No. 07-6053

In The

Supreme Court of the United States

DWAYNE GILES,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

BRIEF OF RICHARD D. FRIEDMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

I am a legal academic, and since 1982 I have taught Evidence law. Much of my academic work has dealt with the confrontation right. In 2005-06, I successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 126 S.Ct. 2266 (2006)). I have a particular interest in forfeiture doctrine, because I believe a robust conception of the confrontation right cannot be developed without a robust conception of how the right might be forfeited. Among my writings on forfeiture are *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997) [hereinafter "*Chutzpa*"], and *Forfeiture of Confrontation Rights After* Crawford *and* Davis, 19 REGENT U.L. REV. 489 (2006-07) [hereinafter "*Forfeiture of Confrontation Rights*"]; in addition, I have made several postings on forfeiture on the Confrontation Blog, http://confrontationright.blogspot.com, which I have maintained since 2004 to report and comment on developments related to the confrontation right. As I have done in several other cases, in this Court and in others, I am submitting an *amicus* brief on behalf of myself only; I have not asked any other person or entity to join it. I am doing this so that I can express my own thoughts, entirely in my own voice.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief.

I am entirely neutral in this case, in the sense that my interest is not to promote an outcome good for one party or the other, or for prosecutors or defendants as a class. Rather, my interest, in accordance with my academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime. In this case, I submitted an *amicus* brief in support the petition for *certiorari*, brought by a criminal defendant, because I believe that this is an ideal case for the Court to begin development of the doctrine of forfeiture of the confrontation right – but my views on the merits of the question presented are far more in line with those of the prosecution, and so I am submitting this brief on the merits in support of the respondent. In one respect, however, not directly involved in this case but important in constructing and understanding an optimal theoretical framework for resolving it, my views are contrary to those of prosecutors: I believe that even though the accused presumptively forfeits the confrontation right if by his wrongdoing he renders a witness unavailable to testify at trial, the prosecution cannot invoke forfeiture doctrine if it forgoes reasonable opportunities to preserve part or all of the confrontation right.

SUMMARY OF ARGUMENT

In this case, petitioner contends that his rights under the Confrontation Clause of the Sixth Amendment preclude admission against him of a testimonial statement made by the woman he killed, even assuming for purposes of this question that he killed her without justification. Petitioner contends for an absolute rule that an accused cannot forfeit confrontation rights unless he engages in wrongful conduct *for the purpose* of rendering the witness unavailable. By contrast, *amicus* contends that if an accused engages in serious misconduct that has the foreseeable consequence of rendering a witness unavailable to be a witness subject to confrontation, the accused should be deemed to have forfeited the confrontation right. Three basic reasons support this principle, rather than the strict purpose requirement advocated by petitioner.

First, the "essentially equitable" nature of forfeiture doctrine, *Crawford v. Washington*, 541 U.S. 36, 62 (2004); *Davis v. Washington*, 547 U.S. 813, 833 (2006), is incompatible with petitioner's argument. If an accused engages in serious misconduct that has the foreseeable consequence of rendering a witness unavailable subject to confrontation, then equitable considerations demand that the accused forfeit the right to object to introduction of the witness's statement on the ground that he has not had an opportunity to cross-examine her. He cannot be heard to complain about the foreseeable consequences of his own misconduct. In this case, there is no need to apply this basic principle any further than to the core case of forfeiting misconduct: murder. Later cases can deter-

mine the outer bounds of the principle – including the responsibility of the prosecution, if it wishes to invoke forfeiture doctrine, to act reasonably to preserve the confrontation right to the extent reasonably practicable.

Second, limiting forfeiture doctrine in the way that petitioner contends would require the addition of a bizarre and ill-fitting complexity to the straightforward structure of confrontation law enunciated by *Crawford*. It is common ground that the Confrontation Clause does not require exclusion of most statements fitting within the traditional "dying declaration" exception to the rule against hearsay, but the question is why. Because the narrow forfeiture rule advocated by petitioner does not reach most of these statements, petitioner is forced to contend that the Confrontation Clause itself contains an unexpressed "dying declaration" exception. The rationale for such an exception makes little sense on its own terms, and its reliability-based nature flies squarely in the face of *Crawford*. A much simpler, more persuasive explanation for admitting these statements, one that fits *Crawford* far better – and so will tend to preserve the robustness of the confrontation right – is that if the accused murders a witness and the state has no reasonable opportunity to arrange for a confrontation between the two, the accused should be deemed to have forfeited the confrontation right.

Finally, the principle advocated by *amicus* is in accordance with the actual holdings of framing-era criminal courts. Notwithstanding their rhetoric, those courts did not create a general rule admitting statements in criminal cases made while the declarant believed himself on the verge of death. Rather, they

admitted statements made by dying *victims of homicides* – and then only if either (a) the accused had an opportunity to be confronted with the speaker, or (b) the speaker believed himself to be on the verge of death. These results square well with a doctrine under which an accused who murders a witness forfeits the right to demand confrontation with the witness so long as the state has acted reasonably to preserve the right to the extent feasible; the victim's belief in the imminence of her own death was a reasonable factor to use in effectively marking when the state may invoke forfeiture theory without arranging for a confrontation between a murderer and his victim.

