trial for the murder of a witness whose testimony the prosecution wants to admit, a defendant's intent or motive is relevant in determining whether the doctrine of forfeiture by wrongdoing applies). Further, we cannot say the distinction between waiver and forfeiture has proved helpful, although we agree that forfeiture is the preferred term. *See Hallum,* 606 N.W.2d at 354-55 (discussing the difference between the two terms).

{36} We note that in describing the doctrine of forfeiture by wrongdoing, *Davis* cited to *Edwards,* 830 N.E.2d at 172, an opinion of the Supreme Judicial Court of Massachusetts, which required the prosecution to prove the defendant acted in order to procure the unavailability of a witness. *See Davis,* 547 U.S. at ___, 126 S.Ct. at 2280 (indicating that both federal and state courts follow the practice of holding the prosecution to the standard of preponderance of the evidence). We also note that the court described Federal Rule of Evidence 804(b)(6) as codifying the forfeiture doctrine. *Id.*

{37} For these reasons, we are not persuaded *Alvarez-Lopez* should be overruled or modified. To the extent

the Court of Appeals' opinion asked us to revisit the issue, we have. Having revisited the issue, we reaffirm our holding in *Alvarez-Lopez* that the prosecution is required to prove intent to procure the witness's unavailability in order to bar a defendant's right to confront that witness. While there are arguments for change and opinions to the contrary, none of the arguments for change or opinions to the contrary provide satisfactory limitations on a doctrine that has the potential to emasculate the Confrontation Clause.

{38} We should make one other point. The Court of Appeals remanded, consistent with *Alvarez-Lopez,* for a factual determination by the trial court of Defendant's intent. We doubt that there is sufficient evidence, even by a preponderance of the evidence standard, to support a finding of intent, but we will not overrule the Court of Appeals on this point. Neither party has suggested the Court of Appeals' opinion erred in remanding for a pre-trial factual determination of intent, and it is possible there is evidence in the record to which we have not been directed that would support such a finding.

III. Conclusion

{39} In a sense, then, we are reversing Defendant's convictions conditionally. The condition is that if, on remand, he is found to have procured the victim's death with the intent to make her unavailable as a witness, he is not entitled to the benefit of the confrontation clause, and his convictions on the charges at issue in this appeal will stand. If, however, the trial court determines that there is insufficient evidence of his intent, he is entitled to a new trial on the charges at issue in this appeal, but

the evidence the Court of Appeals concluded was inadmissible under *Crawford* and *Davis,* with one exception, may not be admitted. The exception is Officer Lewandowski's testimony about the victim's demeanor during the taped interview.

{40} **IT IS SO ORDERED.**

PAMELA B. MINZNER, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice (concurring in part and dissenting in part).

BOSSON, Justice (concurring in part and dissenting in part).

{41} I am pleased to support most of this Opinion with the sole exception of Section II D, "Forfeiture by Wrongdoing," from which I dissent.

{42} Assuming that Defendant Romero is found guilty of intentional homicide of his deceased wife, in some form, I would hold that all the referenced statements of his wife may be used against him, notwithstanding the

Confrontation Clause. Romero has forfeited his right to cross-examine his wife with respect to these statements by virtue of intentionally causing the very absence of his deceased wife of which he now complains. Whether Romero caused that absence with the specific intent to prevent his wife from testifying, or whether he caused that absence simply in a drunken rage, the effect is the same. The witness cannot speak for herself because she is dead at Romero's hands. It seems a perversion of the Constitution and the Confrontation Clause to allow any defendant to profit so from his own misdeeds. Recent decisions from other jurisdictions express a similar reluctance to so narrowly construe the forfeiture doctrine in the wake of *Crawford's* sweeping changes to the Confrontation Clause analysis. *See, e.g., People v. Giles,* ___ P.3d ___, 2007 WL 635716, slip op. at 1, 8-9 (Cal. March 5, 2007); *United States v. Martinez,* ___ F.3d ___, 2007 WL 489217, *4-5 (D.C. Cir. Feb. 16, 2007); *State v. Jensen,* ___ N.W.2d ___, 2007 WL 543053, *13-16 (Wis. 2007). I am persuaded by the reasons discussed in these cases, as well as those in Justice Minzner's able opinion, and as developed by Judge Pickard in the Court of Appeals below.

{43} I regret that we have lost an opportunity to clarify this Court's recent opinion in *Alvarez-Lopez,* on which the majority appears to rely as a reason for requiring an intent not just to kill the witness, but to silence her as well. In my judgment, *Alvarez-Lopez* is a poor vehicle for this Court's reticence. *Alvarez-Lopez* was not a murder case. The defendant absconded, and by the time he was brought to justice the incriminating witness had been deported. This Court appropriately held, in only a brief discussion, that Alvarez-Lopez had not caused the absence of the witness for purposes of the forfeiture rule. We could

have stopped there. Nonetheless we continued, essentially in dicta, to add that according to the federal rule in question Alvarez-Lopez needed to show some specific intent to procure that absence in order to silence the witness, which of course was totally absent in that case. Even the State conceded the point. Rhetorically, the State also conceded in *Alvarez-Lopez* that such a specific intent was an essential element of the forfeiture doctrine, which of course is true if we look only at the federal rule, which is all the parties did in *Alvarez-Lopez* and which of course is NOT the position of the State in the matter before us. As a general proposition, cases do not usually serve as helpful authority for propositions, or in this case choices, neither argued nor discussed. *See Fernandez v. Farmers Ins. Co. of Arizona,* 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) ("[C]ases are not authority for propositions not considered." (internal quotation marks and quoted authority omitted)). I believe that norm should apply in this instance. At the very least, it should serve as a deterrent against undue reliance on that one opinion. I concede that one could go either way on how one interprets the forfeiture doctrine. *Alvarez-Lopez* should be used to frame the question, not decide it.

RICHARD C. BOSSON, Justice

139 N.M. 386

Certiorari Granted, No. 29,690, April 10, 2006

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2006-NMCA-045

Filing Date: February 6, 2006

Docket No. 24,389

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ANTHONY ROMERO,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Stephen Pfeffer, District Judge

Patricia A. Madrid, Attorney General
Santa Fe, NM

Joel Jacobsen, Assistant Attorney General
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for Appellee.

John Bigelow, Chief Public Defender
Will O'Connell, Assistant Appellate Defender
Santa Fe, NM

for Appellant.

OPINION

PICKARD, Judge.

{1} This case requires us to decide whether several statements made by a domestic violence victim were "testimonial" for purposes of Confrontation Clause analysis under *Crawford v. Washington,* 541 U.S. 36 (2004). We also address whether Defendant forfeited his confrontation rights because he was convicted in a separate proceeding of having murdered the victim several months after the domestic violence incident with which this case is concerned. Finally, we address Defendant's assertion that other witness testimony was admitted in violation of Rule 11-404(B) NMRA. We hold that some of the victim's statements were testimonial in nature, that Defendant properly preserved his objections to their admission, and that the admission of the statements was not harmless error. Because we also hold that the State is required to prove the factual elements of the "forfeiture by wrongdoing" doctrine, we remand for the trial court to make the necessary factual findings.

BACKGROUND

{2} A jury convicted Defendant of aggravated battery against a household member, aggravated assault against a household member, false imprisonment, and intimidation of a witness. He was acquitted of criminal sexual penetration. The charges arose out of an incident that occurred on October 12-13, 2001, between Defendant and his estranged wife, Jessica Romero de Herrera (the victim). On December 28, 2001, the victim was found dead in Defendant's bed. In a separate proceeding, Defendant was convicted of second-degree murder in connection with his

wife's death, but this Court overturned his conviction based on an error in jury instructions. *State v. Romero,* 2005-NMCA-060, ¶¶ 22-23, 137 N.M. 456, 112 P.3d 1113, *cert. granted,* 2005-NMCERT-005, 137 N.M. 523, 113 P.3d 346.

{3} At the trial concerning the October 2001 domestic violence charges, the State relied heavily on several of the victim's statements, the admission of which Defendant contests in this appeal. First, the State relied on the victim's grand jury testimony, which set forth the following facts. Defendant and the victim were separated, and Defendant called the victim wanting to get back together and threatening suicide. Sometime during the late hours of October 12th or early hours of October 13th, the victim went looking for Defendant and when she found him, they went back to Defendant's mother's house. While the victim was lying on the bed, Defendant got on top of her and choked her, saying that "if he couldn't have [her] . . . nobody could." The next thing the victim remembered was waking up the following morning, but she could not say whether she had passed out.

{4} At some point on the 13th, the victim was able to call her roommate, Lisa Chavez, and ask for help. Chavez called the police, who came to investigate. When the police arrived, Defendant forced the victim to go into the bathroom, where he held a knife to her abdomen and told her to be quiet. The police left, but eventually came back. This time, Defendant let the victim go and told her to tell everyone that the marks on her neck were a result of "rough sex." She then left the house, went to meet the police, and told them what had happened. Defendant was not apprehended at this time, as he apparently ran out the back door.

{5} Next, the State relied on the testimony of Officer Lewandowski, who responded to the incident. Lewandowski testified that the victim came out of the residence, drove her car about 15 feet toward the officers' location, and then got out and ran toward the officers. He said the victim was "crying [and] asking for help" and that she had red marks on her neck and watery eyes. Lewandowski also testified that the victim told him that Defendant "choked her, held a knife to her throat while she was in the bathroom, and . . . stated that if he couldn't have her, no one could, and that he would kill her." Through Lewandowski, the State also introduced several photographs, taken by Lewandowski on the evening of October 13th, which documented the victim's injuries, including "marks" on her neck.

