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I. The Lower Courts Are In Conflict On the Question Of Whether The Forfeiture Rule Requires Proof Of Intent To Prevent Testimony

Respondent contends that "there is no 'split' of authority" on the issue of intent to prevent testimony and thus no real conflict within the meaning of Supreme Court Rule 10(b) sufficient to warrant this Court's review on certiorari. (Brief in Opp. at 23.) Respondent makes two basic arguments to support this claim. The first is that four cases on which petitioner relied did not consider or rule on the intent issue. The second is that of the cases that did consider the issue, only homicide cases are relevant. Specifically, respondent argues that *State v. Romero*, 156 P.3d 694 (N.M. 2007), *petition for certiorari pending*, No. 07-37, is not relevant because it is not a homicide case, and *People v. Moreno*, 160 P.3d 242 (N.M. 2007) and *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007) are not relevant because they are not homicide cases and because they left open the possibility of developing a homicide exception.

Respondent is incorrect. Many courts have acknowledged the deep split of authority on the issue of whether the forfeiture doctrine requires a showing of intent to prevent testimony. E.g., *Moreno*, 160 P.3d at 245-46; *Stechly*, 870 N.E.2d at 349, 351-52; *Romero*, 156 P.3d at 701-02; *Gonzales v. State*, 195 S.W.3d 114, 120 & n. 25 (Tex. Crim. App. 2006), cert. denied, 127 S.Ct. 564 (2006). As demonstrated below, respondent's arguments are faulty in principle, in fact, or both.

A. The Supreme Courts Of Kansas, Massachusetts, Minnesota, And West Virginia Have Considered The Question Of Intent to Silence And Reached Conflicting Results

Respondent argues that *State v. Meeks*, 88 P.3d 789 (Kan. 2004), *Commonwealth v. Edwards*, 830 N.E.2d 158 (Mass. 2005), *State v. Fields*, 679 N.W.2d 341 (Minn. 2004), and *State v. Mechling*, 633 S.E.2d 311 (W.Va. 2006) are not part of any split of authority because they "did not actually reach or consider any question concerning whether a defendant must intend at the time he renders the declarant unavailable that his act prevent future testimony." (Brief in Opp. at 24.) Respondent is incorrect.

In *Meeks*, the Kansas Supreme Court held that the defendant forfeited his Sixth Amendment confrontation right because he caused the declarant's absence from trial by killing him. *Meeks*, 88 P.3d at 793-94. The court did not expressly address the question of whether the forfeiture rule also requires a showing that the killing was committed for the purpose of preventing testimony. However, the court must have considered the question, since it cited *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982), which required a showing of intent to prevent testimony. [1] *Meeks*, 88 P.3d at 794. Moreover, by holding that forfeiture can be

[1] *Thevis* held: "We conclude that a defendant who causes a witness to be unavailable for trial *for the purpose of preventing that witness from testifying* also waives his right to confrontation under the *Zerbst* standard." 665 F.2d at 630, italics added. The court went on to state that "even if the government proved by clear and convincing evidence that the defendant had caused the witness' absence, the hearsay evidence would still not be admissible until the government proved the second part of the test, i.e., that the defendant-caused absence was for the pur-pose of preventing the witness from testifying. *Id.* at 633, n. 17.

established by a showing of causality alone, *Meeks* implicitly rejected an intent-to-prevent-testimony requirement.

The California Supreme Court found that *Meeks* was strong support for its own conclusion that intent to silence is not required. (Pet., App. A at 41.) Other state courts of last resort also interpret *Meeks* as not requiring intent to prevent testimony. *Stechly*, 870 N.E.2d at 274-75 (citing *Meeks* as "finding intent irrelevant" to the forfeiture doctrine); *Romero*, 156 P.3d at 701 (citing *Meeks* for the proposition that intent is not required); *Gonzales*, 195 S.W.3d at 123 (citing *Meeks* as holding that intent to silence is not required).

In *Edwards,* the Supreme Judicial Court of Massachusetts adopted a forfeiture by wrongdoing doctrine that requires a showing of intent to prevent testimony. *Edwards*, 830 N.E.2d at 168, 170. Specifically, the court held that a defendant forfeits his or her Sixth Amendment confrontation right on findings that "(1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant *acted with the intent to procure the witness's unavailability*." *Id*. at 170, italics added. The court explained that the third element relates to the defendant's intent "to ensure that the witness will not be heard at trial." *Ibid*. As to the scope of the doctrine, the court stated, "Without question, the doctrine should apply in cases where a defendant murders, threatens, or intimidates a witness in an effort to procure that witness's unavailability." *Id*. at 168-69, ns. omitted.