ARGUMENT

I. EQUITABLE CONSIDERATIONS PRECLUDE A RULE UNDER WHICH AN ACCUSED WHO MURDERS A WITNESS COULD FORFEIT THE CONFRONTATION RIGHT ONLY IF A MOTIVATING PURPOSE WAS TO RENDER THE WITNESS UNAVAILABLE TO TESTIFY.

The petitioner killed Brenda Avie and objects on Confrontation Clause grounds to admission of a testimonial statement she made after an earlier incident several weeks beforehand. He contends that, even assuming for purposes of the evidentiary question that he murdered Avie, he cannot be held to have forfeited the confrontation right unless he murdered her *for the purpose* of rendering her unavailable to testify as a witness. If the contention appears at first glance to be counter-intuitive, close analysis does not give it any greater appeal.

As the Court stated in *Crawford v. Washington*, 541

U.S. 36, 62 (2004), and repeated in *Davis v. Washington*, 547 U.S. 813, 833 (2006), the doctrine that an accused may forfeit the confrontation right by wrongdoing that renders the witness unavailable to testify is "essentially equitable" in nature. In *Reynolds v. United States*, 98 U.S. 145 (1879), this Court's first case involving forfeiture of the confrontation right, it succinctly expressed the equitable underpinnings of the doctrine: "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Id.* at 158.

This case features three factors that make it an easy case for application of this principle:

(1) The accused has engaged in *serious misconduct* against the witness.[2] Indeed, the wrongdoing here –

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[2] The California Supreme Court concluded that there was clear and convincing evidence that the petitioner committed a criminal homicide against the witness. Jt. App. at 64. Petitioner does not appear to contend that a constitutional problem is created by the fact that this issue – whether he committed a criminal homicide – arises in determining both (1) whether he forfeited the confrontation right, and (2) whether he is guilty on the merits. And indeed, there is no genuine concern about "bootstrapping" or circularity. The trial judge, in determining forfeiture, and the jury, in determining guilt on the merits, have different functions to perform. They do so on different bodies of evidence, under different standards of persuasion, and with different consequences. The fact that in some settings the same factual question is before them poses no logical or practical difficulty; the judge does not announce to the jury her decision on the predicate matter. The setting is closely analogous to a prosecution for conspiracy in which the admissibility of a key statement depends on a determination by the court that the accused engaged with the declarant in the very conspiracy charged. *See, e.g.*, Fed. R. Evid. 801(d)(2)(E); Bourjaily v. United States, 483 U.S. 171, 175 (1987). *Amicus* has made an extended argument on this point in *Chutzpa*, *supra*, 31 ISRAEL L. REV. at 521-24.

murder – is the most grievous act one person can commit against another.

(2) The misconduct *clearly rendered the witness unavailable to testify*. That is, there is no doubt either that the witness could not appear to testify at trial – or at any other proceeding after the fatal incident – or that the reason for her inability is that the accused killed her. Thus, the state had no opportunity to mitigate the problem by arranging for a confrontation at any time after that incident.

(3) The witness's unavailability was the *foreseeable, natural consequence* of the wrongdoing. From the instant the petitioner cast the fatal blows against Avie, it appeared highly likely that the effect would be that Avie would not be able to testify.[3]

It would be abhorrent to prevent the jury from hearing Avie's testimonial statement on the ground that the petitioner did not have an opportunity to cross-examine her. He did not have that opportunity because he *murdered* her. That he did not do so *for the purpose* of rendering her unavailable as a witness is of minimal significance.[4] If he considered the predictable

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[3] People v. Stechly, 225 Ill.2d 246, 287-88, 870 N.E.2d 333, 352-53 (Il. 20007), while generally insisting on a purpose requirement for forfeiture, attempts to distinguish murder cases on the ground that in a murder case "more than a possibility, or a substantial likelihood, a defendant knows with absolute certainty that a murder victim will not be available to testify." That is not true, however. When the accused casts the fatal blow, he cannot be absolutely certain that the witness will not survive the blow, and even if the blow does prove fatal he cannot be absolutely certain that she will not survive long enough to testify subject to confrontation at trial or some other proceeding. But of course this effect is highly probable and foreseeable.

[4] This is not to say that in all circumstances a purpose to render

consequences of his conduct, he realized full well that this would be the effect. And the equities of the situation hardly tilt any more in his favor if he gave no heed to the consequences of his conduct.[5]

Petitioners amicus National Association of Criminal Defense Lawyers ("NACDL") argue at some length that, if a purpose requirement is not attached to

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the witness unavailable is necessarily irrelevant in deciding whether the accused has forfeited the confrontation right. Suppose the accused engages in conduct that is not wrongful but is motivated by a desire to render the witness unavailable, and succeeds in that objective. (For example, a brother might gently persuade his sister to assert her Fifth Amendment privilege rather than accept a plea deal that would result in her testifying against him.) Whether such conduct should result in forfeiture is, in the view of *amicus*, a close question – which of course does not have to be resolved here.

