No. 07-6053

IN THE
Supreme Court of the United States

DWAYNE GILES,
PETITIONER:

v.

CALIFORNIA,
RESPONDENT.

On Petition for Certiorari to the Supreme Court of California

BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

Richard D. Friedman
Counsel of Record, Pro Se
625 South State Street
Ann Arbor, Michigan 48109
Telephone: (734) 647-1078
Facsimile: (734) 647-4188
E-mail: rdfrdman@umich.edu

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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, and since 2004 I have maintained The Confrontation Blog, http://confrontationright.blogspot.com, to report and comment on developments related to that right. In *Lilly v. Virginia*, 527 U.S. 116 (1999), I was one of the principal authors of the American Civil Liberties Union's *amicus* brief, which Justice Breyer discussed in his concurring opinion, 527 U.S. at 140-43, addressing the eventual need for re-evaluating the basis of Confrontation Clause doctrine. In *Crawford v. Washington*, 541 U.S. 36 (2004), I was author of a law professors' *amicus* brief, which was discussed in oral argument. In 2005-06, I successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 126 S.Ct. 2266 (2006)). I am submitting this brief on behalf of myself only; I have not asked any other person or entity to join in it. I am doing this so that I can express my own thoughts, entirely in my own voice. (Similarly, in *United States v. Yida*, 498 F.3d 945 (9th Cir. 2007), I submitted a solo *amicus* brief, which was quoted approvingly by the court, *id.* at 951, 959.) I am entirely neutral in this

[1] *Amicus* has given the parties more than ten days' notice of his intention to file this brief, and the parties have consented to the filing. Written statements of their consent have been filed with the Clerk. 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, which was not authored in any part by counsel for either party.

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 brief, I 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 respondent state.

SUMMARY OF ARGUMENT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court demolished the old framework of doctrine of the Confrontation Clause and began construction of a radically different one. A central and integral component of confrontation doctrine is the principle that the accused may forfeit the confrontation right if his wrongful conduct renders the witness unavailable. Accordingly, the Court cannot build the new confrontation framework soundly without developing a carefully considered conception of forfeiture.

This case gives the Court the opportunity to begin that task. It presents one of the principal questions of forfeiture theory, one on which courts have sharply divided – whether the accused forfeits the confrontation right when his serious, intentional wrongful

conduct predictably renders the witness unavailable, even though the wrongful conduct was not motivated by the prospect of that consequence. Furthermore, it does so in the context of the most glaring form of forfeiting conduct, murder of the witness.

There are other important contexts in which this issue arises. Most notable are those of domestic violence and child abuse, in which intimidation often causes forfeiture. The ambiguities and complexities of these cases, however, make them less than ideal as initial vehicles for considering the question presented here. A better first step is to address the issue in what is the core case and in many ways the simplest, murder.

An additional reason why it is important to resolve this issue is that, to be coherent, confrontation doctrine must deal successfully with "dying declaration" cases. There is no dispute that statements fitting within the traditional hearsay exception for dying declarations are admissible, but the question is why. The traditional exception is unpersuasive on its own terms and is not at all congruent with confrontation doctrine as enunciated in *Crawford*. Careful analysis indicates that the soundest footing for admitting a dying declaration is as an instance of forfeiture theory – but that is not generally possible assuming forfeiture applies only if the accused's motivating purpose was to render the witness unavailable as a witness. A case fitting within the traditional exception is not an attractive vehicle for resolving this theoretical issue, because it will be a foregone conclusion that the statement will be admissible, and only the choice of rationale – a "dying declaration" exception to the confrontation right or instead an application of

forfeiture doctrine – will be at stake. But in a case like the present one, that choice is crucial, because the statement does not fit within the traditional exception.

ARGUMENT

I. THE QUESTION PRESENTED DETERMINES A CRITICAL COMPONENT OF THE ARCHITECTURE OF THE CONFRONTATION RIGHT.

A. The Question Presented in this Case Arises in Several Significant Contexts.

In transforming understanding of the Confrontation Clause, *Crawford v. Washington*, 541 U.S. 36 (2004), left a host of unanswered questions. Many of those questions concern the fundamental question of what statements shall be deemed to be testimonial. The Court began addressing that issue in *Davis v. Washington*, 126 S.Ct. 2266 (2006). Like *Crawford*, *Davis* explicitly disclaimed any effort to provide a comprehensive definition of the term "testimonial," and it seems inevitable that the Court will find it necessary to return to this realm in the near future.[2] This case presents an altogether different issue, one that is central to the doctrine – explicitly endorsed by

[2] For example, state courts of last resort are sharply divided on the important question of whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is testimonial evidence. *See, e.g.,* Petition for Certiorari in Melendez-Diaz v. Massachusetts, No. 07-591. *Amicus* expects to move for leave to file another *amicus* brief in that case, in support of the petition.