{6} The State also relied on two additional statements of the victim. One was a statement taken at the police station by Lewandowski at approximately 5 p.m. on October 13th. This statement essentially duplicated the grand jury testimony. The other was a statement taken by a Sexual Assault Nurse Examiner (SANE) practitioner. Although the victim had not mentioned being raped in any of her prior statements, she told Lewandowski on approximately November 1, 2001, that Defendant had raped her during the incident. As a result, Lewandowski arranged for the victim to meet with a SANE practitioner for an examination and interview on November 8, 2001. The SANE practitioner, Melinda Tucker, testified at trial and read the victim's statement to the jury. This statement essentially duplicated the grand jury testimony and the stationhouse statement, but added that Defendant had raped the victim.

{7} Finally, Chavez and the victim's mother both testified regarding telephone conversations they had with the

victim during the incident. Chavez testified as to the following facts. The victim had called her, sounding "scared." The victim said that she was at Defendant's house and that she wanted to leave, but Defendant would not let her. After the conversation ended, Chavez waited almost half an hour and then called the victim back. At this point, Chavez asked the victim whether she was okay and whether Chavez should call the police. The victim stated that she was not okay and agreed that Chavez should call the police.

{8} The victim's mother testified that the victim called her on the afternoon of October 13th and said that Defendant would not let her leave. The mother said that the victim sounded scared and like she had been crying. Finally, the mother testified that the victim said Defendant was holding a knife to her throat and telling her that if she said anything, she would never see her kids again.

{9} Chavez and another of the victim's friends, Elaine Jaramillo, were also allowed to testify regarding two past incidents of domestic violence between Defendant and the victim. The trial court allowed this testimony under Rule 11-404(B), and we discuss the specifics of the testimony below where we address Defendant's Rule 11-404(B) arguments.

{10} Before trial, Defendant argued that all of the victim's statements should be excluded "on the grounds of hearsay and on the grounds that she is unavailable and not subject to cross examination." Defendant initially filed a notice to have the SANE statement admitted and eventually introduced the grand jury testimony himself. However, Defendant was clear throughout the proceedings on his position that all of the victim's statements should be

excluded, but that if some were going to be admitted, he wanted to introduce others for purposes of impeachment. *See* Rule 11-806 NMRA (allowing attack on the credibility of a hearsay declarant with "any evidence which would be admissible . . . if declarant had testified as a witness"). Ultimately, the trial court let all of the statements in, ruling that they met various hearsay exceptions.

{11} Because the hearings and trial were held before the United States Supreme Court issued its decision in *Crawford,* the parties argued under the old *Roberts* test, which required only a showing that a statement either falls within a "'firmly rooted hearsay exception'" or bears "'particularized guarantees of trustworthiness.'" *Crawford,* 541 U.S. at 60 (quoting *Ohio v. Roberts,* 448 U.S. 56, 66 (1980)). The trial court apparently found that all of the statements were admissible under *Roberts.* On appeal, Defendant argues that admission of four of the statements (the grand jury testimony, the stationhouse statement, the statement to the SANE practitioner, and the statement to Lewandowski at the scene) violated his rights under the Confrontation Clause, as that Clause was interpreted in *Crawford.* The parties agree that *Crawford* applies in this case. We begin by addressing several preliminary matters, and we then analyze each statement under *Crawford.*

STANDARD OF REVIEW

{12} Defendant's claim that the victim's statements were admitted in violation of his Confrontation Clause rights presents a constitutional question that we review de novo. *State v. Lasner,* 2000-NMSC-038, ¶ 24, 129 N.M. 806, 14 P.3d 1282 (holding that Confrontation Clause claims are reviewed de novo). We review the trial court's decision to

admit evidence under Rule 11-404(B) for abuse of discretion. *State v. Williams,* 117 N.M. 551, 557, 874 P.2d 12, 18 (1994), *questioned on other grounds as recognized in State v. Kerby,* 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740.

DISCUSSION

I. Preservation of the *Crawford* Issues

{13} The State first argues that Defendant failed to preserve his Confrontation Clause arguments. In the alternative, the State argues that Defendant waived his right to object to certain statements by himself arguing for their admission. We disagree with both of these contentions.

{14} The State argues that Defendant failed to preserve his Confrontation Clause claims because he did not argue that the contested statements were "testimonial," as statements must be for the *Crawford* holding to apply. In order to preserve an issue for appeal, it must "appear that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Woolwine v. Furr's, Inc.,* 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). In this case, we note the following statement by the trial court:

> THE COURT: What I'm hearing is people are talking about-you're talking about [Rule 11-804(B)(5)], and what's being argued, which I guess is not too surprising, is confrontation clause stuff. Right? Nobody's used the term, but that's what I'm hearing.
>
> [DEFENSE ATTORNEY]: That's right, your Honor.

We also note that in his initial motion to exclude all of the victim's statements, Defendant stated as one ground for doing so that "Defendant has never had the opportunity to cross examin[e] or confront the witness regarding her statements."

{15} The State appears to argue that Defendant's trial counsel should have been able to anticipate *Crawford*'s holding by piecing together statements from various concurring opinions by individual United States Supreme Court Justices. We do not believe defendants should be required to scour concurring opinions to determine the direction in which the Supreme Court may or may not be heading in the future. We also note that other jurisdictions have been fairly liberal with regard to preservation of Confrontation Clause claims that are based on *Crawford* but were litigated before the opinion came out. *See, e.g., Commonwealth v. Whitaker,* 878 A.2d 914, 921 n.3 (Pa. Super. Ct. 2005) (noting that in order to preserve a *Crawford* argument, a defendant need only "object to admissibility on Sixth Amendment Confrontation Clause grounds"); *People v. Ruiz,* No. H026609, 2005 WL 1670426, at *3 (Cal. Ct. App. July 19, 2005) (unpublished) ("[C]ounsel expressly argued that the admission of the wife's hearsay statements violated the confrontation clause in the sense that they were not trustworthy. . . . Under the circumstances, this was more than adequate to preserve defendant's *Crawford* contention."). Given the trial court's statement and Defendant's assertions in his motion, we hold that Defendant "fairly invoked a ruling [by] the trial court" that admission of the victim's statements would violate his confrontation rights. Accordingly, we hold that Defendant's general Confrontation Clause arguments were sufficient to preserve his *Crawford* claims. *See also State*

v. Lopez, 2000-NMSC-003, ¶ 11, 128 N.M. 410, 993 P.2d 727 (holding that objection on the grounds of "inability to cross examine or confront the witness" was adequate to raise Confrontation Clause claims even though the defendant did not mention the Sixth Amendment).

{16} The State next argues that Defendant waived his objections to both the grand jury testimony and the victim's statement to the SANE practitioner because he either admitted those statements himself or acquiesced in their admission. We disagree. As explained above, Defendant made clear throughout the proceedings that none of the victim's statements should be admitted, but that, if some statements were admitted, he wanted to introduce others for impeachment purposes. This does not constitute a waiver. In *State v. Martinez,* we said, "The law in this jurisdiction is that if improper evidence is admitted over objection, resort may be had to like evidence without waiving the original error." 95 N.M. 795, 802, 626 P.2d 1292, 1299 (Ct. App. 1979). *See also State v. Kile,* 29 N.M. 55, 70, 218 P. 347, 351 (1923) ("[W]here incompetent evidence is admitted over objection, and where it becomes expedient or necessary to rebut the same, . . . resort may be had to the same class of objectionable evidence without waiving the original error."); 1 John W. Strong, *McCormick on Evidence* § 55, at 246-47 (5th ed. 1999) ("If a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact, he has waived his objection. . . . However, when his objection is made and overruled, he is entitled to . . . explain or rebut, if he can, the evidence admitted over his protest. Consequently, there is no waiver . . . if he meets the testimony with other evidence which, under the theory of his objection, would be inadmissible." (footnotes omitted)). Thus,

we hold that Defendant properly preserved, and did not waive, his objections to the admission of each of the victim's four statements.

II. Application of the Forfeiture by Wrongdoing Doctrine

{17} We next address the State's contention that Defendant forfeited all of his Confrontation Clause objections under the doctrine of "forfeiture by wrongdoing" because he was later convicted of murdering the victim. The doctrine of forfeiture by wrongdoing was first explained by the United States Supreme Court in *Reynolds v. United States,* 98 U.S. 145 (1878). In *Reynolds,* the defendant was charged with bigamy and the evidence showed that he had tried to keep the whereabouts of one of his alleged wives from the police. *Id.* at 159-60. At trial, the defendant objected to the admission of the alleged wife's statement from a prior proceeding. The Court stated:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.

Id. at 158. The *Reynolds* Court based its decision on "the maxim that no one shall be permitted to take advantage of his own wrong[.]" *Id.* at 159.

{18} The forfeiture by wrongdoing doctrine has been accepted in many jurisdictions and *Crawford* specifically

recognizes that it does not run afoul of the Confrontation Clause: "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds[.]" 541 U.S. at 62. In 1997, the doctrine was incorporated into the Federal Rules of Evidence. Federal Rule of Evidence 804(b)(6) (FRE 804(b)(6)), which applies when the declarant is unavailable, creates a hearsay exception for "[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."