[5] In varied contexts, this Court has invoked the maxim that a person is presumed to intend the natural consequences of his own acts. *E.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 932 (2005); Reno v. Bossier Parish School Bd., 520 U.S. 471, 487 (1987). Sandstrom v. Montana, 442 U.S. 510 (1979), is not to the contrary. There the Court held that an instruction that the accused was presumed to intend the ordinary consequences of his voluntary acts was invalid because the jury may have interpreted it as effectively limiting the prosecution's burden of proving every element of a criminal offense beyond a reasonable doubt. No such concerns arise in the present context, concerning a determination by the court on a preliminary matter.

In a case such as this – in which victim made a testimonial statement against the accused before the final assault and the accused was presumably aware of that fact — denying forfeiture absent a showing of purpose to render the witness unavailable would create a horribly perverse incentive, to "finish the job" and make the assault a fatal one: If the accused had other reasons for the assault, it would be hard for the court to find that the killing was motivated by desire to prevent the victim from testifying, and so the statement would not be admitted.

forfeiture doctrine, the doctrine is capable of abuse. *Amicus* agrees that abuse is a significant danger, and discusses here two respects in which this is so. But the solution lies in careful attention to the equities of the situation at hand, not in declining to apply forfeiture doctrine where the equities plainly call for it.

1. One source of potential abuse is failure on the part of the state to act responsibly in preserving the confrontation right to the extent reasonably possible. Thus, suppose that the victim of a life-threatening assault makes a testimonial statement identifying the assailant, and that for some time after she is in such condition that it would be neither infeasible nor inhumane for her to give a deposition, subject to confrontation. (As discussed below, this was standard practice in the founding era.) Suppose further that the state, knowing of the possibility that the victim will not survive until a trial and satisfied with the statement it has in hand, takes no steps to give the accused an opportunity to be confronted with the victim. If the victim does indeed die, so the trial becomes one for murder, the state should not be allowed to invoke forfeiture doctrine to usher the statement into evidence. Of course, the accused was responsible for the ultimate death of the witness, and thus for rendering impossible the ideal opportunity for confrontation, testimony at trial. But by hypothesis, the accused's conduct did not preclude a second-best opportunity, at a pre-trial deposition or hearing. And the state, the proponent of the evidence and the entity responsible for providing the accused with an opportunity for cross-examination, has, by hypothesis, negligently or even willfully let that second-best opportunity disappear. The state should not be

allowed to nullify the accused's constitutional right to confrontation in this way.[6]

In the present case, the issue does not arise; there is no suggestion that it would have been feasible for Avie to give a deposition after the fatal attack.[7] But as developed further below, *amicus* believes that the responsibility of the state to take reasonable steps to preserve the confrontation right to the extent possible – what he has referred to as a mitigation requirement[8] – is essential to ensure that forfeiture doctrine achieves equitable results, is theoretically coherent, and accords with historical practice. There is no need

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[6] *Cf. Motes v. United States*, 178 U.S. 458, 471 (1900) (Government precluded from offering prior testimony of witness given that witness was absent from trial "due to the negligence of the officers of the government"). In *Motes*, the accused was blameless, which is not true in the hypothetical posed here. But for the reasons suggested above, this factor is not decisive. The accused should not be held to have forfeited an opportunity for confrontation that could and would have occurred, absent negligent or willful failure by the government, even given the accused's misconduct.

[7] A deposition may have been possible before the fatal attack. after Avie made her testimonial statement in response to the prior incident. Whether the state's failure to take advantage of such an opportunity should preclude it from invoking forfeiture after a subsequent, fatal attack is, in the view of *amicus*, a difficult and complicated question. (The state obviously did not know that a murder would ensue. On the other hand, it failed to make an adequate response to a serious complaint of violence, either to prevent recurrence or to preserve testimony; perhaps domestic violence prosecutions will be improved if prosecutors know that they may be dissipating evidence if they do not respond to such complaints.) In any event, the question is not presented here, and *amicus* believes the Court should do nothing to preclude unimpaired consideration of it in a future case.

[8] *See, e.g., Forfeiture, the Prosecutorial Duty to Mitigate, and Rae Carruth*, http://confrontationright.blogspot.com/2005/03/forfeiture-prosecutorial-duty-to.html.

in this case to develop a doctrine of mitigation, but its development should not be foreclosed, and recognizing its existence may help the Court place its decision in a sound theoretical context.

2. *Amicus* believes that forfeiture may arise from a serious assault, or series of such assaults, that has the foreseeable consequence of so traumatizing the witness that she is unable to testify subject to cross-examination. Indeed, *amicus* believes that recognizing this principle is critical in preventing courts from adopting an unduly narrow conception of what is testimonial for purposes of the Confrontation Clause.[9] But the confrontation right would be severely threatened if the trial court were allowed to conclude

[9] Thus, in *Hammon v. Indiana* (the companion case to *Davis)*, the State and supporting *amici*, in asking the Court not to characterize the statements involved there as testimonial, emphasized the intimidating impact of abusive behavior. This Court properly refused to "vitiate" the constitutional right in response to this problem; rather, than denying the plainly testimonial character of the statements, the Court pointed to the "rule of forfeiture" as an appropriate remedy. 547 U.S. at 832-33.

