No. 07-37

IN THE
SUPREME COURT OF THE UNITED STATES

New Mexico,

Petitioner,

v.

Anthony Romero,

Respondent.

On Petition for a Writ of Certiorari
To the New Mexico Supreme Court

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent Anthony Romero respectfully requests that this Court deny certiorari in this case.

JURISDICTION

As elaborated in Part A of this brief, this Court lacks jurisdiction over this case because there is not yet any final judgment.

STATEMENT

The State seeks review of a case in interlocutory posture to resolve a potential conflict over a constitutional issue that no state court of last resort or federal court of appeals has yet addressed on a full record.

1. During 2001, Respondent Anthony Romero and Jessica Herrera were involved in a romantic relationship, but the relationship was rocky. The couple split up once, but were reunited. They split up again in September, and Herrera served respondent with a restraining order. She nonetheless continued to call him at work. During the next month, Herrera learned that respondent was drinking a lot, and that he was threatening suicide.

Early in the morning of October 13, Herrera – herself intoxicated – went looking for respondent and found him at a friend's house. She invited respondent to her parents' home. Later that day, Herrera called her friend, Lisa Chavez, and asked for help. Herrera told Chavez that respondent would not let her go. Chavez asked whether she should call the police, and Herrera replied, "yes." At about 3:00 pm, Herrera also called her mother, who testified at trial that Herrera told her that respondent would not let her leave, that he was holding a knife to her throat, and that he was telling her that if she said anything, she would never see her kids again.

Chevez called the police, and the police arrived shortly thereafter. Herrera ran out of the house and cried for help. She had red marks on her throat and watery eyes. She told the officers that respondent had "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." Later that evening, Herrera went to the police station and gave a full, tape-recorded interview concerning the incident.

About two weeks later, the State commenced grand jury proceedings. During her grand jury testimony, Herrera alleged that respondent had raped her twice during the October 13 incident. Upon hearing that accusation, the police arranged for Herrera to meet with a Sexual Assault Nurse Examiner. The Examiner conducted a lengthy interview with Herrera, in which Herrera repeated her earlier accusations concerning respondent.

The grand jury returned an indictment charging respondent with aggravated assault against a household member, aggravated battery against a household member, false imprisonment, intimidation of a witness, and criminal sexual penetration.

2. On December 28, 2001, while the grand jury's charges were still pending, respondent and Herrera were together at respondent's residence watching television. An argument ensued, in which each struck the other several times. Respondent and Herrera then made up and had consensual sex. They then fought some more, with Herrera at one point pinning respondent beneath her, punching him in the face and elbowing him in the mouth. Then, "after Herrera grabbed respondent by the genitals, he struck her again on the side of the head to get her to release her grip." Pet. App. 48 (quotation omitted). Eventually, they stopped fighting and went to sleep.

When respondent awoke the next morning, Herrera was dead. As the New Mexico Court of Appeals later explained, "[t]he forensic evidence was inconclusive, with the State's expert conceding that there was no obvious cause of death. However, the expert did state that the death was caused by 'complications of mechanical injuries to the head.' The defense expert testified that the victim died 'a natural or accidental death as a result of [an unrelated] liver condition.'" Pet. App. 48. The State convicted respondent in a separate proceeding of second-degree murder, but the New Mexico Court of Appeals reversed the conviction "on the basis that the trial court should have given [respondent's] requested jury instructions on nondeadly force self-defense and involuntary manslaughter." Pet. App. 48. A properly instructed jury, the appellate court concluded, "could have found that the victim's death was accidental." Pet. App. 49.

3. Several months later, the trial concerning the October 13 incident commenced. The State introduced all of the hearsay statements Herrera made to her mother, Chavez, and the responding police officers during the incident. Over respondent's objection, the trial court also allowed the State to introduce the tape-recorded interview she gave at the police department later that evening and the interview she gave to the sexual assault examiner a few weeks later. Applying the then-prevailing framework for assessing Confrontation Clause objections, encapsulated in *Ohio v. Roberts*, 448 U.S. 56 (1980), the court ruled that the two statements were admissible because they both satisfied "firmly rooted" hearsay exceptions – the interview at the police department purportedly being an "excited utterance" and the interview with the sexual assault examiner being conducted for purposes of medical diagnosis or treatment. Tr. 88-89 (July 30, 2002).