{19} Despite widespread acceptance of the doctrine of forfeiture by wrongdoing, however, there has been some confusion over its requirements. Specifically, and of significance to the present case, courts have disagreed over the intent requirement present in the federal rule. The federal rule was enacted to prevent defendants from gaining an advantage by intimidating witnesses. 30B Michael H. Graham, *Federal Practice and Procedure: Evidence* § 7078, at 702 (Interim ed. 2000) ("Rule 804(b)(6) is an attempt to respond to the problem of witness intimidation[.]"). As a result, the plain language of the rule requires that the defendant not only be involved in causing the witness's unavailability, but also that the defendant commit the relevant act with the *intent* to prevent the witness from testifying.

{20} Some state and federal courts, however, have decided that the "intent to silence" requirement is only mandated by the federal rules and not by the constitution. *See, e.g., United States v. Garcia-Meza,* 403 F.3d 364, 370 (6th Cir. 2005) ("Though the Federal Rules of Evidence may contain [the intent to silence] requirement, the right secured by the Sixth Amendment does not[.]" (internal

citation omitted)); *Gonzalez v. State,* 155 S.W.3d 603, 611 (Tex. App. 2004) (holding that while some courts have adopted the intent to silence requirement, "we see no reason why the [forfeiture] doctrine should be limited to such cases"); *Ruiz,* 2005 WL 1670426, at *6 ("Ultimately, if the forfeiture rule is to further the maxim that no one shall be permitted to take advantage of his own wrong, then the motivation for the wrongdoing must be deemed irrelevant." (internal quotation marks and citation omitted)).

{21} Other courts have stated the intent to silence requirement as an element of their forfeiture by wrongdoing doctrine, but those courts have generally not analyzed the relative benefits of adopting or not adopting that element. *See, e.g., United States v. Houlihan,* 92 F.3d 1271, 1279 (1st Cir. 1996) ("[A] defendant who wrongfully procures a witness's absence for the purpose of denying the government that witness's testimony waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements."); *Commonwealth v. Edwards,* 830 N.E.2d 158, 170 (2005) (holding the doctrine applicable where "the defendant acted with the intent to procure the witness's unavailability"); *State v. Wright,* 701 N.W.2d 802, 814-15 (Minn. 2005) (en banc) ("In Minnesota, a defendant will be found to have forfeited by his own wrongdoing his right to confront a witness against him if the state proves that the defendant engaged in wrongful conduct, that he intended to procure the witness's unavailability, and that the wrongful conduct actually did procure the witness's unavailability.").

{22} Our Supreme Court has recognized the forfeiture by wrongdoing doctrine and has also required the State to prove the defendant's intent to silence the witness. In

State v. Alvarez-Lopez, the defendant had absconded from the jurisdiction and remained a fugitive for seven years. 2004-NMSC-030, ¶ 5, 136 N.M. 309, 98 P.3d 699. By the time he turned himself in, one of the State's key witnesses had been deported to Mexico and could not be found. *Id.* The witness would have been available to testify had the defendant's trial been held when it was supposed to be. *Id.* ¶ 12. Thus, in a sense, the defendant's action of absconding prevented the State from putting on its witness. *See id.* The trial court allowed the State to present a statement that the witness had made to the police shortly after the incident in question. *Id.* ¶ 5. The defendant argued that the admission of the statement violated his confrontation rights, and the State responded that the defendant had forfeited his right to confrontation by absconding. *Id.* ¶ 7.

{23} The Court began its analysis by citing *Reynolds* and explaining the general contours of the forfeiture by wrongdoing doctrine. *Id.* ¶ 8. It then cited a Tenth Circuit case, *United States v. Cherry,* 217 F.3d 811 (10th Cir. 2000), which held that the Confrontation Clause and FRE 804(b)(6) are essentially coextensive and that the elements of the rule are constitutionally mandated. *Alvarez-Lopez,* 2004-NMSC-030, ¶ 9, 136 N.M. 309, 98 P.3d 699; *see Cherry,* 217 F.3d at 816 ("We . . . read the plain language of Rule 804(b)(6) to permit the admission of those hearsay statements that would be admissible under the *constitutional* doctrine of waiver by misconduct[.]" (emphasis added)). Our Court noted that New Mexico has not adopted a rule of evidence that parallels FRE 804(b)(6). *Alvarez-Lopez,* 2004-NMSC-030,¶ 9, 136 N.M. 309, 98 P.3d 699. But stating that "we are bound to apply federal law in determining the minimum level of a criminal defendant's

constitutional right to confrontation," the Court then proceeded to apply the four-part test under FRE 804(b)(6). *Alvarez-Lopez,* 2004-NMSC-030, ¶¶ 9-10, 136 N.M. 309, 98 P.3d 699. The Court thus implied, but did not explicitly state, that it was bound to follow the Tenth Circuit's interpretation of the forfeiture by wrongdoing doctrine.

{24} The test the Court adopted requires the State to prove the following four elements by a preponderance of the evidence: "(1) the declarant was expected to be a witness; (2) the declarant became unavailable; (3) the defendant's misconduct caused the unavailability of the declarant; and (4) the defendant intended by his misconduct to prevent the declarant from testifying." *Id.* ¶ 10. In applying the test, the Court held that the defendant had not forfeited his confrontation rights for two reasons. *Id.* ¶¶ 12-13. First, the Court held that while the defendant's conduct may have been an "attenuated" cause of the declarant's absence, his conduct did not "procure" that absence. *Id.* ¶ 12. Second, the Court held that "the State failed to show [the d]efendant absconded with the specific intent of preventing [the declarant] from testifying." *Id.* ¶ 13.

{25} With regard to the intent requirement, the Court noted that "[t]he State need not . . . show that [the d]efendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant was motivated *in part* by a desire to silence the witness." *Id.* (internal quotation marks and citation omitted). The Court also stated that intent could be "inferred" in some cases:

> It may be sufficient to infer under certain facts that a defendant intended by his misconduct to prevent the witness from testifying. For example, we may be able to infer a criminal defendant's

> murder of a key prosecution witness was intended to prevent the witness from testifying at the defendant's trial.

Id. Lastly, the Court noted that the policy behind the forfeiture by wrongdoing doctrine is to "deter criminals from intimidating or 'taking care of' potential witnesses." *Id.* ¶ 14 (internal quotation marks and citation omitted). It determined that that policy would not be served by admitting the testimony because the defendant had not "intentionally prevented [the declarant] from being a witness against him." *Id.*

{26} In this case, Defendant and the State agree that the first three elements of the forfeiture by wrongdoing doctrine are met: the victim testified before the grand jury about the domestic violence incident and would likely have testified at trial; the victim is dead and is thus "unavailable"; and Defendant was involved in the victim's death. With regard to the intent element, the State argues that (1) a showing of intent to silence is not required and (2) even if it is, we should infer an intent to silence on the facts of this case. We reject both of these arguments.

{27} In support of its position that a showing of intent to silence is not required, the State argues that *Alvarez-Lopez* should not be applied in this case because in *Alvarez-Lopez* the witness had been deported during the period of the defendant's flight rather than murdered. Moreover, the State argues, the *Alvarez-Lopez* Court only chose to apply the test from FRE 804(b)(6) to the particular facts of that case but did not establish that test as the rule for all cases. We disagree with these contentions and hold that we are bound to apply the test set forth in *Alvarez-Lopez*.

{28} We certainly agree with the State that the rationale for requiring a showing of the defendant's intent to silence the witness is much stronger in a case of deportation during the period when the defendant is a fugitive than it is in a case of murder. In a deportation case, the causal connection between the defendant's misconduct and the witness's unavailability will generally be quite attenuated. Indeed, the relationship might be better characterized as coincidental. *See People v. Melchor,* ___ N.E.2d ___, 2005 WL 3041536, at printed page 15 (Ill. App. Ct. June 28, 2005) (stating that the "defendant's conduct was merely an act that incidentally rendered [the witness] unavailable"). In the case of murder, on the other hand, the defendant's misconduct is the direct cause of the witness's unavailability. Moreover, the defendant has likely committed misconduct that is more morally reprehensible than absconding. *See id.* at printed page 14 ("Although defendant's flight was reprehensible and showed a complete disrespect for the court and the administration of justice, we do not find it constitutes wrongdoing sufficient to invoke the forfeiture by wrongdoing rule.").

{29} Nevertheless, we disagree with the State that *Alvarez-Lopez* can be limited to deportation cases. First, while the Court phrased its holding in terms of applying the FRE 804(b)(6) test to the particular case, it applied the rule because it felt itself "bound to apply federal law." 2004-NMSC-030, ¶ 9. In view of this, we read *Alvarez-Lopez* to hold that the intent to silence requirement applies to all cases where forfeiture by wrongdoing is argued. Second, and more importantly, the Court specifically referred to murder cases. The Court's acknowledgment that "we may be able to infer a criminal defendant's murder of a key prosecution witness was intended to prevent the witness from testifying at the defendant's trial," *id.* ¶ 13, clearly indicates that the Court considered

whether the test it was adopting should be applicable in other types of cases, specifically cases involving the murder of a witness, and decided that it should. Thus, we hold that the test announced in *Alvarez-Lopez* applies to all cases in New Mexico involving forfeiture by wrongdoing.