Crawford, 541 U.S. at 62 – that an accused may forfeit the confrontation right by wrongdoing, and critical to the overall architecture of Confrontation Clause doctrine.

Forfeiture doctrine operates on the premise that, as in this case, the statement in question is testimonial. Therefore, assuming the accused has not had an opportunity to cross-examine the witness – that is, the person who made the testimonial statement – introducing the statement against the accused is presumptively a violation of the Confrontation Clause. But forfeiture doctrine prescribes that, by rendering a witness unavailable to testify at trial, the accused may in some circumstances lose the right with respect to statements by that witness; he cannot complain about the consequences of his own wrongful conduct. *See* James F. Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant's Intent to Intimidate the Witness,* 15 J.L. & POL. 863, 867 (2007) ("The term forfeiture connotes an automatic and unintentional loss of a right upon the happening of a specified condition."); Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214 (1977) ("[A] defendant can forfeit his defenses without ever having made a deliberate, informed decision to relinquish them . . . . Unlike waiver, forfeiture occurs by operation of law without regard to the defendant's state of mind.").

It is undisputed that the accused forfeits the right when (1) the witness is unavailable to testify at trial subject to cross-examination, (2) that unavailability was caused, predictably, by wrongdoing of the accused,

and (3) the wrongdoing was motivated at least in part by a desire to render the witness unavailable. For example, forfeiture doctrine applies if the accused, for the purpose of preventing a witness from testifying against him at trial, murders her; the confrontation right presumptively will not require exclusion of a testimonial statement made by the witness, even though the accused had no opportunity to cross-examine her.[3]

The question presented by this case is whether forfeiture doctrine applies when the first and second conditions stated above, but not the third, are present – that is, when the accused engages in serious misconduct that in fact, and predictably, renders the witness unavailable to testify at trial, but there is insufficient evidence to support the conclusion that the conduct was motivated by a desire to achieve that result. The Petition ably demonstrates that the lower courts are sharply divided on this question.[4] This brief will focus on arguing that this question is a significant

[3] This statement of the rule puts it in presumptive rather than absolute terms because the prosecution may have an obligation to provide an opportunity for confrontation if the witness survives the fatal blow for some time. *See infra* note 7.

[4] The suggestion has been made that decisions holding that there is no purpose requirement when the allegedly forfeiting conduct is murder do not necessarily conflict with decisions holding that there is such a requirement in other cases. People v. Stechly, 870 N.E.2d 333, 352-53 (Ill. 2007). But even if consideration is limited to cases involving murder, the conflict is clear; at least two states apply to claims of forfeiture by murder a requirement that the prosecution prove that the murder was at least partially motivated by the desire to procure the victim's unavailability as a witness. *See, e.g.*, Pena v. People, 2007 WL 3342709 (Col. Nov. 13, 2007); Romero v. State, 156 P.3d 694, 703 (N.M. 2007), *petition for certiorari pending*, No. 07-37.

one, and that this case presents an ideal opportunity to begin the Court's consideration of it.

Most cases presenting this question fall into one of three categories:

Category 1 (dying declarations): In this classic scenario, a homicide is committed, but shortly before dying, the victim, knowing that death is near, makes a testimonial statement about the fatal attack, often describing it and identifying the killer. It is virtually certain that the statement will be admitted, but determining the justification is a matter of considerable importance. The statement fits within the traditional hearsay exception for dying declarations, *see, e.g.*, Fed. R. Evid. 804(b)(2); as explained *infra* Part I.B.2, however, creating a "dying declaration" exception to the confrontation right would lack any sound rationale and would tend to undercut the foundation of the right. The persuasive justification for admitting these statements is on the basis of forfeiture – but that does not work if there is a purpose requirement for forfeiture, because usually in this setting there is no substantial proof that the killer committed the crime *for the purpose* of preventing the victim from testifying.