The jury acquitted respondent of criminal sexual penetration, but it convicted him of the remaining charges.

4. The New Mexico Court of Appeals remanded the case in light of this Court's intervening decision in *Crawford v. Washington*, 541 U.S. 36 (2004). This Court held in *Crawford* that the prosecution generally may not introduce "testimonial" hearsay statements when, as here, the defendant did not have an opportunity to cross-examine the declarant. Applying that decision, the New Mexico Court of Appeals ruled that Herrera's statements at the police station and to the sexual assault examiner – as well as certain statements she made to the grand jury that had been introduced at trial – were testimonial.

The New Mexico Court of Appeals acknowledged that the *Crawford* rule does not apply when a defendant has forfeited his right to confrontation through wrongdoing that procured the witness's unavailability. *See* Pet. App. 33-36 (citing *Crawford*, 541 U.S. at 62 and *State v. Alvarez-Lopez*, 98 P.3d 699 (2004), *cert. denied*, 543 U.S. 1177 (2005)). But because the trial here occurred prior to *Crawford*, the appellate court "remand[ed] for the trial court to make factual findings with regard to the elements of the forfeiture by wrongdoing doctrine articulated in *Alvarez-Lopez*." Pet. App. 49. The appellate court "express[ed] no opinion" on whether respondent was "in any way motivated by a desire to prevent [Herrera] from testifying when he committed the acts that contributed to her death." Pet. App. 49.

5. The New Mexico Supreme Court upheld the New Mexico Court of Appeals' determination that Herrera's statements at issue were testimonial and agreed with its decision to remand the case for an evidentiary hearing on the State's forfeiture argument. For purposes of that remand, the New Mexico Supreme Court explored the standard

governing forfeiture by wrongdoing determinations. Drawing heavily on this Court's recent opinion in *Davis v. Washington*, 126 S. Ct. 2266 (2006), the New Mexico Supreme Court reconsidered and reaffirmed its 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." Pet. App. 20.

The New Mexico Supreme Court concluded:

> [W]e are reversing [respondent'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. That exception is Officer Lewandowski's testimony about the victim's demeanor during the taped interview.

Pet. App. 20-21.

6. The evidentiary hearing that the New Mexico Supreme Court ordered has not yet occurred on remand. The trial court held a scheduling conference on August 10, 2007, to begin addressing the matter. But because the State failed to transport respondent from prison to the courtroom, the parties were unable to have any substantive discussion concerning the forthcoming forfeiture hearing.

Respondent also has yet to be retried on the separate case dealing directly with Herrera's death.

REASONS FOR DENYING THE WRIT

A. This Court Lacks Jurisdiction Over This Case Because No Final Judgment Exists.

This Court lacks jurisdiction over cases from state courts that are not "final." 28 U.S.C. § 1257(a). The State, however, argues that the New Mexico Supreme Court's decision satisfies an exception to this rule – known as the "practical finality" exception – that is set forth in the "third category" of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Under that exception, this Court has jurisdiction over a state court's interlocutory resolution of a federal issue when the "[t]he federal issue would not survive the remand, whatever the result of the [trial] proceedings." *Id.* at 482.

The State is incorrect. The New Mexico Supreme Court remanded this case for an evidentiary hearing to determine whether certain testimonial statements were improperly admitted at trial – an issue that turns on whether respondent forfeited his right to confrontation based on his connection to Herrera's death. If the trial court determines that respondent forfeited his right to confrontation, then "his convictions on the charges at issue in this appeal will stand." Pet. App. 20. This outcome, assuming it stands up on appeal, would likely preclude further review of the confrontation issue the State presents here. But the State would suffer no prejudice.