{30} Despite our decision that we are bound by *Alvarez-Lopez,* we note that the State has presented several compelling reasons why a showing of intent to silence should not be required in cases where the defendant has killed the witness. First, the State cites to cases positing that the differing opinions over the intent requirement stem from confusion surrounding the proper terminology. It seems that the majority of courts have used the term "forfeiture." *See, e.g., Edwards,* 830 N.E.2d at 168 ("Given the overwhelming precedential and policy support for its adoption, we recognize the 'forfeiture by wrongdoing' doctrine in the Commonwealth."); *Gonzalez,* 155 S.W.3d at 609 ("[The defendant] forfeited his right of confrontation under the doctrine of forfeiture by wrongdoing."). Some courts, however, have referred to the doctrine in terms of "waiver." *See, e.g., United States v. Thompson,* 286 F.3d 950, 963 (7th Cir. 2002); *State v. Meeks,* 88 P.3d 789, 794 (Kan. 2004) ("[W]hen confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived." (internal quotation marks and citation omitted)).

{31} The California Court of Appeal has explained the confusion caused by the use of these two terms as follows:

> We glean that the intent-to-silence element arises from the erroneous use of a "waiver-by-misconduct" label. Because a "waiver" is an intelligent relinquishment of a known right, the intent-to-silence element was added in order to

> establish that the defendant was on notice that the declarant was a potential witness and therefore knowingly relinquished the right to cross-examine that witness. But the rule in question is characterized by the Supreme Court as a "forfeiture" that "extinguishes confrontation claims on essentially equitable grounds," not a waiver. As a forfeiture, there is no need to prove an intelligent relinquishment of a known right[.]

Ruiz, 2005 WL 1670426, at *6 (quoting *Crawford,* 541 U.S. at 62, other internal quotation marks and citations omitted).

{32} The State also cites cases noting that *Crawford*'s reference to the doctrine's "equitable" nature counsels against imposing an intent to silence requirement on constitutional grounds. As the Second Circuit has explained it,

> The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.

Garcia-Meza, 403 F.3d at 370-71 (quoting *Crawford,* 541 U.S. at 62).

{33} We find both the California court's explanation of the waiver/forfeiture distinction and the Second Circuit's point regarding the equitable nature of the doctrine to be

persuasive, at least in cases of the murder of the witness or the death of the witness arising out of a domestic violence situation. *See Melchor,* 2005 WL 3041536 at printed page 12. We also note that our Supreme Court may not have had the benefit of these thoughtful analyses when it decided *Alvarez-Lopez.* We take judicial notice of the briefs filed in *Alvarez-Lopez,* and we note that the State in that case agreed that intent to silence must be proved. *See Garcia v. Mora Painting & Decorating,* 112 N.M. 596, 601, 817 P.2d 1238, 1243 (Ct. App. 1991) (taking judicial notice of the briefs in another case).

{34} In addition, we note that while our Court in *Alvarez-Lopez* consistently used the term "forfeiture," *Cherry,* the Tenth Circuit case relied on by our Court, consistently uses the term "waiver." *See Cherry,* 217 F.3d at 815 ("There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." (internal quotation marks and citation omitted)). We also note that the *Cherry* Court may not have considered the waiver/forfeiture distinction, because *Cherry* was decided before *Crawford,* and *Crawford* appears to be the first case in which the United States Supreme Court referred to the doctrine as a "forfeiture."

{35} We also find the reasoning in *Cherry* to be less than compelling. The issue in *Cherry* was whether participants in a drug conspiracy could be said to have waived their confrontation rights when one member of the conspiracy clearly and intentionally procured the witness's absence. *Id.* at 814, 816. The court framed that issue as one of "imputed waiver." The court said:

> The proper scope of such imputed waiver as applied to a criminal defendant is best defined in the context of the Confrontation Clause doctrine of waiver by misconduct. While the Confrontation Clause and the hearsay rules are not coextensive, it is beyond doubt that evidentiary rules cannot abrogate constitutional rights. We therefore read the plain language of Rule 804(b)(6) to permit the admission of those hearsay statements that would be admissible under the constitutional doctrine of waiver by misconduct[.]

Id. (internal citation omitted). Despite the court's acknowledgment that the rules of evidence and the Confrontation Clause are not coextensive, this statement seems to boil down to nothing more than an unsupported assertion that they are indeed coextensive with regard to the forfeiture doctrine. In fact, the *Cherry* court offered no other support for its conclusion that the elements of the federal rule are constitutionally mandated. Unlike the special concurrence, ¶ 85, we do not believe that *Reynolds* says anything about whether the intent to silence requirement is required by the constitution. *See Reynolds,* 98 U.S. at 158-61 (holding that the defendant forfeited his confrontation rights where he kept the police from finding his wife so she could not testify, but not addressing the intent requirement). Further, we have been able to find no authority besides *Cherry* that supports the proposition that it is.

{36} Moreover, we do not agree with the *Cherry* Court's rationale for holding that the elements of FRE 804(b)(6) are constitutionally mandated. While it is clear that congressionally promulgated rules cannot afford defendants *narrower* rights than those afforded by the constitution, such rules can certainly afford *broader* rights. That is

arguably what FRE 804(b)(6) does. For example, the rule mandates that the forfeiture by wrongdoing doctrine can only be successfully invoked in cases in which the prosecution can show that the defendant procured the witness's absence with the specific intent of preventing the witness from testifying. The prosecution will surely be able to show that the defendant procured the witness's absence in more cases than it will be able to show that the defendant did so with the specific intent of preventing the witness from testifying. As a result, the better reading of the federal rule seems to be that it simply narrows the class of cases in which the doctrine can be invoked, thereby broadening the rights of defendants. Thus, *Cherry* itself does not support the proposition that the elements of the federal rule are constitutionally mandated. We also note that because *Cherry* was exclusively concerned with whether members of a conspiracy could be deprived of their confrontation rights on the basis of actions taken by other members of the conspiracy, the case did not directly consider the intent to silence requirement at all.

{37} In view of the briefs in *Alvarez-Lopez* and *Cherry*'s reliance on the waiver doctrine and questionable constitutionalization of the elements of the federal rule, we suspect that our Supreme Court may not have fully considered the pros and cons of imposing the intent to silence requirement in all cases involving forfeiture by wrongdoing. The special concurrence believes that our Supreme Court was aware of the distinction and made a deliberate choice to follow the cases that require an intent to silence. *See* special concurrence at ¶¶ 82-83. In support of this conclusion, the special concurrence cites two cases that were cited in *Alvarez-Lopez, United States v. Dhinsa,* 243 F.3d 635 (2d Cir. 2001); *United States v. Mastrangelo,*

693 F.2d 269 (2d Cir. 1982), and one case that was cited in *Dhinsa* with a *cf.* signal on the page prior to the page cited in *Alvarez-Lopez, United States v. Miller,* 116 F.3d 641 (2d Cir. 1997), *abrogated on other grounds, Rutledge v. United States,* 517 U.S. 292 (1996). However, like the cases we referred to above, which required intent to silence, and like the cases cited at ¶ 85 of the special concurrence, these cases did not examine the relative advantages and disadvantages of the requirement. Rather, except for *United States v. Rouco,* 765 F.2d 983, 985-87 (11th Cir. 1985), which involved a gun battle with the police in which the defendant shot the officer in an attempt to escape arrest, and except for *Miller,* which involved extreme culpability and little reasoning for its holding that intent to silence is not a prerequisite to admissibility, these cases generally involved fact situations where the intent to silence was clear, and thus there was no reason to question whether the requirement was constitutionally mandated or beneficial from a policy standpoint. *See Dhinsa,* 243 F.3d at 642-43, 650-54 (applying doctrine to the defendant, who was head of a "vast racketeering organization" and was convicted of numerous counts of killing and threatening people who cooperated with police); *Miller,* 116 F.3d at 652-53, 667-69 (applying doctrine to the defendants, who were involved in "a RICO enterprise conducted through a campaign of violent enforcement and retribution"); *Mastrangelo,* 693 F.2d at 271, 273-74 (remanding for evidentiary hearing on the defendant's involvement in death of a witness who was killed on his way to the courthouse to testify against the defendant). In addition, we question whether it can be inferred from an incidental citation contained in a portion of *Dhinsa* other than the portion our Supreme Court cited that our Supreme Court was put on notice of the split in relevant authority.

{38} The special concurrence is also concerned about cases in which domestic violence victims recant, and it cites a few cases in which the allegations are based on revenge or other improper motive. *See* special concurrence at ¶ 79. To be sure, any examination of policy in this area must be informed by the possibility of improper motivation for testimony. Yet, the examination of policy must also be informed by fact that the overwhelming majority of cases of recantation or refusal to cooperate are due to "financial reasons, fear of retaliation, low self-esteem, or sympathy for the assailant." *See* Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women,* 36 Ind. L. Rev. 687, 707 n.68 (2003); *see also id.* at 709 n.76 (indicating that nonprosecution or recantation is epidemic in domestic violence cases, with estimates that such occurs in 80 to 90 percent of the cases).