Category 2 (other statements by homicide victims): The second category is similar to the first except that, for one reason or another, the statement does not fit within the traditional hearsay exception for dying declarations. It may be that, although the victim was near death when she made the statement, she did not realize that to be so. Or, as in this case, it may be that the testimonial statement was made before the fatal attack. In either event, if a purpose to render the witness unavailable to testify in court is a prerequisite for forfeiture doctrine, then the doctrine usually does

not apply and (assuming there has been no opportunity for cross-examination), the Confrontation Clause requires exclusion of the statement. If, however, such a purpose is not necessary for forfeiture doctrine, then the doctrine presumptively does apply and (assuming the state has not failed in a duty to mitigate the problem), the Confrontation Clause poses no obstacle to admission of the statement.

Category 3 (intimidating conduct): These cases involve serious misconduct that meets two conditions: (1) the misconduct intimidates the witness from testifying at trial or subject to confrontation by the accused, and this effect is a reasonably predictable result of the misconduct; and (2) the accused did not engage in the misconduct for the purpose of intimidating the witness from testifying. Cases of domestic violence and of child abuse often fit into this category.

B. The Question Presented in this Case Has Crucial Theoretical and Practical Consequences for Forfeiture Doctrine and for Confrontation Clause Doctrine in General.

1. Imposing a purpose requirement on forfeiture doctrine would tend to constrict the breadth of the confrontation right.

The doctrine of forfeiture is an essential component of the overall doctrine of the Confrontation Clause; without a robust theory of forfeiture, the Clause will likely generate unfortunate results, and in compensation courts will likely interpret the con-

frontation right more narrowly than they should. And to ensure that forfeiture doctrine is constructed sturdily, it is essential that this Court answer the question presented by the petition in this case.

In *Crawford*, the Court explicitly accepted the doctrine of forfeiture. 541 U.S. at 62. *Crawford* did not present a forfeiture issue, however, and so the Court did not go beyond noting that the doctrine "extinguishes confrontation claims on essentially equitable grounds" and that it "does not purport to be an alternative means of determining reliability." *Id.*

Nor was a forfeiture issue presented in the cases decided in *Davis*, but the matter of forfeiture loomed closely over them. Those cases involved statements alleging domestic violence, made by complainants who ultimately did not testify at trial. In arguing that these accusations were not testimonial, the respondent state in *Hammon v. Indiana* and numerous *amici* emphasized that often domestic violence complainants do not testify because of intimidation by the accused. *See* Brief of Respondent State of Indiana, *Hammon v. Indiana*, No. 05-5705, at 40 ("In domestic-violence cases, . . . it is implicitly the defendant's influence over the victim, rather than the State's, that keeps the victim from testifying."); Brief of *Amici Curiae* The National Network to End Domestic Violence, et al., in *Hammon* and *Davis v. Washington*, No. 05-5224 [hereinafter "NNEDV Brief], at 2 ("The . . . practice of 'evidence-based' prosecution ensures that violent abusers are held accountable when their own conduct makes the victim's testimony impossible to obtain."). In reply, petitioner Hammon, represented by the current *amicus*, emphasized that the proper response to this problem was not to apply an artificially narrow

construction of the term "testimonial" in the context of domestic violence. A key part of the response, rather, is a doctrine under which "if wrongful conduct of the accused causes the complainant to be unable to testify, then the accused should be held to have forfeited the confrontation right." Indeed, "a robust doctrine of forfeiture is an integral part of a sound conception of the right." Reply Brief of Petitioner Hammon, at 19-20.

The Court explicitly recognized the significance of the matter. After deciding that the accusation in *Hammon* was testimonial, it noted the argument by the states and *amici* that domestic violence "is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." The Court declared that it could not "vitiate" the constitutional right in response to this problem; rather, an appropriate remedy is the "rule of forfeiture," under which "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." 126 S.Ct. at 2279-80. The Court noted further that most courts implementing forfeiture doctrine applied the preponderance-of-the-evidence standard, and it suggested that hearsay statements, including those by the out-of-court witness the admissibility of whose statement was at issue, might be considered by the court in determining whether there had been forfeiture. Id. at 2280.