On the other hand, if the trial court determines that respondent did not forfeit his right to confrontation, then respondent's convictions would be vacated and he would be entitled at that moment to a new trial in which Herrera's testimonial statements are suppressed. But once the trial court entered that order, the State would have the right to appeal, thereby causing the federal issue to survive the remand.

New Mexico law specifically grants the State a right to appeal "in any criminal proceeding" from "a decision or order of a district court suppressing or excluding evidence . . . if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." N.M. Stat. Ann. § 39-3-3(B)(2).[1] In contrast to similar federal provisions, the State's right to appeal if it makes the statutorily required certification is "mandatory in nature"; section 39-3-3(B)(2) "excepts suppression order appeals from our usual discretionary consideration." *State v. Alvarez*, 823 P.2d 324, 326-27 (N.M. Ct. App. 1991); *see also State v. Romero*, 999 P.2d 1038, 1041 (N.M. Ct. App. 2000) (noting that appellate court had "jurisdiction to entertain this appeal under section 39-3-3(B)(2)" because "excluded evidence went to the very heart of the proof required to establish an

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[1] N.M. Stat. Ann. § 39-3-3 provides in relevant part:

> B. By the state. In any criminal proceeding in district court an appeal may be taken by the state to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:
>
> > (1) within thirty days from a decision, judgment or order dismissing a complaint, indictment or information as to any one or more counts;
> >
> > (2) within ten days from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property, if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> C. No appeal shall be taken by the state when the double jeopardy clause of the United States constitution or the constitution of the state of New Mexico prohibits further prosecution.

essential element of the State's case"). Accordingly, if the State loses the evidentiary hearing on remand, it would have the option of invoking this procedure to attempt to bring the federal forfeiture issue back up through the New Mexico appellate courts and, ultimately, to this Court.[2]

Presumably cognizant of its well-established appellate rights, the State asserts in its petition for certiorari that if Herrera's statements were suppressed "after the jury is sworn," then it would be prohibited from seeking to appeal (at least absent respondent agreeing to waive his double jeopardy rights). Pet. 2. But there is zero chance of that happening. Under the New Mexico Supreme Court's mandate, the trial court must decide whether Herrera's statements should be suppressed *before* it even decides whether to vacate respondent's convictions – and long before any new jury might be selected or sworn. Pet. App. 20-21. The trial did not say anything at the August 10 scheduling conference – nor has it said or done anything previously – to suggest that it will ignore this mandate, which of course accords with common-sense pretrial practice.

Because this Court lacks jurisdiction over this case, it must deny the State's petition for certiorari.

[2] Of course, even if the trial court rules on remand that Herrera's testimonial statements must be suppressed, the State might choose not to appeal and to try the case based on the remaining evidence, which includes the statements Herrera made on the phone and to the responding officers during the incident. As the New Mexico Supreme Court made clear, "there is sufficient evidence to support the conviction[s]" besides Herrera's testimonial statements. Pet. App. 14. The point, however, is that "if [the State] were to lose on the merits, . . . the governing state law would . . . permit [it] again to present [its] federal claims for review." *Cox Broadcasting*, 420 U.S. at 481.

B. Neither the Factual Record Here Nor the Legal Question the State Presents is Ripe for Review.

Even if this Court had jurisdiction over this case, the undeveloped state of the factual record here and the law in this area would themselves provide powerful reasons to deny review.

1. The State asks this Court to answer the question whether a defendant who "kills" a witness who previously made testimonial statements forfeits his right to confrontation only if he "killed her with the specific intent to prevent her from testifying at trial." Pet. i. The State asserts that courts are divided three different ways on this issue. One of the groups of decisions, however, is characterized by having not yet even decided whether forfeiture occurs under these circumstances. *See* Pet. 9 (citing *People v. Stechly,* 870 N.E.2d 333 (Ill. 2007), and *People v. Moreno,* 160 P.3d 242 (Colo. 2007)). It is self-evident that these decisions cannot contribute to any conflict.