{39} In sum, we find the circumstances of this case to be materially different from the circumstances of *Alvarez-Lopez.* In this case, for example, it might be inequitable to allow Defendant to reap a benefit, even if an unintended one, from his involvement in the victim's death. Nonetheless, if our Supreme Court misconstrued the law in *Alvarez-Lopez,* it is not our place to attempt to correct any such error. *See State ex rel. Martinez v. City of Las Vegas,* 2004-NMSC-009, ¶ 22, 135 N.M. 375, 89 P.3d 47 ("[W]hile the Court of Appeals is bound by Supreme Court precedent, the Court is invited to explain any reservations it might harbor over its application of our precedent so that we will be in a more informed position to decide whether to reassess prior case law[.]"). Thus, we reiterate our holding that the State is required to prove the elements of the forfeiture by wrongdoing doctrine as they are articulated in *Alvarez-Lopez.*

{40} The State next argues that even if we hold that intent to silence must be shown, we should infer such an intent on the facts of this case because "no reasonable factfinder could fail to infer by a preponderance of the evidence that a desire to silence [the victim] was among Defendant's motives." The State draws support for its conclusion from the fact that the jury in this case found Defendant guilty of intimidating the victim in order to prevent her from reporting the domestic violence to the police. The State also relies on the passage in *Alvarez-Lopez* which notes that:

> It may be sufficient to infer under certain facts that a defendant intended by his misconduct to prevent the witness from testifying. For example, we may be able to infer a criminal defendant's murder of a key prosecution witness was intended to prevent the witness from testifying at the defendant's trial.

2004-NMSC-030, ¶ 13.

{41} We agree with the State that in some cases, a trial court could simply "infer" from the evidence presented to it that the defendant intended by his misconduct to prevent the witness from testifying. We even agree that such an inference could possibly be made by an appellate court in a case such as the present one where, due to an intervening change in the law, the appellate court is making a decision on the forfeiture doctrine without the benefit of the trial court's having done so. However, this is not such a case.

{42} In order to explain why this is not such a case, we must delve briefly into the evidence that was presented at Defendant's murder trial. *See Romero,* 2005-NMCA-060. The evidence presented consisted primarily of Defendant's

statements about the events of the night in question and forensic evidence. *Id.* ¶ 5. Defendant's statements set forth the following facts. Defendant and the victim were together at Defendant's residence, watching television. *Id.* They began to fight and Defendant struck the victim several times. *Id.* Defendant and the victim made up and had consensual sex, and then fought some more. *Id.* At one point, the victim "pinn[ed] Defendant beneath her, punching him in the face and elbowing him in the mouth." *Id.* Then, "after the victim grabbed Defendant by the genitals, he also bit her and struck her again on the side of the head to get her to release her grip." *Id.* Eventually, they stopped fighting and went to sleep. *Id.* When Defendant awoke the next morning, the victim was not breathing, so Defendant went to summon help. *Id.*

{43} The forensic evidence was arguably inconclusive, with the State's expert conceding that there was "no obvious cause of death." *Id.* ¶ 7. However, the expert did state that the death was caused by "complications of mechanical injuries to the head." *Id.* (internal quotation marks omitted). The defense expert testified that the victim died "a natural or accidental death as a result of [an unrelated] liver condition." *Id.* The jury found Defendant guilty of second-degree murder. *Id.* ¶ 3.

{44} We reversed and remanded for a new trial on the basis that the trial court should have given Defendant's requested jury instructions on nondeadly force self-defense and involuntary manslaughter. *Id.* ¶ 2. Defendant's theory of the case was that when he hit and bit the victim, he was lawfully defending himself with nondeadly force, but due to unusual circumstances including the victim's liver condition, the victim unexpectedly died. *Id.* ¶ 16. We held that on this theory, Defendant was entitled to his requested

jury instructions: "The cause of death was disputed, and in the light most favorable to Defendant, the cause of death did not exclude an accidental death caused by the exercise of nondeadly force." *Id.* ¶ 15.

{45} As we held in the murder case, evidence was presented based on which the jury could have found that the victim's death was accidental. A finding of accidental death might support the inference that Defendant did not intend to silence the victim when he committed the acts that contributed to her death. Whether a court would make such a finding as part of its duties to find preliminary questions of fact under Rule 11-104 NMRA by a preponderance of the evidence standard, as opposed to a reasonable doubt standard, is something on which we can only speculate. Thus, because we find below that some of the contested statements do give rise to valid objections under *Crawford,* we remand for the trial court to make factual findings with regard to the elements of the forfeiture by wrongdoing doctrine articulated in *Alvarez-Lopez.* Specifically, the State is required to prove that Defendant procured the victim's absence with the intent to prevent her from testifying. We express no opinion on a proper finding under these facts. We do note that the trial court should hold a new trial and exclude those statements which are testimonial in nature only if it finds that Defendant was not in any way motivated by a desire to prevent the victim from testifying when he committed the acts that contributed to her death. *See Alvarez-Lopez,* 2004-NMSC-030, ¶ 13 ("The State need not show . . . that [the d]efendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defendant was motivated *in part* by a desire to silence the witness." (internal quotation marks and citation omitted)). If the trial court

finds the requisite intent, Defendant's convictions will stand.

III. Analysis of Whether the Victim's Statements Were "Testimonial" in Nature

{46} We now turn to an examination of whether the victim's statements present valid Confrontation Clause objections under *Crawford.* In *Crawford,* the Supreme Court overruled prior precedent and established a new framework for analyzing Confrontation Clause claims. The Court held that the Confrontation Clause is always implicated when "testimonial" statements of an absent witness are admitted. *Crawford,* 541 U.S. at 68. The Court specifically declined to provide a comprehensive definition of "testimonial," *id.* n.10, but did set forth the following three categories of statements that are clearly testimonial: (1) "*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52 (internal quotation marks and citations omitted). The Court then held that "[w]hatever else the term ["testimonial"] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68. Finally, the Court held that if a statement is testimonial, it may only be admitted

if two conditions are satisfied: (1) the declarant is unavailable and (2) the defendant has had a prior opportunity to cross-examine the declarant. *Id.*

{47} In this case, it is undisputed that the victim is unavailable and that Defendant had no prior opportunity to cross-examine her. Thus, if any of her statements are testimonial, they are inadmissible unless the trial court finds that Defendant forfeited his confrontation rights under the forfeiture by wrongdoing doctrine. We now examine each of the statements individually to determine whether they are testimonial in nature.

A. The Grand Jury Testimony and the Stationhouse Statement

{48} Under the plain language of *Crawford,* the victim's testimony before the grand jury is testimonial in nature. *See id.* ("Whatever else the term covers, it applies at a minimum to prior testimony . . . before a grand jury[.]"). Thus, the grand jury testimony is inadmissible absent a finding that Defendant forfeited his confrontation rights.

{49} We also hold that the statement taken by Lewandowski at the police station is testimonial because it was given in response to a "police interrogation." In *Crawford,* the defendant and his wife Sylvia were both given *Miranda* warnings and questioned at the police station. *Crawford,* 541 U.S. at 38, 65. The Court held that Sylvia's statement was testimonial because it was given in response to "police interrogation." *Id.* at 52, 53 n.4. While declining to give a more specific definition of the term "interrogation," the Court held that "Sylvia's recorded statement, knowingly given in response to structured

police questioning, qualifies under any conceivable definition." *Id.*

{50} Many courts have held that statements given in response to formal, structured interviews by law enforcement personnel qualify as testimonial under *Crawford. See, e.g., United States v. Saget,* 377 F.3d 223, 228 (2d Cir. 2004) (holding testimonial statements to include those involving "a declarant's knowing responses to structured questioning in an investigative environment"); *Commonwealth v. Foley,* 833 N.E.2d 130, 133 (Mass. 2005) ("[S]tatements made in response to police questioning after the scene was secure and the victim had assured the officer she did not want emergency medical attention were made in response to investigatory interrogation. As such, they were testimonial per se."); *State v. Walker,* 118 P.3d 935, 940 (Wash. Ct. App. 2005) (holding victim's statement testimonial where it was "elicited in response to structured police questioning pursuant to a police investigation").

{51} In this case, the State acknowledges that out-of-state authority supports a holding that the statement taken at the police station is testimonial. The State urges us, however, to hold that the statement is not testimonial because it was introduced to show two types of information: the victim's actual words and her emotional state, i.e., the fact that she was crying and upset. This second type of information, the State argues, provides evidence of physical characteristics and is not testimonial in nature. The State provides no authority for the proposition that when a statement is introduced in part to show the declarant's emotional state, it is somehow removed from the purview of *Crawford.* We note that individuals giving statements to the police are likely to be upset, and we

decline to exempt this entire category of statements from scrutiny under the Confrontation Clause.

{52} The circumstances surrounding the statement taken by Lewandowski bear numerous indicia of a formal police interrogation. The interview took place at the police station. Lewandowski testified that his reason for taking the statement was that "[a]t this point I needed to know what really happened." The victim gave responses to a number of questions asked by Lewandowski. All of these factors indicate that the statement, like the statement in *Crawford,* was "knowingly given in response to structured police questioning." *See Crawford,* 541 U.S. at 53 n.4. Moreover, the statement was tape recorded, which indicates that the purpose of both Lewandowski and the victim was to memorialize it for future use. We thus hold that the statement is testimonial in nature and, as such, should be excluded unless the trial court finds that Defendant forfeited his confrontation rights.

B. The Victim's Statement to the SANE Practitioner

{53} We next address whether the victim's statement to the SANE practitioner is testimonial. We begin by providing some additional background on the circumstances surrounding the statement. As detailed above, the victim did not initially report that any sexual assault had occurred during the incident in question. Approximately three weeks after the incident, the victim told Lewandowski that Defendant had sexually assaulted her. As a result, Lewandowski made an appointment for the victim to see a SANE practitioner. At trial, Tucker, the SANE practitioner who interviewed the victim, testified

that she is a registered nurse who has had "additional classroom and clinical training in dealing with forensic evidence collection, how to obtain the evidence collection, what to do with it, chain of custody, et cetera." She testified that during her interview with the victim, she took a complete statement from the victim and conducted a "head to toe assessment and a genital exam." The trial court allowed Tucker to read the victim's statement into the record and certified Tucker as "an expert in Sexual Assault Nurse Examiner."