This dynamic highlights a key difference between forfeiture of hearsay objections and forfeiture of the confrontation right. The rule against hearsay has become extremely porous. It is not surprising, then, that the Federal Rules of Evidence were in force for more than 20 years before they included a forfeiture rule at all. Even with no forfeiture rule, or only a limp one, in effect, a court inclined to admit a statement will not have difficulty finding a way around the rule; *see, e.g.*, Fed. R. Evid. 807 (residual exception). Given *Crawford*, the confrontation right, by contrast, is rigid and categorical in nature. If the rule of forfeiture of the confrontation right is not fully developed, therefore, inequitable results will frequently occur. Accordingly, in both *Crawford* and *Davis* the Court immediately recognized the importance of forfeiture doctrine. In short, the bounds of the Federal Rules' version of forfeiture, Rule 804(b)(6), have no bearing at all on the constitutional question presented here.

that the accused forfeited the right on the basis of the prosecutor's statement, "I have spoken to the victim, and she has been so traumatized by the accused's misconduct towards her that she is now unable to testify." This possibility should not be prevented by the artifice of adding a purpose requirement to forfeiture doctrine, or by denying forfeiture in a case like this, which so plainly calls for it. Rather, as cases arise that are missing one or more of the elements that make this case an easy one, the Court can delineate the proper bounds of the doctrine.

Thus, a case involving not murder but wrongful conduct that allegedly had an intimidating effect on the witness would raise complexities not involved here: Should the witness, who could be brought to court but is frightened, be deemed unavailable? If so, should the unavailability be attributed to the wrongful conduct of the accused? If so, was the unavailability a foreseeable, natural consequence of the accused's misconduct? What steps should the state be required to take to ensure that it has acted reasonably in an attempt to preserve the confrontation right in whole or in part? (*Amicus* believes that some such mitigation requirement is essential, both as a matter of theory and practically, to ensure that forfeiture doctrine is not abused in the assault setting. *See Forfeiture of Confrontation Rights*, *supra*, 19 REGENT U.L. REV. at 494-95.)

Amicus does not pretend that these issues will be easy to resolve. On the contrary, he believes that many cases will be excruciatingly difficult. But that is no reason to cut forfeiture doctrine short. *Crawford* recognized that it would be a challenging and complex task to define the outer bounds of the category of

testimonial statements – but that did not stop the Court from enunciating the concept and applying it to an easy case. Similarly, in this case, the Court can adopt the sound principle that when the accused engages in serious misconduct that has the foreseeable consequence of rendering the witness unavailable, both at trial and for any pretrial proceeding that might reasonably be held, he forfeits the confrontation right with respect to any testimonial statements the witness has made. Further, it can apply that principle in its most obvious setting, where the wrongful act rendering the witness unavailable is murder. And other cases it can leave to the future.

II. IMPOSING A PURPOSE REQUIREMENT ON FORFEITURE DOCTRINE WOULD REQUIRE AN ADDITION TO CONFRONTATION DOCTRINE THAT MAKES NO SENSE ON ITS OWN TERMS AND THAT CONFLICTS WITH THE THEORY UNDERLYING *CRAWFORD*.

Consider the classic "dying declaration": After receiving a fatal blow, the victim, on the edge of death, makes a statement identifying his killer. It is common ground in this case that these statements ought ordinarily be admitted. Indeed, well over a century ago, this Court noted that these statements had been admitted "from time immemorial" and that "no one would have the hardihood at this day to question their admissibility." *Mattox v. United States*, 156 U.S. 237, 243-44 (1895). The same is no less true today. But if they are clearly admissible, the question remains why, given that many, if not all, of these statements are testimonial[10] and most have not been subjected to

[10] *Crawford*, 541 U.S. at 56 n.6. *Amicus* believes that all, or

cross-examination.

Petitioner cannot acknowledge that these statements are admissible as an application of forfeiture doctrine, because in most circumstances there is no evidence that the accused committed the murder for the purpose of rendering the victim unavailable to be a witness. Thus, petitioner is forced to contend that there is a special exception to the Confrontation Clause for "dying declarations," crafted according to traditional lines.[11] There are several serious problems with this approach.

(1) The rationale usually given for the exception is that "the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath," *Mattox*, 156 U.S. at 244. But whatever the force of this rationale in earlier times, one can hardly say that today the prospect of imminent death will universally induce speakers to tell the truth so that they will avoid eternal damnation. Imagine this thought experiment: Defense counsel and the accused are given a special opportunity to visit the hereafter to examine the deceased witness. According to the traditional rationale, articulated by this Court in a

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virtually all, dying declarations identifying the speaker's killer should be deemed testimonial. Whether they are made directly to law enforcement authorities or not, such statements are not idle chatter for the amusement and edification of the listener; they are an attempt to bring the speaker's killer to justice.

[11] *Crawford*, while clearly indicating distaste for the possibility, explicitly left unresolved the question whether there is such an exception. 541 U.S. at 56 n.6 ("We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.").

relatively recent pre-*Crawford* case, *Idaho v. Wright*, 497 U.S. 805 (1990), counsel would presumably turn down the opportunity, because it would be of "marginal utility." *Id.* at 820. "Couldn't do anything with her," counsel might say. "She was about to go into the presence of her Maker when she made that statement, and she wouldn't have done so with a lie upon her lips [*see id.*, *quoting Queen v. Osman*, 15 Cox Crim.Cas. 1, 3 (Eng.N.Wales Cir.1881) (Lush, L.J.)], so there's no way I could shake her story."

