No. _____ 07-37

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?

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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

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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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