Thus, the *Hammon* Court, having just held the statement to be testimonial, made a special point of emphasizing the availability and breadth of forfeiture doctrine. This demonstrates vividly a critical tension: Absent an efficacious forfeiture doctrine, the tendency will be to constrict the confrontation right artificially by according an unduly narrow construction to the

term "testimonial." Just as brakes allow an automobile to be driven faster, the presence of a sound forfeiture doctrine allows the courts to develop the confrontation right fully to its proper extent.

2. By preventing forfeiture doctrine from addressing the "dying declaration" case, a purpose requirement would add incoherence to, and undermine the foundations of, Confrontation Clause doctrine.

In what is labeled above as Category 1 – "dying declaration" cases – there is little doubt about the outcome: These statements have been admitted for hundreds of years, *e.g.*, *R. v. Woodcock*, 168 E.R. 352 (K.B. 1789), and "no one would have the hardihood at this day to question their admissibility." *Mattox v. United States*, 156 U.S. 237, 243-44 (1895). But what is the basis for taking them beyond the reach of the Confrontation Clause? There appear to be only two conceivable rationales – by incorporation of the traditional "dying declaration" exception and its rationale into the Confrontation Clause, or as an implementation of forfeiture doctrine. The first is severely flawed and would undermine the framework of the Clause. The second is persuasive, *see, e.g.,* Joshua Deahl, *Expanding Forfeiture without Sacrificing Confrontation After* Crawford, 104 MICH. L. REV. 599, 611-17 (2005) – but it cannot apply if a purpose requirement is imposed on forfeiture doctrine.[5]

[5] A court might also be tempted to hold that some dying declarations are not testimonial because they were made to private parties rather than to government officials. Such a ruling would in any event leave in the testimonial category many dying

Crawford recognized that a "dying declaration" exception to the hearsay rule predated the Confrontation Clause and applied to testimonial statements. Accordingly, it left open without deciding the possibility that "the Sixth Amendment incorporates an exception for testimonial dying declarations." The Court added, "If this exception must be accepted on historical grounds, it is *sui generis*." 541 U.S. at 56 n.6.

To create an exception to the confrontation right based on the traditional rationale of the "dying declaration" exception to the hearsay rule would raise two fundamental problems.

First, even on its own terms, the traditional rationale makes little sense: If statements by dying declarants were so remarkably reliable, we might have a much broader exception for all such statements, not simply those explaining the cause of death. But in fact it is absurd to say that simply because a victim is on the verge of death her statement about the cause – a statement made under great stress and perhaps on the basis of an inadequate opportunity to observe, *e.g.*, *People v. Taylor*, 737 N.W.2d 790 (Mich. Ct. App. 2007), *leave to appeal granted*, Nov. 27, 2007 (shooting from outside window while victim was in bed) – is so reliable that cross-examination would be of virtually no use.

Second, the traditional rationale does not cohere at

declarations that fall within the traditional exception. In addition, *amicus* submits, it would be misguided: A dying person who identifies the person who has cast a fatal blow against her does so not for the amusement and edification of her audience but, in most cases, to increase the probability that her killer will be brought to justice. Also, while some dying declarations might be deemed to be made in response to ongoing emergencies under the doctrine of *Davis*, many are not. *E.g.*, *Woodcock, supra*; Williams v. State, ___ So.2d ___, 2007 WL 1774389 (Fl. June 21, 2007).

all with the fundamental theory of the Confrontation Clause as explicated in *Crawford*. The traditional rationale is that statements fitting within the exception are particularly reliable because the dying declarant will be unwilling to face the awful consequences of dying with a lie upon her lips. *See, e.g.*, *Idaho v. Wright*, 497 U.S. 805, 820 (1990). But *Crawford* makes crystal clear that reliability is besides the point: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69.

Now consider this alternative explanation for the "dying declaration" cases. It would be an abomination for the victim's dying statement to be excluded on the basis of the accused's inability to cross-examine her if the cause of that unavailability is that the accused murdered her.[6] Of course, the statement could properly be admitted under this application of

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[6] *See, e.g.*, United States v. Mayes, 512 F.2d 637, 651 (6th Cir.), *cert. denied*, 467 U.S. 1204 (1975) (the defendant "cannot now be heard to complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial"); 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."); 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 353 (1803) (justifying exception on the basis that "the usual witness on occasion of other felonies, namely the party injured, is gotten rid of").

forfeiture doctrine only if the trial court made a predicate finding, to the requisite degree of probability, that the accused did in fact kill the witness. But a side hearing to determine that issue does not cause a significant practical or conceptual difficulty.[7]

In short, the "dying declaration" cases can be resolved according to a theory that is sensible on its own terms and congruent with Confrontation Clause doctrine. Such a resolution requires recognition that an accused may forfeit the confrontation right even if his misconduct was not motivated by the desire to render the witness unavailable. In the long run, that recognition will strengthen the confrontation right.