(2) If the rationale were correct, it would support an exception for any statement made by the speaker while believing that death was imminent. But in fact the exception as traditionally expressed is far more limited. In particular, it is limited to statements "concerning the cause or circumstances of what the declarant believed to be impending death." *E.g.*, Fed. R. Evid. 804(b)(2).

(3) At most, the rationale would suggest that dying declarations are unlikely to be the result of deliberate mendacity on the part of the speaker. It would provide no reason to believe that the statement is free from other defects, most significantly that of failed perception. And yet some courts have applied the exception in circumstances in which the speaker had a significantly impaired ability to perceive the assault.[12]

(4) Without extreme distortion, the exception cannot reach some statements that equity plainly

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[12] See, e.g., People v. Taylor, 275 Mich. App. 177, 737 N.W.2d 790 (Mich. App.), *leave to appeal granted*, 480 Mich. 946, 741 N.W.2d 24 (2007), in which the court held admissible a victim's statement identifying the man who allegedly shot him from outside his bedroom window while he lay in bed overnight.

requires be admitted.[13] Consider the recent and highly publicized Jensen case. Julie Jensen wrote a letter, to be opened in the event of her death, indicating that if she died suddenly her husband Mark should be the prime suspect. Julie did indeed die, of poisoning, and Mark, on the basis of considerable evidence, was charged with the murder. The prosecution sought to introduce the letter, and the Wisconsin Supreme Court, relying on the decision of the California Supreme Court in this case, ultimately (and properly) held that Mark could be held to have forfeited the confrontation right.[14] But after the grant of *certiorari* in this case, the trial court sought to protect against the possibility that this Court would reverse the California decision. Accordingly, it held that there is an exception to the Confrontation Clause for dying declarations and that Julie's statement fit within it – on the mind-boggling theory that the statement, though written well before her death, did not become effective until it was read by another person after her death. (Perhaps it should be called a dead declaration rather than a dying one.)[15]

(5) Most fundamentally, even if the traditional rationale were persuasive on its own terms, it would at most support a conclusion that dying declarations are reliable. But to base a rule on that conclusion conflicts

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[13] *Amicus* believes this case is an example. The statement involved here does not fit the "dying declaration" exception – and yet, as explained in Part I, equity clearly requires that it be admissible.

[14] State v. Jensen, 299 Wis.2d 267, 727 N.W.2d 518 (2007).

[15] Links to video clips of the trial court's ruling, and of argument in response to it, may be found in the commentary to the blog posting *"If anything happens to me . . .,"* http://confrontationright.blogspot.com/2008/03/if-anything-happens-to-me.html.

squarely with the essential theory of *Crawford*:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. . . . [T]he Confrontation Clause commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

541 U.S. at 61. How bizarre, then, it would be to incorporate an exception for dying declarations – that is, to carve out one area in which the Clause does not apply precisely because the statements are believed to be so reliable.

Now note how sensibly the classic dying declaration case is addressed by forfeiture doctrine – assuming no purpose requirement is grafted onto that doctrine. The accused has forfeited the confrontation right, and therefore the dying statement is admissible, *because he murdered the victim*. (Of course, this principle applies only if the trial court makes a preliminary finding that in fact the accused murdered the victim. But so far as *amicus* is aware, in every dying declaration case, the court could and would have found at least to a preponderance of the evidence that he did so, and indeed a prosecution in which this condition is not met, despite the dying victim's accusation, is highly unlikely.[16]) The traditional limitation of the exception to statements in a homicide prosecution makes perfect

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[16] *Davis* strongly suggested that the victim's own statements may be considered in deciding whether the accused forfeited the confrontation right. 547 U.S. at 833. *Cf.* Bourjaily v. United States, 483 U.S. 171 (1987) (similar rule with respect to conspirators' statements).

sense; it is the homicide that causes the forfeiture.[17] So too does the limitation to statements concerning the cause of the speaker's expected death; that is the type of statement that a lingering victim may make that could become material in a prosecution for her murder. And the qualification that the declarant must have anticipated that her death was impending also fits quite well: If the qualification is not met, then probably a deposition of the victim could reasonably have been held, and so preserved an opportunity for confrontation, but if the qualification is not met, then it probably would not have been feasible, or humane, to hold a deposition.

Under the view presented here, then, the Confrontation Clause prohibits use of a testimonial statement against an accused to prove the truth of what it asserts unless the accused either has had or will have an opportunity to confront the witness (which should occur at trial unless the witness is then unavailable) or has rendered the confrontation unfeasible. *See Forfeiture of Confrontation Rights*, *supra*, 19 REGENT U.L. REV. at 489. *There are no exceptions.*[18]

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[17] Some 18th century civil cases were receptive to statements by deceased declarants, but not all were, *see* Craig v. Anglesea, 17 How. St. Tr. 1140, 1161 (1743), and the rule quickly became limited to criminal cases charging homocide. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 277 (J.H. Chadbourn rev. 1974). The Federal Rules of Evidence version of the exception, Rule 804(b)(2), was drawn more expansively to include civil cases. *See* Adv. Comm. Note. to Fed. R. Evid. 804(b)(2). So far as *amicus* is aware, the rule has never been applied to non-homicide criminal cases. *See* LEONARD MACNALLY, THE RULES OF EVIDENCE 381, 386 (1802) (referring to rule as applicable "on a trial for murder" and in civil cases); ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE 124 (1810) (similar).