{54} We hold that the victim's statement to the SANE practitioner is testimonial because it falls into the third category of evidence labeled testimonial by *Crawford,* "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 541 U.S. at 52 (internal quotation marks and citation omitted).

{55} We first note that the fact that the SANE practitioner is not a government official does not preclude statements given to her from being testimonial. *See, e.g., State v. Mack,* 101 P.3d 349, 352 (Or. 2004) (en banc) (holding statements made to a social worker to be testimonial because she was acting as a "proxy" for the police). However, many cases involving statements given during examinations by non-government personnel have focused on the degree to which law enforcement is involved in the examination. This focus makes sense in light of *Crawford*'s admonition that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." 541 U.S. at 56 n.7. In *State v. Snowden,* for example, the Maryland Court of Appeals held that statements made by

child victims to a "sexual abuse investigator" were testimonial. 867 A.2d 314, 325 (Md. 2005). The court noted that the interviews were "initiated, and conducted, as part of a formal law enforcement investigation," and took place "subsequent to initial questioning . . . by the police and after the identity of a suspect was known." *Id.* The court did also note that "the express purpose of bringing the children to the facility to be interviewed was to develop their testimony for possible use at trial." *Id.* at 326.

{56} Here, the victim went to the interview at Lewandowski's suggestion. He set the interview up and drove her to it. While he did not attend the interview, he apparently waited for the victim while the interview took place. He testified that he did so "just . . . to make sure everything went okay." As in *Snowden,* the interview took place "subsequent to initial questioning" and "after the identity of a suspect was known." *See id.* at 325. Moreover, the victim had already made a formal statement to the police, was aware of the ongoing investigation, and had already testified before the grand jury. Thus, Lewandowski's involvement suggests that a person in the victim's position would likely have recognized that her statements could later be used prosecutorially.

{57} Next, the State argues that the statement cannot be testimonial because the trial court made a preliminary finding that it was admissible under the hearsay exception for statements made for purposes of medical diagnosis or treatment. *See* Rule 11-803(D) NMRA. The State contends that this ruling necessarily indicates that "[the victim's] motive for making the statement, and . . . Tucker's motive for eliciting it, was *not* to perpetuate her testimony for use in a future trial."

{58} We disagree. Even if a statement falls within the hearsay exception for statements made for the purpose of obtaining medical diagnosis or treatment, it may still be testimonial. *See, e.g., State v. Stahl,* 2005-Ohio-1137, ¶ 13, 2005 WL 602687, at *4 (Ohio Ct. App. Mar. 16, 2005) (rejecting the State's contention that statements made for purposes of diagnosis and treatment are categorically non-testimonial). Indeed, it seems logical that a sexual assault victim might submit to a SANE examination both to seek medical or psychological treatment and to preserve his or her account of the incident. However, while a victim might have both of these reasons in mind, the first counsels against a finding that the statement is testimonial, while the second indicates that the statement should be considered testimonial. Thus, if a victim's primary motivation was to seek medical attention, the statement would be less likely to be testimonial. *See, e.g., People v. West,* 823 N.E.2d 82, 89 (Ill. App. Ct. 2005) (holding that parts of the adult sexual assault victim's statement to emergency room personnel that described "the nature of the alleged attack, and the cause of her symptoms and pain" were not testimonial because they fell into the category of statements "made by a patient with a selfish interest in treatment" and were not "accusatory" in nature. (internal quotation marks and citation omitted)); *State v. Moses,* 119 P.3d 906, 912 (Wash. Ct. App. 2005) (holding a victim's statements to emergency room doctor not testimonial where "the purpose of [the] examination was for medical diagnosis and treatment").

{59} In this case, the facts suggest that the victim's purpose in attending the SANE interview was not merely to obtain medical treatment. First, nearly three weeks elapsed between the incident and the examination, indicating that the victim was not in need of immediate care.

Second, in the physical examination, the SANE practitioner found "no evidence of trauma," although she also testified that her findings were not inconsistent with the type of sexual assault the victim had reported. Finally, the content of the statement indicates that the victim was not primarily concerned with getting treatment. The statement did not focus on the sexual assault, but rather recounted the entire incident. There are only two places in the statement where the victim actually referred to the sexual assault. She said, "That's when he sexually assaulted me on the floor. He took off my pants and underwear and penetrated me." When the SANE practitioner asked her what she meant, she replied, "[P]enis in my vagina. . . . I kept telling him no and to stop." Other than these two statements, the victim did not mention the sexual assault. Given these facts, it does not seem that the victim's primary motivation was to obtain treatment. This leads to the conclusion that a person in her position would have known that the information given might be later used at trial.

{60} Finally, we note that some courts have considered the intent of not only the declarant, but also of the person eliciting the statement. For example, in *Hammon v. State,* the Indiana Supreme Court held that a statement is testimonial if it was "given *or taken* in significant part for purposes of preserving it for potential future use in legal proceedings." 829 N.E.2d 444, 456 (Ind.), *cert. granted,* 126 S.Ct. 552 (2005) (emphasis added). We agree with this approach and believe that the motive of the person eliciting the statement is relevant for two reasons. First, it bears on the intent and understanding of the declarant. As the Supreme Court put it in *Crawford,* "An accuser who makes a formal statement to government officers bears

testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S. at 51. Second, the motivation of the listener is relevant due to *Crawford*'s admonition regarding "production of testimony with an eye toward trial." *Id.* at 56 n.7. If the listener is motivated by a desire to gather evidence, he or she will be more likely to elicit responses that will be useful in a later prosecution, thereby implicating the concerns of *Crawford*.

{61} Here, the SANE practitioner testified that she is specifically trained in "forensic evidence collection" and "chain of custody," and that she has testified as an expert witness on four occasions. Tucker's descriptions of her qualifications and training further lead us to conclude that both Tucker and the victims she interviews significantly after the event would likely realize that the statements given might be used at trial. In view of all of these factors, we hold that the victim's statement to Tucker was testimonial and should thus be excluded absent a finding by the trial court of forfeiture.

C. The Victim's Statement to Lewandowski at the Scene

{62} Finally, we turn to the statement the victim made to Lewandowski at the time of the incident. We begin by briefly reiterating Lewandowski's testimony. Lewandowski testified that the victim came out of the residence, drove her car about 15 feet toward the officers' location and then got out and ran toward the officers. He said the victim was "crying [and] asking for help" and that she had red marks on her neck and watery eyes. Lewandowski also testified that the victim told him that Defendant "choked her, held a knife to her throat while she was in the bathroom, and

. . . stated that if he couldn't have her, no one could, and that he would kill her." The trial court apparently ruled that this latter statement was admissible as either an excited utterance or a present sense impression.

{63} This type of on-scene statement to police officers has perhaps generated the most post-*Crawford* caselaw. Many jurisdictions have held statements similar to the one in this case to be non-testimonial. *See Anderson v. State,* 111 P.3d 350, 354 (Alaska Ct. App. 2005) ("The great majority of courts which have considered this question have concluded that an excited utterance by a crime victim to a police officer, made in response to minimal questioning, is not testimonial."). As with other statements that are arguably testimonial under *Crawford,* the primary concern is the intent of the declarant and the listener. Many courts have noted that responses to initial, on-scene questions from a police officer are likely motivated by goals other than perpetuating testimony. In *Hammon,* the Indiana Supreme Court held that statements made at the scene to a police officer answering a domestic violence call were not testimonial. The court based its decision on the fact that the officer was "principally in the process of accomplishing the preliminary tasks of securing and assessing the scene." 829 N.E.2d at 458. *See also State v. Greene,* 874 A.2d 750, 775 (Conn. 2005) ("[W]here a victim contacts a police officer immediately following a criminal incident to report a possible injury and the officer receives information or asks questions to ensure that the victim receives proper medical attention and that the crime scene is properly secured, the victim's statements are not testimonial in nature because they can be seen as part of the criminal incident itself, rather than as part of the prosecution that follows." (internal quotation marks and citation omitted));

Commonwealth v. Gonsalves, 833 N.E.2d 549, 555-56 (Mass. 2005) ("We conclude that questioning by law enforcement agents . . . other than to secure a volatile scene or to establish the need for or provide medical care, is interrogation [and thus testimonial.]"); *People v. Bradley,* 799 N.Y.S.2d 472, 477 (N.Y. App. Div. 2005) ("Preliminary, on-scene interviews are clearly distinguishable from the ex parte testimony found to be excludable on Sixth Amendment grounds in *Crawford.*"); *Spencer v. State,* 162 S.W.3d 877, 881 (Tex. Ct. App. 2005) ("[S]tatements made to officers responding to a call during the initial assessment and securing of a crime scene are not testimonial.").

{64} However, some courts have held such statements to be testimonial. In *Lopez v. State,* the court held that a statement made by an upset victim to an officer at the scene of the crime was testimonial. 888 So.2d 693, 700 (Fla. Dist. Ct. App. 2004). The court reasoned that "a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect." *Id.* at 699. This appears to be the minority view. *See Contreras v. State,* 910 So.2d 901, 912-13 (Fla. Dist. Ct. App. Sept. 14, 2005) (May, J., dissenting) (noting that "*Lopez* has been distinguished and disagreed with by courts across the country" and citing cases).