In order to determine whether a legitimate conflict exists between the other two categories of cases the State sets forth, one must first limit oneself to decisions that post-date this Court's decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006). In that decision, this Court offered important guidance regarding when forfeiture should apply – namely, "when defendants *seek to undermine the judicial process* by procuring or coercing silence from witnesses and victims." *Id.* at 2280 (emphasis added). That is because defendants have a duty "to refrain from acting in ways that destroy the integrity of the criminal-trial system." *Id.* The New Mexico Supreme Court expressly followed that guidance in holding that forfeiture does not occur unless a defendant acts with the intent to procure a witness's unavailability. Pet. App. 15-19.

Only three other state courts of last resort have considered the question presented since *Davis* was announced. (No federal court of appeals has done so.) In *People v. Giles*, 152 P.3d 433 (Cal. 2007), the California Supreme Court held that a defendant forfeits his right to confrontation when he commits an "intentional criminal act" that causes the death of a would-be witness. *Id.* at 446-47. The California Supreme Court further concluded that the defendant in that case did, in fact, forfeit his right to confrontation because he "did not shoot [the victim] in self-defense" but rather "committed an unlawful homicide" – a first degree murder – "that caused the victim's unavailability at trial." *Id.* at 447; *see also id.* at 447 (Werdegar, J., concurring) (shooting was "intentional criminal conduct"; the defendant "shot and killed [the witness] and was not acting in self-defense"). In *State v. Jensen*, 727 N.W.2d 518 (Wisc. 2007), the Supreme Court of Wisconsin held that a defendant charged with "first degree intentional homicide" forfeits his right to confrontation respecting the victim's earlier testimonial statements if a trial court finds in a pre-trial hearing the defendant was the person who killed the victim. *Id.* at 522, 535. Finally, in *State v. Mason*, 162 P.3d 396 (Wash. 2007), the Supreme Court of Washington held that a defendant convicted of "first degree murder" forfeited his right to confrontation respecting the victim's earlier testimonial statements because "the defendant's conduct prevented the witness' testimony" and "[k]nowledge that the foreseeable consequences of one's actions include a witness' unavailability at trial is adequate to conclude a forfeiture of confrontation rights." *Id.* at 399, 404. Though these decisions use slightly different language, it is safe to say that

they collectively hold that a defendant forfeits his right to confrontation when he is found to have intentionally killed the witness at issue.[3]

It is simply impossible to know right now whether the outcome in this case will conflict with any of those three decisions. The State presumably will continue to argue on remand, as it did in the courts below, that respondent killed Herrera with a specific intent to prevent her from testifying in this case. Respondent will argue, as he did in the homicide trial, that Herrera "died a natural or accidental death as a result of [an unrelated] liver condition," Pet. App. 48 (quotation omitted), and that he struck Herrera only in order to protect himself from serious injury. And as the New Mexico Supreme Court explained, there is no way to predict for sure what the trial court will find. The jury in respondent's first homicide trial found that he committed second degree murder. But evidence also would support a finding that Herrera's death was purely accidental or that respondent acted in self-defense. Pet. App. 48-49. Any of these conclusions – or any other on the spectrum from intentional killing to natural death – is theoretically possible.

Even if the trial court were to find here (or in some future case) that the defendant intentionally murdered the witness but there was no direct evidence that he did so specifically in order to silence her as a witness, it is not entirely clear that the New Mexico Supreme Court would hold, contrary to other states' decisions, that no forfeiture occurred. As the Illinois Supreme Court has opined in *dicta,* the cases holding that the

[3] Both of the decisions the State cites from federal courts of appeals and state courts of last resort that reached similar conclusions after *Crawford* but before *Davis* also involved intentional killings. *See United States v. Garcia-Meza,* 403 F.3d 364 (6th Cir. 2005) (first-degree premeditated murder); *State v. Meeks,* 88 P.3d 789 (Kan. 2004) (first-degree premeditated murder).

intentional killing of a witness triggers forfeiture "might . . . be reconcilable with the general rule that intent is required." *Stechly*, 870 N.E.2d at 352.