[18] Forfeiture, in this view, is not best considered an exception to

Though of course complexities and ambiguities lie within this framework, its basic principles are clear and simple, making them easily understood, worthy of respect, and so capable of enduring for generations. *See* JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 112 (1992). That is a benefit utterly lost if the structure depends on incorporating an unpersuasive exception that warrants ridicule rather than respect, and that conflicts with the basic nature of the confrontation right. Over the long run, the devastating flaws in the approach advocated by the petitioner would have a substantially corrosive effect on that right.

III. A PURPOSE REQUIREMENT IS INCONSISTENT WITH THE RESULTS OF FRAMING-ERA CASES.

In light of the considerations presented above, a purpose requirement should not be engrafted onto

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the right, but rather, like waiver, the consequence of the accused's own conduct estopping him from asserting the right in given circumstances. The accused may be estopped from later asserting the confrontation right not only if he renders the witness unable to testify subject to confrontation but also if he pleads guilty, Boykin v. Alabama, 395 U.S. 238, 243 (1969), consents to admission of the evidence, Diaz v. United States, 223 U.S. 442, 450 (1912), voluntarily absents himself from trial, Taylor v. United States, 414 U.S. 17 (1973), or so disrupts trial that he is excluded from it, Illinois v. Allen, 397 U.S. 337, 342-43 (1970). The accused can be estopped from asserting most of the rights enumerated in the Sixth Amendment. *See, e.g.,* People v. Ortega, 12 Misc.3d 1182(A), 824 N.Y.S.2d 765 (N.Y. Sup. Ct. 2006) (citing forfeiture holdings in several contexts, including speedy trial and right to counsel).

forfeiture doctrine unless that was the unmistakable command of the framers of the Confrontation Clause. And that is not remotely true.

At the outset, it must be recognized that forfeiture doctrine – the existence of which is not disputed – is not prescribed in the text of the Constitution. It is, as this Court has repeatedly indicated, equitably based. *Reynolds*, 98 U.S. at 158-59; *Crawford*, 541 U.S. at 62; *Davis*, 547 U.S. at 833. Traditionally, it has been based on a principle that goes back at least to Roman law,[19] and that has been a part of English law at least since the 16th century,[20] that no one should profit from his own wrong.[21] The text of the Confrontation Clause did not in itself express this principle – which of course prescribes forfeiture in the present case – but was rather written against the background of it. However significant framing-era practice may be in interpreting the text of the Constitution, other factors take greater prominence in resolving a question that the text does not address. *See Printz v. United States*, 521 U.S. 898, 905 (1997).

But in fact, if one focuses not on rhetoric but on the

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[19] Justinian's Digest prescribed as one of its Rules of Early Law: "No one is allowed to improve his own condition by his own wrongdoing." 2 THE DIGEST OF JUSTINIAN 50.17.134.1 (Alan Watson ed. rev. ed. 1998).

[20] Ridgeway's Case, 3 Co. Rep. 52a, 52b, 76 Eng. Rep. 753, 755 (K.B. 1594).

[21] *Amicus* has argued that this principle does not quite fit the forfeiture idea, and that the more precise governing principle is that no one should be able to complain about the consequences of his wrongdoing. *Chutzpa, supra*, at 516-17. But the two are sufficiently close that it is easy to slip from one to the other – and indeed this Court did so in consecutive paragraphs in *Reynolds*. 98 U.S. at 158-59.

actual results of cases from the framing era, it becomes clear that they are at least as consistent with the theory presented here as with the one presented by the petitioner and NACDL in their thoroughly researched briefs.

Putting aside one rather adventurous and obviously doomed argument advanced by the NACDL,[22] most of

[22] This is the argument that in the framing era forfeiture was nothing more than a species of unavailability justifying the admission of testimony that had been subjected to cross-examination. *If* this were true, and *if* the Court were bound to follow such a limitation, the devastation would be considerable. The version of forfeiture prescribed by Fed. R. Evid. 804(b)(6) would be rendered unconstitutional, as NACDL appears to recognize, Br. at 5, 13, but that would be just the beginning of the damage. Because the premise of the argument is that the only effect of forfeiture doctrine is to add to the otherwise permissible grounds for deeming a witness unavailable, then grounds not stated in the framing era would no longer be permissible – not just with respect to forfeiture but for all prior testimony. Thus, privilege, refusal to testify, lack of memory, and general inability of the prosecution to procure the witness's attendance, *see* Fed. R. Evid. 804(a)(1)-(3), (5), would all be rendered improper bases for treating prior testimony that had been taken subject to an opportunity for confrontation as satisfying the Confrontation Clause.

