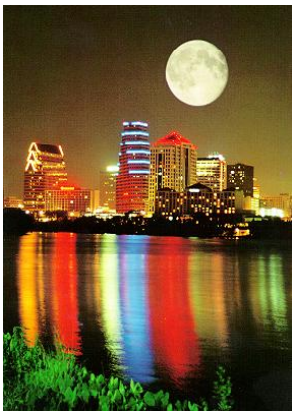

One Fabulous Skyline

TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-354-7823
Fax: 512-532-6282

Web Site: www.texindbar.org

Vol. 14, No. 24 - June 26, 2006

Case Name: Ray Gonzalez v. The State of Texas

- OFFENSE: Capital Murder - Life Sentence
- COUNTY: Bexar
- COURT OF APPEALS: San Antonio 2004
- C/A CITATION: 155 S.W.3d 603
- C/A RESULT: Conviction Affirmed
- CCA. CASE No. PD-0247-05
- DATE OF OPINION: June 21, 2006
- DISPOSITION: Court of Appeals Affirmed
- OPINION BY: Cochran, J. VOTE: 8-1-0
- TRIAL COURT: 399th D/C; Hon. Juanita Vasquez-Gardner
- LAWYERS: Julie Pollock (Defense); Enrico Valdez (State)

292 Hearsay - Confrontation / Oral Statements (Confrontation Clause - Crawford Violations - Dying Declarations): San Antonio police officers responded to a 911 call as the result of a shooting. Maria and Baldomero Herrera had both been shot while in their home. Baldomero was unconscious and died at the scene. Maria was dying, but still conscious and not aware that she was dying. She "excitedly" identified Appellant as the assailant by describing his appearance and the house across the street in which he lived. A few hours later, Maria was dead. Appellant drove the Herreras' new white Nissan truck to a cousin's apartment. He told the cousin he had acquired the truck as the result of a drug deal. An officer spotted the truck, which had been reported stolen, and along with other officers set up surveillance outside of the cousin's apartment complex. When Appellant got behind the wheel of the Nissan truck, the officers pursued him, and a chase ensued until Appellant drove into a dead-end. Appellant had Baldomero's wallet in his pocket, and Maria's blood was on his tennis shoes. At trial, the defense objected to the admission of Maria's not-quite-dying declarations as a violation of the Confrontation Clause. Appellant argued that the statements were not dying declarations; he pointed to the officers' testimony that Maria was not aware of the gravity of her condition. He also argued that her statements were not excited utterances because they were not spontaneous; instead, they were answers to police questions. The trial judge doubted that the statements were dying declarations, but he admitted them "mainly under the excited utterance" exception, noting that they also fell under the hearsay exceptions for present-sense impression and then-existing physical condition. The jury convicted Appellant of capital murder and sentenced him to life imprisonment. The Court of Appeals affirmed the conviction, holding that Appellant is precluded from objecting to the introduction of Maria's statements on Confrontation Clause grounds because it was his own criminal conduct (in this case, murder) that rendered Maria unavailable for cross-examination (see , Vol. 13, No. 1; 01/10/2005).

Holding: Despite the Supreme Court's ruling in Crawford v. Washington, the Supreme Court recognized that equitable exceptions to the Confrontation Clause may still apply, and it specifically mentioned the doctrine of forfeiture by wrongdoing which "extinguishes confrontation claims on essentially equitable grounds" as one that it accepts. There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness's unavailability, he intended to prevent the witness from testifying. Though the Rule 804(b)(6) of the Federal Rules of Evidence may contain such a requirement, the right secured by the Sixth Amendment does not depend on, in the recent words of the Supreme Court, "the vagaries of the Rules of Evidence." 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. Appellant, 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. However, an examination of the entire record clearly supports the inference that Appellant shot the Herreras to silence them. They knew him. They lived across the street from his grandmother and were friends with her and other members of her family. The evidence strongly suggests that the procurement of the Maria's absence was motivated, at least in part, by Appellant's desire to permanently silence her and prevent her from identifying him. We affirm the decision of the Court of Appeals. We express no opinion on the Court of Appeals's broader holding that the procurement of a witness's absence need not be motivated by a desire to silence the declarant for the forfeiture by wrongdoing doctrine to apply.

Sidebars: (Alan Curry) The courts are going to have to decide, and I hope quickly, whether, before the "forfeiture by wrongdoing" doctrine can be applied, a defendant was motivated to make sure that the declarant would be absent from trial. Now that a State's-oriented interpretation of "testimonial" or "interrogation" has essentially been rejected in Davis v. Washington (see ☙, Vol. 6, No. 25; 06/29/2006), I predict that the State will be requesting "forfeiture by wrongdoing" hearings much more often, especially in domestic violence cases. What will also have to litigated is whether the State's burden of proof is by a preponderance of the evidence, and whether the hearsay statements themselves can be utilized in support of the State's claim that the defendant forfeited his right to confrontation because of his own misconduct.