> Notwithstanding that some cases contain broader language, the above cases have essentially held that the prosecution need not *prove* that the defendant committed murder with the intent of procuring the victim's absence. This is consistent with presuming such intent when the wrongdoing at issue is murder. When a defendant commits murder, notwithstanding any protestation that he did not specifically intend to procure the victim's inability to testify at a subsequent trial, he will nonetheless be sure that this would be a result of his actions. . . . Although we express no opinion on the topic, as it is not before us on this appeal, the total certainty that a murdered witness will be unavailable to testify could theoretically support presuming intent in the context of murder, while requiring proof of intent in all other situations.

Id. at 352-53. The New Mexico Supreme Court likewise stated in the decision at issue here that "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." Pet. App. 18. It therefore declined to resolve whether "the doctrine [of forfeiture] might be said to encompass premeditated murder." Pet. App. 17.

Allowing further percolation on the question whether forfeiture automatically applies whenever the defendant intentionally murdered a witness would allow New Mexico and other states to sort out their views on this issue. It also would allow California, Wisconsin and Washington to consider whether their "no specific intent" holdings apply beyond the context of intentional killings. *Cf. State v. Henderson*, 160 P.3d 776, 793 (Kan. 2007) (holding, despite previous decision concluding that forfeiture occurred when defendant murdered victim, that no forfeiture occurred in child abuse case because the defendant did not "threaten[]" the victim or "procure[] [the victim's] unavailability"). If

a genuine conflict develops on either of these issues, this Court will have ample opportunity to resolve it.

2. There is a deeper problem that makes the question the State presents unripe for review. "[T]he applicability of the forfeiture-by-wrongdoing rule requires a factual determination that [appellate courts are] ill-equipped to make in the first instance." *Stechly*, 870 N.E.2d at 353. Yet the trial in this case, as in every other case to consider the issue (save one irrelevant exception[4]), occurred prior to this Court's decision in *Crawford*, when recourse to the forfeiture doctrine was typically unnecessary. As a result, none of the parties in any of these cases even raised the forfeiture doctrine in the trial court. And, quite predictably, none of the trial courts in these cases held any hearings or developed any records with respect to the issue.

This lack of factual development would not only hamper this Court's ability to elucidate the contours of the forfeiture doctrine by applying it to a record, but it also would cloud this Court's consideration of the very equities at the heart of the question presented. At oral argument in *Davis* and its companion case, *Hammon v. Indiana*, some members of this Court suggested that their views on the proper test for forfeiture under any particular set of circumstances might turn to some degree on how difficult certain facts are to prove in pretrial hearings. *See* Tr. of Oral Arg. 23-24, *Davis v. Washington*, No. 05-5224 (March 20, 2006); Tr. of Oral Arg. 21-24, *Hammon v. Indiana*, No. 05-5705 (March 20, 2006). And indeed, a common theme in the cases holding that intentionally

[4] The trial court in *Jensen* held a hearing after *Crawford* was announced. *See Jensen*, 727 N.W.2d at 523. But the hearing apparently focused only on whether the hearsay statements at issue were testimonial; after reviewing the trial court's decision in that respect in an interlocutory appeal, the Wisconsin Supreme Court remanded the case "for a pre-trial decision by the [trial] court" concerning whether the defendant murdered the witness, thereby forfeiting his right to confrontation. *Id.* at 535.

killing a witness triggers the forfeiture doctrine regardless of any direct evidence that the defendant did so to procure the witness's unavailability is that it is too much to ask for the prosecution to make an evidentiary showing of specific intent to silence a witness. The State even closes its petition in this case by suggesting that a broad conception of forfeiture is necessary essentially for prophylactic reasons – that is, to avoid unintentionally rewarding the narrow acts of "intimidat[ing]" and "murder[ing]" witnesses in judicial proceedings. Pet. 14.