Moreover, the only conceivable consequence of any forfeiture doctrine, according to the NACDL argument, would be that the witness would be deemed unavailable, for purposes of determining whether a prior testimonial statement subject to an opportunity for confrontation should be admitted. If the witness was dead, forfeiture doctrine could therefore have no effect at all. If the witness was merely "kept away," the only effect of forfeiture doctrine would be to compensate, in that particular circumstance, for the fact that generally the prosecution could no longer maintain that a witness should be deemed unavailable for Confrontation Clause purposes if it was unable to secure her attendance, *see* Fed. R. Evid. 804(a)(5) – and even then the doctrine would only apply if the accused had been subjected to an

the space in the briefs of the petitioner and of the NACDL demonstrates two points that are neither controversial nor dispositive. First, the cases admitting statements under a "dying declaration" exception usually articulated a trustworthiness rationale, based on the imminence of apparent death. *Amicus* acknowledges this point, with the caveats that unavailability of the witness was also part of the rationale, that in this era treatise writers indicated a forfeiture rationale for dying declarations,[23] and that there are 19th century cases stating this rationale even

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opportunity for cross-examination. This, if the accused, knowing that a witness had given grand jury testimony implicating him, abducted the witness on the way to the trial and kept her hidden nearby until trial was over, forfeiture would not be possible.

Beyond that, the premise of the argument is not true. The NACDL points out that some of the early statements to which forfeiture doctrine applied were Marian examinations. Even assuming that these were uniformly subjected to an opportunity for confrontation – an assumption that has been hotly contested, *see* Thomas Y. Davies, *Revisiting the Fictional Originalism in* Crawford*'s "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557 (2007) – this proves nothing at all, because there was no rule that forfeiture could be applied only to such statements. Indeed, the NACDL acknowledges that cross-examination was not the rule in with respect to statements made before the coroner. Br. at 9. The NACDL is not helped by later American cases, not involving forfeiture, that reject these statements because not made subject to confrontation. Br. at 10. Furthermore, as developed in Part II and in the balance of this Part, *amicus* contends that the "dying declaration" cases in reality represent the application of forfeiture doctrine to a species of statements not made subject to confrontation.

[23] 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 353 (1803) [hereinafter "PLEAS OF THE CROWN"] (justifying exception on the basis that "the usual witness on occasion of other felonies, namely the party injured, is gotten rid of"); SWIFT, DIGEST, *supra*, at 124 (following East).

more explicitly.[24] Second, the cases admitting statements under an explicit forfeiture rationale concerned witness tampering – that is, conduct motivated by a desire to prevent a witness from testifying. *Amicus* acknowledges this point as well. Nevertheless, the framing-era decisions do not compel the conclusion that forfeiture required a purpose to render the witness unavailable.

One fact, not mentioned by petitioner or NACDL, stands out from their historical demonstrations: They cite no decision from the framing era that fits the mold of this one, in which the testimonial statement was made before the crime being charged. *Amicus* has not been able to find any, either. This is not surprising. Such a statement is likely to be made – as in the present case – only if the accused has committed a crime against a given victim repeatedly, or over an extended period of time. And that scenario is likely to arise only in the case of domestic violence. But non-lethal domestic violence was rarely prosecuted in the founding era.[25] Thus, even in a case involving, as this

[24] State v. Bohan, 15 Kan. 407, 418 (1875) (holding that sole ground justifying "dying declaration" exception is "that the murderer, by putting the witness, and generally the sole witness, of his crime beyond the power of the court, by killing him, shall not thereby escape the consequences of his crime"); State v. McDaniel, 8 Smedes & M. 401, 416, 1847 WL 1763 (Miss.Err. App. 1847) ("It would be a perversion of [the Confrontation Clause's] meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness, by causing his death.").

[25] Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996), summarizes the law and practice:

> The Anglo-American common law originally provided that a husband, as master of his household, could subject his

one does, one or more incidents of abuse before a murder that was prosecuted, the victim would almost certainly not make a testimonial statement to authorities after the earlier statement and before the fatal assault.[26] If there are any cases fitting this pattern, they must be quite rare, far too few to constitute such a settled practice as to have any guiding significance two centuries later.

Examining the cases that *were* decided reveals that their holdings are entirely consistent with the principles advocated here – that is, that an accused forfeits the confrontation right if by murdering the victim he renders her unavailable for confrontation, but the state cannot forgo reasonable opportunities to preserve the right.

Thus, even though the victim of a murder was dying, it was routine practice in the framing era to

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> wife to corporal punishment or "chastisement" so long as he did not inflict permanent injury upon her. During the nineteenth century, . . . authorities in England and the United States declared that a husband no longer had the right to chastise his wife. Yet, for a century after[, . . . w]hile authorities denied that a husband had the right to beat his wife, they intervened only intermittently in cases of marital violence . . . .

See generally, e.g., SOCIETY FOR THE PREVENTION OF VICE, THE CONSTABLE'S ASSISTANT (2d ed. 1808) (manual giving no hint of the existence of domestic violence).