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[7] The situation is very much similar to that in which a judge presiding over a conspiracy case rules that a statement is admissible under the hearsay exemption for statements of conspirators, Fed. R. Evid. 801(d)(2)(E), because it was made during the course of and in furtherance of a conspiracy of which the accused was a member – the very conspiracy being tried. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171 (1987). The fact that the judge and the jury must decide the same factual issue, for different purposes, poses no logical or practical difficulty; the judge does not announce to the jury her decision on the predicate matter. *Amicus* has made an extended argument on this point in Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506, 521-24 (1997).

Amicus believes also that inherent within forfeiture doctrine is the principle that the accused does not forfeit the confrontation right if the prosecution has and forgoes a reasonable opportunity to preserve the right, as by conducting a deposition. *Cf.* R. v. Forbes, 171 E.R. 354 (1814) (establishing right of accused to be present at deposition of dying victim). This principle produces results similar to those of the apparent-imminence requirement of the "dying declaration" exception – the circumstances in which a deposition is not reasonably practical are closely congruent with those in which the dying victim anticipates imminent death.

3. A purpose requirement would severely limit the usefulness of forfeiture doctrine in the context of domestic violence and child abuse

Though it offered some reflections on forfeiture doctrine, the *Davis-Hammon* decision did not directly address the question presented here: whether the accused forfeits the confrontation right if he commits serious misconduct that predictably causes a witness to be unavailable to testify at trial but that was not motivated by a purpose to cause that result. If there is such a requirement, the usefulness of forfeiture doctrine in the context of domestic violence and child abuse will be severely undercut.

Sometimes, a domestic batterer threatens his victim with harm if she testifies against him in court. Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 769 (2005). But very often a domestic batter renders his victim psychologically unable to testify without making an explicit threat, or by misconduct of which threats are a relatively small part. Frequently, the batterer's previous conduct causes the victim reasonable fear of retaliation for testimony, regardless of whether he makes an explicit threat. Deborah Tuerkheimer, Crawford's *Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. Rev. 1 (2006). And trauma from the battering itself is a "pervasive aspect of battering that undermines victims' ability to testify." NNEDV Brief at 12; Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-term Safety in the Prosecution of Domestic Violence Cases*. 11 AM. U. J. GENDER, SOC. POL. & L. 465, 474-75 (2003).

Viewed more broadly, domestic violence is often part of a pattern of control by the batterer that creates a deeply intimidating effect. *E.g.*, LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 5 (2002) ("The overarching behavioral characteristic of the batterer is the imposition of a pattern of control over his partner.") (emphasis deleted); Tuerkheimer, *supra*, at 6-7, 10-14. In these cases, there is no substantial evidence that the unavailability of the victim was caused by misconduct in which the batterer engaged *for the purpose* of rendering the victim unable to testify.

If an absolute purpose requirement is imposed on forfeiture doctrine, therefore, in many cases of domestic violence and child abuse the Confrontation Clause will cause exclusion of the victim's statement because the accused has not had an opportunity to cross-examine her – even though the cause of that failure is that the accused's serious, intentional misconduct has, quite predictably, rendered her unavailable.

If by contrast there is no absolute purpose requirement, then forfeiture doctrine will be able to reach at least some of these cases. Whether the doctrine will actually result in admission of the evidence will depend, in the view of *amicus*, on several factors: Was the accused's misconduct serious enough to warrant forfeiture? (Perhaps as the doctrine develops, a purpose test would be decisive in cases in which the answer to this question is marginal.[8]) Is the witness genuinely unavailable? Has the state taken

[8] *Amicus* does not necessarily endorse such a principle, but it is sufficiently plausible that it should be considered.

advantage of whatever reasonable opportunities it might have had (such as conducting a deposition) to preserve the confrontation right, in while or in part, notwithstanding the accused's misconduct? Answering these questions will often be very difficult, but a doctrine along these lines would often result in admission of the victim's statement, while still giving the state incentive to do what it reasonably could to ensure that she testifies subject to confrontation, and under safe conditions. Such a rule, in short, would have very different consequences from one imposing a flat purpose requirement.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