{65} Many cases have held that this type of statement will usually be non-testimonial, but that the inquiry should be fact-specific and if there are articulable indications that either the declarant or the officer was trying to do more than simply get help or secure the scene, then the statement might be considered testimonial. *See, e.g., State v. Parks,* 116 P.3d 631, 642 (Ariz. Ct. App. 2005) ("[P]olice

questioning during a field investigation does not automatically exempt the statements from being testimonial."); *Wright,* 701 N.W.2d at 812-13 (holding that "statements made to the police during a field investigation should be analyzed on a case-by-case basis" and establishing an eight-factor test that includes consideration of the purpose of both the declarant and the officer); *State v. Allen,* 614 S.E.2d 361, 365 (N.C. Ct. App. 2005) ("[W]hether 'interrogation' encompasses a statement made in response to police questioning at the scene of a crime is a factual question that must be determined on a case-by-case basis.").

{66} We prefer this fact-specific inquiry. While on-scene statements to police officers in response to initial questioning will generally be non-testimonial, we hold that such statements should be considered testimonial if there are articulable indications that either the officer or the declarant was trying to procure or provide testimony. However, when it appears that the officer's primary goal was to secure the scene or give immediate aid to victims and the declarant's primary goal was to get aid, the statements will be considered non-testimonial.

{67} We now turn to the facts of this case to see where they fit in the above standard. Lewandowski testified that the victim ran toward the officers, that she had no shoes on and was running through gravel, and that she was "upset" and "crying for help." Lewandowski testified that he "talked to her for just a minute" and then put her in the back of a police car "for her safety and ours" and that "basically all she did was just hold on to me asking for help." Apparently it was during this brief conversation that the victim made the statement about Defendant holding a knife to her throat. Lewandowski also testified

as follows: "A few questions we did ask was is there a weapon, are you okay, and it was a real fast conversation. Our main point was to get her into a safe environment just in case he was out somewhere with a weapon." Finally, he testified that "at that point our main concern wasn't [to] investigate her, interview her, our main point was to make sure she was safe and that we were safe and that we were able to get in the house and clear it and maybe try to obtain the subject to detain him."

{68} Under these circumstances, we hold that the victim's statement to Lewandowski that Defendant held her at knifepoint and threatened to kill her was not testimonial under *Crawford.* It is clear from Lewandowski's testimony that his primary goal was to secure the scene and give aid to the victim. He was not conducting an investigation and he was not attempting to procure or preserve testimony for later use at trial. Moreover, his descriptions of the victim indicate that she was primarily concerned with getting help from the police, not with making accusations against Defendant. Thus, we hold that the statement was not testimonial and was properly admitted at trial.

IV. Admission of the Victim's Statements Was Not Harmless Error

{69} The State next contends that only the victim's statement given at the stationhouse could possibly be testimonial, and that if it is testimonial, its admission constituted harmless error because it was cumulative of other properly admitted evidence. However, we have held that the stationhouse statement, the grand jury statement, and the statement made to Tucker were all testimonial in nature and must be excluded absent a finding that

Defendant forfeited his confrontation rights. The State does not argue that the admission of all three of these statements could be considered harmless error. However, we briefly address that possibility and hold that the error was not harmless.

{70} When a constitutional trial error has been committed, "the burden is on the State to demonstrate the error is harmless beyond a reasonable doubt." *State v. Johnson,* 2004-NMSC-029, ¶ 9, 136 N.M. 348, 98 P.3d 998. The "central focus" of this inquiry is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* (internal quotation marks and citation omitted). A reviewing court must make "an objective reconstruction of the record of evidence the jury either heard or should have heard absent the error." *Johnson,* 2004-NMSC-029, ¶ 10. An error is not necessarily harmless even when the evidence that was properly admitted constitutes "overwhelming evidence of the defendant's guilt." *Id.* ¶ 11. Error is not automatically harmless when the improperly admitted evidence was cumulative of other properly admitted evidence. *Id.* ¶ 37. Moreover, evidence is not considered "cumulative" if it "corroborates, and therefore strengthens, the prosecution's evidence." *Id.*

{71} In this case, we have held that admission of all three of the victim's detailed statements about the incident are inadmissible under *Crawford.* The State relied heavily on these statements at trial. For example, at the end of closing argument, the prosecutor stated: "Ladies and Gentlemen, you've had ample evidence . . . to conclude that [the victim] told police, told . . . Tucker, told the Grand Jury and through those statements told you exactly what . . . Defendant did to her." Examining the evidence the jury

would have heard absent the erroneous admission of these three statements, we note that the State would have had little direct evidence of Defendant's involvement in the victim's injuries. It would have had to rely solely on the statement the victim made at the scene and the testimony of the other witnesses, who essentially testified only to the victim's statements over the phone that Defendant would not let her leave and was holding a knife to her throat. At a minimum, the improperly admitted evidence corroborated this other testimony. Thus, we conclude that the State has not shown beyond a reasonable doubt that there was no "'reasonable possibility that the evidence complained of might have contributed to the conviction.'" *See Johnson,* 2004-NMSC-029, ¶ 9 (quoting *Chapman,* 386 U.S. at 23).

V. Defendant's Rule 11-404(B) Objections

{72} Lastly, Defendant argues that witness testimony regarding past incidents of domestic violence between himself and the victim was erroneously admitted under Rule 11-404(B). Over Defendant's objection, the trial court allowed Chavez, the victim's roommate, to testify that a few weeks before the events giving rise to the trial, she saw Defendant "shove[ ] [the victim's] head into the wall." Another friend of the victim, Jaramillo, testified regarding an occasion when she had gone with the victim to Defendant's house because Defendant had taken the victim's keys. Jaramillo testified that the victim went into Defendant's house and came out and handed her a folder that contained "personal papers, like her past income tax returns." Then, according to Jaramillo, Defendant took the folder out of her hands and the three of them engaged in a "shoving match over the folders."

{73} Rule 11-404(B) prohibits the admission of "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show action in conformity therewith." However, the rule allows evidence of such prior acts "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." We review a trial court's decision to admit evidence under Rule 11-404(B) for abuse of discretion. *Williams,* 117 N.M. at 557, 874 P.2d at 18.

{74} Before the trial court, the State argued that the testimony of Chavez and Jaramillo was admissible under Rule 11-404(B) to show why the victim's friends were concerned about her when she called on the day of the incident and said that Defendant would not let her leave his house. The State also argued that the testimony "goes to . . . Defendant's motive, intent and plan in terms of why [the victim] was over there, and that the bruises and marks were not accidental, and that he was, in fact, holding her against her will[.]" The trial court allowed the testimony of both witnesses for purposes of showing "the motive of . . . Defendant, the intent in this particular instance, [and] absence of mistake."

{75} Defendant testified that the victim liked experimental sexual practices, such as having him pretend to be a rapist. He testified that on the night of the incident, the victim wanted him to "pull her by the hair and to hit her" and to call her "a bitch and a slut." He also testified that the next morning, the victim was upset because there were "a lot of hickeys on her neck." Defendant claimed the marks on the victim's neck that appeared in the photos introduced by the State were hickeys and not cuts. This testimony indicates that Defendant was arguing that he caused the marks on the victim's neck either by mistake or with the victim's consent. In view of Defendant's

testimony, we agree that the testimony of Chavez and Jaramillo was not improper propensity evidence, and we hold that the trial court did not abuse its discretion in ruling that the testimony was relevant to show, among other things, absence of mistake regarding the victim's injuries. *See State v. Jones,* 120 N.M. 185, 187, 899 P.2d 1139, 1141 (Ct. App. 1995) (holding prior bad acts evidence is admissible where there is an "articulation or identification of the consequential fact to which the proffered evidence of other acts is directed").

CONCLUSION

{76} We hold that the victim's statements before the grand jury, to Lewandowski at the stationhouse, and to the SANE practitioner were testimonial under *Crawford* and that their admission was not harmless error. We also hold that the State is required to prove the four elements of the forfeiture by wrongdoing doctrine. Thus, we remand for the trial court to make factual findings with regard to those elements. If the trial court finds that Defendant forfeited his confrontation rights under *Alvarez-Lopez,* his convictions will stand. If the trial court finds that he did not, the Defendant is entitled to a new trial, at which the three testimonial statements will be inadmissible.

{77} **IT IS SO ORDERED.**

LYNN PACKARD, Judge

I CONCUR:

CELIA FOY CASTILLO, Judge

MICHAEL E. VIGIL, Judge (specially concurring)

VIGIL, Judge (specially concurring).

{78} I write separately only to disagree with the majority's criticism of the *Alvarez-Lopez* requirement of a foundation showing that a defendant intended by his misconduct to prevent the declarant from testifying before hearsay of that unavailable witness may be admitted as substantive evidence against a defendant in a criminal trial under the constitutional doctrine of waiver by misconduct. Under this doctrine, a defendant's constitutional right to confrontation under the Sixth Amendment, and therefore his hearsay objection as well, is forfeited by his own wrongdoing. *Reynolds,* 98 U.S. at 158.