[26] The lack of a professional police force may have further dissuaded any victim of domestic violence who might have been inclined to make a report. *See, e.g.*, THE CONSTABLE'S ASSISTANT, *supra*, at 5-6 ("That few Constables are sufficiently acquainted with their Duties and Powers is justly a subject of general complaint. . . . [F]ew persons know in what cases they are entitled to call for the interference of the Constable, and how he is bound to act when called upon.").

take the victim's testimony according to the usual deposition procedures, *in the presence of the accused.*[27] If the accused was *not* present – meaning that the authorities had not done what they reasonably could do to preserve the confrontation right – then the deposition ordinarily could not be admitted, notwithstanding the ultimate death of the victim.[28] Only if the victim was aware he or she was on the verge of death was the failure to bring the accused into the presence of the victim excused.[29] But that circumstance, heavily stressed by the petitioner and NACDL, is a rather good proxy for a determination of when it is no longer feasible and humane to arrange a confrontation between assailant and victim: Time is probably short, the victim may not have the energy to face the accused,

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[27] *See* King v. Radbourne, 1 Leach 457, 168 Eng. Rep. 330 (1787); King v. Forbes, Holt 599, 171 Eng. Rep. 354 (1814); King v. Smith, Holt 614, 171 Eng. Rep. 357 (1817).

[28] *See* King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (1791); Thomas John's Case (1790), reported in EAST, PLEAS OF THE CROWN, *supra*, at 357-58; Henry Welbourn's Case (1792), reported in *id.*, at 358-60. In *Forbes*, *supra*, the accused was present for only part of the deposition – and only that part was held admissible. In *Smith*, *supra*, also, the accused appeared when the proceeding was well under way – but the victim was resworn, the testimony already given was read back, the victim reaffirmed it, and all was held admissible.

[29] *E.g.*, King v. Woodcock, 1 Leach 500, 168 E.R. 352 (K.B. 1789). THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE (1801) presents a nice juxtaposition, summarizing the law and showing the relation of the deposition and dying declaration rules. On pages 40-41, Peake asserts that a Marian deposition may be admitted at trial if the witness has died *and* the accused was present, but that if the accused was not present the deposition may not be admitted. A listing of Errata, p. xii, qualifies this by noting that the statement may yet be admitted if the witness was "apprehensive of, or in imminent danger of death."

and simple decency may call for allowing the victim to face death without being in the presence of his or her murderer. A deposition not being a practical possibility, the difficulty having been created by the accused's wrongdoing, and the prosecution not having forgone any reasonable opportunity to preserve the right, forfeiture is appropriate.

Significantly, so far as *amicus* is aware, there is only one criminal case from the framing era involving a statement by a person about to die but *not* subject to forfeiture analysis – because the defendant was not the cause of impending death. And that statement was not admitted, the court using strained logic to avoid the apparent command of the "dying declaration" exception.[30]

The best understanding of the framing-era "dying declaration" cases, then, is as reflections of a forfeiture principle that (a) is not limited to witness-tampering cases in which the accused engaged in the forfeiting

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[30] The case is King v. Drummond, 1 Leach 337, 168 Eng. Rep. 271 (1784). A prisoner named Edwards, about to be executed, had confessed to a chaplain that he, rather than Drummond, committed the robbery for which Drummond was later charged. The court held that the statement could not be admitted because Edwards live, as a convict, could not have given testimony under oath, and so Edwards dead could not be heard from. But if the usually stated rationale for the hearsay exception, based on the fear created by the portent of death, were determinative, one might have expected that it would apply fully to Edwards. An oath might not have meant much to him in ordinary course, but there is no reason to believe he would be immune to the fear of adverse consequences to be suffered by facing an immediate final judgment with a fresh lie upon his lips. If the case arose today, the statement would fall outside the exception because it did not concern the cause of impending death – a qualification that has little or nothing to do with the supposed reliability rationale.

conduct for the purpose of rendering the witness unavailable, and (b) is qualified by the principle that the authorities must act reasonably to preserve the confrontation right to the extent reasonably feasible. True, this was not the rationale usually articulated,[31] but if the focus is on what the courts *did* rather than what they *said* the picture from the framing era is clear – and it is perfectly consistent with the equitable principles discussed in Part I of this brief and the structure of confrontation doctrine discussed in Part II.

CONCLUSION

To decide this case properly, the Court need only hold that if the trial court determines as a preliminary matter that the accused rendered confrontation with the victim impossible by murdering her, then the accused should be held to have forfeited the confrontation right. The same principle can apply to other serious misconduct that has the foreseeable consequence of rendering the victim unavailable to testify at trial, but it will be time enough to address the complexities of these situations when they arise in a properly presented case. To reach equitable results,

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[31] One reason for this may have been that the judicial role in making preliminary determinations of fact was not yet universally understood; in *Woodcock*, the trial judge left it to the jury to determine whether the victim was sufficiently aware of impending death for the exception to apply, 1 Leach at 504, 168 Eng. Rep. at 354, and in *John's Case* the trial judge left the matter vague, so the reviewing judges felt the need to assert that the matter was not for the jury. EAST, PLEAS OF THE CROWN, *supra,* at 358. In this setting, courts may have been disinclined to articulate a theory under which admissibility would depend on a preliminary determination that the accused had committed the murder charged.

to play its proper integral role in the framework of the Confrontation Clause, and to adhere to the results of framing-era cases, forfeiture doctrine must be attended by a corollary that the accused does not forfeit the confrontation right if the state has forgone reasonable opportunities that would have preserved the right in whole or in part. The Court should do nothing in this case to constrain future development of that corollary doctrine – but questions related to it are not presented by this case, and so they too may be left to the future.

Respectfully submitted,

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