A. This Is the Type of Case in Which the Question of Whether There is a Purpose Requirement Should First be Addressed.

What is labeled above as a Category 2 case – one that does not fit the traditional "dying declaration" exception though the allegedly forfeiting conduct is murder – is the best type of case for the Court to begin addressing the question of whether, or the extent to which, forfeiture doctrine includes a purpose requirement. In these cases, that issue is likely to determine whether or not the challenged statement is admitted. There is typically no theory other than forfeiture that will bring the statement outside the Confrontation Clause. There is no ambiguity as to whether the witness is unavailable to testify at trial. There is no doubt (assuming the predicate that the

accused killed the witness, and assuming also that the state has not failed in any mitigation requirement, see note 7 *supra*) that wrongdoing by the accused is responsible for that unavailability. There is no doubt that the misconduct alleged is sufficiently wrongful to warrant forfeiture; murder is, indeed, the paradigm of misconduct warranting forfeiture. And for similar reasons, murder presents the strongest case for declining to incorporate a purpose requirement into forfeiture doctrine; if ever forfeiture can be applied without satisfying a purpose test, it is when the misconduct alleged is murder.[9]

By contrast, a Category 1 case – one fitting within the "dying declaration" exception – would provide a poor vehicle because as a practical matter the only genuine question would be what the rationale for admission should be, as an application of either a "dying declaration" exception to the confrontation right or of forfeiture doctrine. In virtually all such cases, the outcome – admission of the statement – would be a foregone conclusion.[10]

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[9] Thus, People v. Stechly, 870 N.E.2d 333, 352-53 (Ill. 2007), wihle adopting a purpose requirement, notes, "[S]o far as our research has discerned, every case holding intent irrelevant has involved the defendant's murdering the witness." *Stechly*'s attempt to reconcile those cases with its holding on the ground that "a defendant knows with absolute certainty that a murder victim will not be available to testify" is unpersuasive. Attempts at murder sometimes fail – and even when they ultimately succeed, the victim sometimes survives long enough to testify, at a deposition if not at trial.

[10] Forfeiture doctrine might preclude admission of a statement fitting within the "dying declaration" exception if, though the victim thought death was imminent, there was in fact an opportunity to take a deposition but the state did not take advantage of it. But a case fitting this description would be very

Category 3 cases – involving intimidating conduct – pose different types of problem. As suggested in Part I.C, even apart from the question of a purpose requirement, applicability of forfeiture doctrine in these cases tends to be very fact-bound, involving questions such as the following: Was the conduct alleged sufficiently serious, and was the intimidating effect of it sufficiently predictable, to warrant forfeiture? Was the witness in fact so intimidated that the right should be deemed forfeited? Did the state act unreasonably by failing to take sufficient advantage of opportunities to mitigate the intimidating effect of the accused's conduct? Difficult normative questions will also arise, such as: To what extent may forfeiture be based on intimidating conduct committed *before* the act being charged?

These complexities cannot be divorced from the question of the extent to which forfeiture doctrine includes a purpose requirement; as noted in Part I.C, the Court might impose that requirement in some intimidation cases but not in others, in which the question of whether the conduct is serious enough to warrant forfeiture is marginal.

In short, the Court has a choice to begin examination of the question presented from the murder end of the problem or from the intimidation end, and

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rare. Similarly, forfeiture doctrine would not apply if the court did not find as a predicate, to the requisite level of probability, that the accused killed the victim. But in most prosecutions in which dying declarations are offered, there is strong evidence, enough to satisfy whatever standard of persuasion is likely to be imposed on the prosecution with respect to the forfeiture issue, that the accused killed the victim; *Davis* suggested without deciding that the standard is likely to be preponderance of the evidence. 126 S.Ct. at 2280.

amicus believes that it makes more sense to begin from the murder end. Murder cases provide a simpler, less factually-sensitive context, and the one most inviting to a holding that forfeiture doctrine does not include a purpose requirement. If the Court holds (contrary to the views of *amicus*) that murder of a witness cannot result in forfeiture of the confrontation right unless the accused committed the murder for the purpose of rendering the witness unavailable, then the principle would clearly apply to intimidation cases as well. If, however, the Court holds that in the murder context there is no purpose requirement, it can then move on to the question of whether, or to what extent, the same principle should apply in the intimidation context.