{79} I do not agree that the State has presented "several compelling reasons why a showing of intent to silence should not be required" (Majority Opinion, ¶ 30), in "cases of the murder of the witness or the death of the witness arising out of a domestic violence situation." Majority Opinion ¶ 33. My disagreement is primarily on policy grounds. It is well documented that victims of domestic violence may recant their testimony on the witness stand or seek to minimize the effects of domestic violence on themselves or others. *See* Cynthia L. Barnes, Annotation, *Admissibility of Expert Testimony Concerning Domestic-Violence Syndromes to Assist Jury in Evaluating Victim's Testimony or Behavior,* 57 A.L.R. 5th 315 (1992). It is also equally true that self-serving, untrue statements, sometimes motivated by revenge, are made by partners in the context of domestic violence allegations. *See Adams v. State,* 727 So.2d 983, 983 (Fla. Dist. Ct. App. 1999) (affirming conviction of perjury after wife filed a false affidavit in a domestic violence action); *Dix v. State,* 479 S.E.2d 739, 742 (Ga. 1997) (recognizing that a client can make self-serving

statements to her attorney and paint a picture of the marital relationship that is inaccurate and biased in considering whether statements made to her attorney are admissible in a prosecution of husband for murdering his ex-wife). Practitioners dealing with domestic violence know of these contradictions, and our own cases recognize the problem. *See Lujan ex rel. Lujan v. Casados-Lujan,* 2004-NMCA-036, ¶ 10, 135 N.M. 285, 87 P.3d 1067 (recognizing that the motivation for a domestic abuse case can be to further the parent's interest); *State v. Buck,* 33 N.M. 334, 338, 266 P. 917, 919 (1927) (recognizing, in a domestic violence case, that the admission of a spontaneous declaration is often sought where the declarant has died. "In such cases great caution is to be exercised. The danger of admitting merely self-serving declarations, or those prompted by revenge, must be guarded against."). I therefore hesitate to recognize a special exception to admit hearsay evidence substantively in a category of cases where contradictory, self-serving statements are known to be made. It must be remembered that once a determination is made that the constitutional right of confrontation has been waived, the hearsay is admissible as substantive evidence, regardless of its reliability. Even the catch-all provision governing the admissibility of hearsay of an "unavailable" witness in our own Rules of Evidence recognizes that intent is relevant. "A declarant is not unavailable as a witness if [her] 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.*" Rule 11-804(A) NMRA (emphasis added).

{80} Further, I cannot agree to recognizing a special hearsay exception "in cases of the murder of the witness or

the death of the witness arising out of a domestic violence situation." It is perfectly conceivable, as this case demonstrates, for a defendant to have *accidentally* killed someone with no intention of preventing them from testifying. Nevertheless, the majority would allow admission of the deceased's hearsay. This is contrary with the principle that there is a presumption against the waiver of a constitutional right, and that for a waiver to be effective, there must be an intentional relinquishment or abandonment of the right. *See State v. Herrera,* 2004-NMCA-015, ¶ 8, 135 N.M. 79, 84 P.3d 696. Additionally, it would be anomalous for the hearsay to be excluded in a white collar crime case because no showing could be made that the defendant intended by his misconduct to prevent the declarant from testifying, but admitted in a homicide case even if all the evidence was that the defendant did not have such an intent.

{81} The first basis for the majority's criticism is its view that the requirement arises out of a confusion over the "proper terminology" used to describe the constitutional doctrine. Specifically, the majority agrees with certain post *Alvarez-Lopez* cases which describe a distinction between "waiver" which conceptually supports an intent element and "forfeiture" which does not conceptually require an intent element. The majority agrees that it is more appropriate to view the constitutional doctrine as grounded on "forfeiture" than "waiver" and therefore supports disposing of the intent element. Further, since the authorities cited were decided after *Alvarez-Lopez,* the majority suggests that our Supreme Court may have been misled by this confusion over the "proper terminology" used to describe the constitutional doctrine. Majority Opinion ¶ 30-34.

{82} I do not believe our Supreme Court was misled by any such confusion. Instead, I believe our Supreme Court was fully conscious of cases holding there is no intent requirement for the constitutional doctrine to apply, and deliberately chose to follow those cases which require intent.

{83} *Alvarez-Lopez* quotes the following from the Second Circuit opinion of *Mastrangelo,* 693 F.2d at 272-73: "If a witness' silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights[.]" *Alvarez-Lopez,* 2004-NMSC-030, ¶ 8. *Alvarez-Lopez* also specifically quotes *Dhinsa,* 243 F.3d at 653, that "Rule 804(b)(6) [of the Federal Rules of Evidence] 'was intended to codify the waiver-by-misconduct rule as it was applied by the courts at that time.'" *Alvarez-Lopez,* 2004-NMSC-030, ¶ 9. On the very same page referenced by *Alvarez-Lopez,* the Second Circuit *Dhinsa* court refers to its own opinion of *Miller,* 116 F.3d at 668, as "holding that neither the existence of an ongoing proceeding nor a finding that the defendant's intention was to prevent the declarant from testifying is required to admit the declarant's out-of-court statement." *Dhinsa,* 243 F.3d at 652-53. *Miller* specifically states, "Although a finding that defendants' purpose was to prevent a declarant from testifying[ ] is relevant, such a finding is not required." *Id.* at 668 (internal quotation marks, brackets, and citation omitted).

{84} Despite its clear knowledge of these authorities, our Supreme Court made a conscious decision in *Alvarez-Lopez* to reject them and to require the State to establish by a preponderance of the evidence that "the defendant intended by his misconduct to prevent the declarant from testifying" as one of the elements of waiver by misconduct.

2004-NMSC-030, ¶ 10. Finally, our Supreme Court stated in *Alvarez-Lopez* that "[o]ne of the primary purposes of the forfeiture by wrongdoing rule is to deter criminals from intimidating or 'taking care of' potential witnesses." *Id.* ¶ 14 (internal quotation marks and citation omitted). Our Supreme Court therefore concluded, "[w]ithout a showing that [the defendant] intentionally prevented [the witness] from being a witness against him, this purpose is not served by admitting the [hearsay] testimony." *Id.*

{85} Secondly, the majority suggests that the requirement arises out of misplaced reliance upon *Cherry,* because *Cherry* improperly equates the Federal Rule of Evidence 804(b)(6) requirement that "the defendant intended by his misconduct to prevent the declarant from testifying" as also being constitutionally required to admit the hearsay of an unavailable witness. Majority Opinion ¶¶ 24, 35-36. This reasoning overlooks the fact that when Rule 804(b)(6) was adopted in 1997, the defendant intended by his misconduct to prevent the witness from testifying in virtually every case in which the constitutional waiver doctrine was recognized. *See, e.g., United States v. White,* 116 F.3d 903, 909-12 (D.C. Cir. 1997) (involving the murder of a potential witness that the defendant suspected was working with the police); *Houlihan,* 92 F.3d at 1278 (concluding that a defendant waives his constitutional confrontation rights by murdering a potential witness to prevent the witness from testifying); *United States v. Thai,* 29 F.3d 785, 814-15 (2d Cir. 1994) (involving murder of potential witness); *United States v. Aguiar,* 975 F.2d 45, 47 (2d Cir. 1992) (holding that defendant waived his confrontation rights by threatening witness not to testify); *Rouco,* 765 F.2d at 985, 995 (involving murder of undercover police officer involved with the

defendant in drug transactions while in the process of arresting the defendant); *United States v. Thevis,* 665 F.2d 616, 630 (5th Cir. 1982) ("We conclude that a defendant who causes a witness to be unavailable for trial [by murdering him] for the purpose of preventing that witness from testifying also waives his right of confrontation[.]"); *Steele v. Taylor,* 684 F.2d 1193, 1199, 1201 (6th Cir. 1982) (concluding that the constitutional waiver was applicable where the defendant caused a witness under his control to refuse to testify based on the fifth amendment privilege); *United States v. Balano,* 618 F.2d 624, 629-30 (10th Cir. 1979) (holding that witness grand jury testimony was admissible when defendant waived his constitutional right of confrontation by making witness unavailable by threats to his life), *overruled on other grounds as recognized by United States v. Cherry,* 217 F.3d 811 (10th Cir. 2000); *United States v. Carlson,* 547 F.2d 1346, 1354 (8th Cir. 1976) (same). *But see Miller,* 116 F.3d at 668 (stating that while a finding that the defendant's purpose is to prevent witness from testifying is relevant, it is not necessary); *Mastrangelo,* 693 F.2d at 272-73 ("[I]f a witness' silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights[.]") (internal quotation marks and citations omitted). Moreover, the United States Supreme Court has not stated that this requirement of the rule is not constitutionally required. In fact, *Crawford* cites *Reynolds,* 98 U.S. at 158-59, as recognizing the doctrine of forfeiture by wrongdoing. *Crawford,* 541 U.S. at 62. *Reynolds* applied the common law and held that when the defendant kept the witness away from his trial, that conduct waived his constitutional right of confrontation. *Id.* at 158-60. Since *Reynolds* was

not criticized, and Rule 804(b)(6) remains unchanged, I disagree with the majority's criticisms.

{86} For the foregoing reasons, I specially concur.

MICHAEL E. VIGIL, Judge

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

April 11, 2007

NO. 29,690

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ANTHONY ROMERO,

Defendant-Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing and brief in support thereof, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Pamela B. Minzner, Justice Patricio M. Serna, and Justice Petra Jimenez Maes concurring, and Justice Richard C. Bosson dissenting;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED.

IT IS SO ORDERED.

WITNESS, Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 11th day of April 2007

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk
of the Supreme Court of the
State of New Mexico

(SEAL)

ATTEST IS TRUE COPY

/s/ Amy Meyer
Clerk of the Supreme Court
of the State of New Mexico