The problem is that until prosecutors in these cases actually try to prove in evidentiary hearings that defendants intentionally killed witnesses to procure their unavailability, there is no way to assess the strength of their prophylactic argument for a broad conception of forfeiture. It might well be that in hearings conducted under the relaxed evidentiary standards that *Davis* invites, *see* 126 S. Ct. at 2280, prosecutors could prove defendants' intent in appropriate cases – as, apparently, they were able to do for centuries pre-dating *Crawford*, given that apparently every pre-*Crawford* decision finding forfeiture includes a finding of specific intent. This might suggest, in turn, that the handful of recent appellate decisions ruling that prosecutors need not directly prove specific intent are overreacting in attempts to uphold convictions for extremely serious crimes that were obtained before *Crawford* – that is, before anyone had reason to think they might be vulnerable on appeal. Unless and until this Court allows this issue to percolate in the post-*Crawford* world long enough for prosecutors, defense lawyers and trial courts to grapple with the forfeiture doctrine in actual evidentiary hearings, it will be impossible to know for sure how various practicalities play out on the ground. And until

that happens, this Court will lack potentially critical information for reaching any decision on the subject.

C. The New Mexico Supreme Court's Decision is Correct.

The New Mexico Supreme Court's decision is fully consistent with this Court's precedent, which repeatedly has reinforced the importance of requiring a showing that a defendant intended to procure a witness's unavailability before holding that he forfeited his right to confrontation. In *Davis*, this Court explained that forfeiture applies "when defendants *seek to undermine the judicial process* by procuring or coercing silence from witnesses and victims." *Id.* at 2280 (emphasis added). That is because defendants have a duty "to refrain from acting in ways that destroy the integrity of the criminal-trial system." *Id.* To make matters even more clear, this Court stated that Federal Rule of Evidence 804(b)(6) "codifies" the forfeiture doctrine. That Rule expressly requires limits the forfeiture concept to wrongdoing that is "intended to . . . procure the unavailability of the declarant as a witness." The *Davis* Court did not expressly contemplate a scenario in which the defendant killed (as opposed to merely intimidated or coerced) the witness, but neither did it suggest that any exception with respect to killings might exist.

In its only other decision to consider the issue in any depth, this Court held in *Reynolds v. United States*, 98 U.S. 145 (1878), that the defendant forfeited his right to confrontation through conduct specifically intended to prevent a witness from testifying – namely, concealing the witness and keeping her out of reach of the government's subpoena power. *Id.* at 160. Not only did this Court emphasize that the defendant intentionally "kept away" the witness, but it also explained that it was "content with th[e] long-established usage" of the forfeiture concept in common law cases, which applied the

doctrine only when defendants acted with the specific intent to prevent witnesses from testifying against them. *Id.* at 158-59 (reviewing common law authorities).

Post-*Crawford* courts adopting a broader conception of the forfeiture doctrine in the intentional homicide context have emphasized that the doctrine is "grounded in equity." *Mason*, 162 P.3d at 404; *see also Giles*, 442-43 (agreeing with courts that "emphasize the equitable aspects of the rule"). It is true enough that the doctrine is grounded in equity. But simply invoking the notion of equity hardly compels the conclusion that intentionally killing a person is automatically enough to forfeit the right to confrontation. Equity does not mean that courts can take whatever measures they happen to think is fair in light of the defendant's past actions. In the context of constitutional criminal procedure rights, equity traditionally is limited to meaning that courts may hold that even when defendants do not voluntarily waive a given right, they forfeit it when they tamper with the "judicial process" or "act[] in ways that "destroy the integrity of the criminal-trial system." *Davis*, 126 S. Ct. at 2280; *see also Harris v. New York*, 401 U.S. 222, 225 (1971) (defendant forfeits right to suppress voluntary confession taken in violation of *Miranda* when he exploits the suppression ruling by taking the stand and testifying inconsistently with the confession); *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (defendant forfeits his right to be present at trial when, "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom"); *Walder v. United States*, 347 U.S. 62, 65 (1954) (defendant forfeits his right to exclude physical evidence obtained in violation of the Fourth Amendment when he resorts to

offering "perjurious testimony in reliance on the Government's disability to challenge his credibility"). There is no reason why that same conception of equity – as protecting intentional attempts to thwart, disrupt, or manipulate ongoing criminal proceedings, but not extending beyond that realm – should not govern forfeiture doctrine in the context of the right to confrontation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this _____ day of August, 2007.

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