B. This Case in Particular Is an Excellent Vehicle for Considering the Question Presented.

This is a classic example of a Category 2 case, and there is no problem that undermines its usefulness as a vehicle for considering the question presented.

The decision of the California Supreme Court is a final order, and there is no doubt that this Court has jurisdiction over the case.

There is no issue of waiver; the parties have vigorously contested the question presented, and the California Supreme Court addressed it at length.

The case comes to this Court on direct review, so it is free of complications created by collateral review.

There is no material factual ambiguity. It is clear that the accused killed the victim, and the issue in the case is whether he did so in self-defense; the state has not suggested that he did so for the purpose of

rendering her unavailable as a witness.

The victim's statement was important for the prosecution; if admitting it was error, the error could not be deemed harmless.

The declarant was an adult. Statements by children raise a host of difficult factual and legal questions under the Confrontation Clause, and particularly with respect to forfeiture doctrine.[11] In the view of *amicus*, addressing a basic question of doctrine under the Clause in the context of a case involving a child witness would be unwise, because that factor could complicate and distort the question. For now, *amicus* suggests, the best use of the limited resources the Court can devote to the Confrontation Clause is to address general questions that arise in the

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[11] For example: Should the age of the declarant be taken into account in determining whether the statement is testimonial? Should some level of cognitive or moral development be considered essential to one's capacity to act as a witness for Confrontation Clause purposes? If the declarant (or a child of ordinary development of the declarant's age) understands that her statement accuses another person of wrongdoing, but does not understand the likely criminal-justice implications of the statement, is the statement testimonial, assuming it would be if made by an adult? What if the child understands that the accusation may cause the person accused to suffer adverse consequences? What procedures are necessary to determine whether a child is unable to testify? How must it be determined that the child's inability to testify is crucially caused by misconduct of the accused rather than by general trauma associated with the giving of testimony? How does the court determine that the child's apparent inability to testify was not induced by a care-giver? *Amicus* has commented on some of these issues, *e.g.*, in an entry on the Confrontation Blog, *Child Witnesses on the Academic and Judicial Front*, <http://confrontationright.blogspot.com/2007/09/child-witnesses-on-academic-and.html>.

context of both adult and child declarants; the complexities peculiar to child declarants would be better considered after the basic framework of doctrine under the Clause is more firmly established.

CONCLUSION

The question presented by the Petition is a crucial one in determining the architecture of Confrontation Clause doctrine. This case presents an ideal vehicle for the Court to begin consideration of that question. For these reasons, the Court should grant the Petition and review the decision.

Respectfully submitted,

RICHARD D. FRIEDMAN
Counsel of Record, Pro Se
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078

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Crawford recognized that a "dying declaration" exception to the hearsay rule predated the Confrontation Clause and applied to testimonial statements. Accordingly, it left open without deciding the possibility that "the Sixth Amendment incorporates an exception for testimonial dying declarations." The Court added, "If this exception must be accepted on historical grounds, it is *sui generis*." 541 U.S. at 56 n.6.

To create an exception to the confrontation right based on the traditional rationale of the "dying declaration" exception to the hearsay rule would raise two fundamental problems.

First, even on its own terms, the traditional rationale makes little sense: If statements by dying declarants were so remarkably reliable, we might have a much broader exception for all such statements, not simply those explaining the cause of death. But in fact it is absurd to say that simply because a victim is on the verge of death her statement about the cause – a statement made under great stress and perhaps on the basis of an inadequate opportunity to observe, *e.g.*, *People v. Taylor*, 737 N.W.2d 790 (Mich. Ct. App. 2007), *leave to appeal granted*, Nov. 27, 2007 (shooting from outside window while victim was in bed) – is so reliable that cross-examination would be of virtually no use.

Second, the traditional rationale does not cohere at

declarations that fall within the traditional exception. In addition, *amicus* submits, it would be misguided: A dying person who identifies the person who has cast a fatal blow against her does so not for the amusement and edification of her audience but, in most cases, to increase the probability that her killer will be brought to justice. Also, while some dying declarations might be deemed to be made in response to ongoing emergencies under the doctrine of *Davis*, many are not. *E.g.*, *Woodcock, supra*; Williams v. State, ___ So.2d ___, 2007 WL 1774389 (Fl. June 21, 2007).