Other high courts recognize *Edwards* as establishing an intent-to-prevent-testimony element in the forfeiture doctrine. E.g., *Moreno*, 160 P.3d at 245 (citing *Edwards* as "finding such a requirement"); *Stechly*, 870 N.E.2d at 349 (citing *Edwards* as having "held that intent is an element of the doctrine"); *Romero*, 156 P.3d at 702 (citing *Edwards* as part of the majority that requires intent to prevent testimony).

The Supreme Court of Minnesota has also adopted a forfeiture doctrine that requires a showing of intent to prevent testimony. *Fields*, 679 N.W. at 347; *State v. Wright*, 701 N.W.2d 802, 814-15 (Minn. 2005), *vacated on other grounds*, 126 S.Ct. 2979 (2006). In *Fields*, the court held that the defendant forfeited his confrontation right because he engaged in wrongful conduct that was intended to and did procure the witness's unavailability at trial. *Fields,* 679 N.W.2d at 347. Subsequently, in *Wright,* the court reiterated the rule and the requirement of proof that the defendant "intended to procure the witness's unavailability." 701 N.W.2d at 814-15. *See also State v. Wright,* 726 N.W.2d 464, 479 (Minn. 2007) (repeating intent-to-silence requirement).

The courts widely recognize Minnesota as adopting a forfeiture doctrine that requires proof of intent to prevent testimony. E.g., *Romero*, 156 P.3d at p. 702 (citing *Wright* as requiring proof of intent to silence); *Moreno,* 160 P.3d at 245 (citing *Wright* at 726 N.W.2d at 479 as "finding" a requirement of intent to prevent testimony).

Mechling also issued definitive guidance on the forfeiture doctrine in the context of domestic violence prosecutions. The West Virginia Supreme Court set forth the parameters of the forfeiture rule in that state and remanded the case to the circuit court for a determination whether a claim of forfeiture was properly raised and, if so, whether it was meritorious. *Mechling*, 633 S.E.2d at 326. The court noted that forfeiture would clearly result if the defendant, after being charged, coerced the witness into not testifying. *Ibid*. The court then clearly stated that some conduct that had the unintended effect of causing the witness not to testify would also constitute forfeiture by wrongdoing. "Another likely situation where an accused may trigger forfeiture is when, after being charged, the accused engages in further abuse or intimidation of the victim *which is not explicitly intended to alter, but has the effect of altering*, the victim's testimony." *Ibid.*, italics added.

Thus, the courts in *Meeks*, *Edwards*, *Fields*, and *Wright* made a clear decision on whether intent to silence is or is not required to establish forfeiture by wrongdoing under the Sixth Amendment. This fact is widely recognized, as many courts interpret *Edwards* and *Fields* as holding that intent to prevent testimony is an element of the forfeiture rule and interpret *Meeks* as standing for the opposite proposition. *Mechling* is consistent with *Meeks* because it clearly stated that some acts that unintentionally cause a witness' absence are within the forfeiture rule. These cases represent clear and conflicting views on the question

before this Court and are properly part of the split that petitioner has noted.

B. *Romero* Is A Homicide Case Because The Wrongdoing Was The Defendant's Killing Of The Declarant

Respondent describes *Romero* as simply a case involving post-crime statements by the alleged victim of "the charged domestic battery." (Brief in Opp. at 30.) However, the facts are more complex than this. For purposes of the forfeiture doctrine, *Romero* is a case involving the murder of the declarant.

In *Romero*, the defendant assaulted his wife in October 2001 and killed her in December 2001. He was tried and convicted for homicide first. Later, in a separate proceeding, he was tried for the assault. *Romero*, 156 P.3d at 696. Based on the homicide conviction, the state argued that the wife's testimonial hearsay was admissible to prove the assault charge because defendant forfeited his confrontation right by killing her. *Id.* at 701. The New Mexico Supreme Court held that forfeiture by misconduct requires proof that he killed her to prevent her from testifying. *Id.* at 703.

Respondent apparently seeks to distinguish petitioner's case from *Romero* on the ground that the murder in *Romero* was prosecuted in a prior proceeding. This is an artificial, meaningless distinction, which respondent does not even try to justify. For purposes of the forfeiture rule, the key facts are that in both cases (1) the defendant killed the victim, (2) there was no evidence that he did so for

the purpose of preventing the victim from testifying, and (3) the issue presented was whether the defendant forfeited his Sixth Amendment confrontation right because he killed the victim. The California Supreme Court said yes to the issue presented, and the New Mexico Supreme Court said no. They are in direct, irreconcilable conflict.

C. Colorado Requires A Showing Of Intent To Silence In Murder Cases

In two decisions following *Moreno*, the Colorado Supreme Court required proof of intent to prevent testimony when the defendant had wrongfully killed the declarant. *Vasquez v. People*, 2007 WL 3342707 (Colo. Nov. 13, 2007); *People v. Pena,* 2007 WL 3342709 (Colo. Nov. 13, 2007).

In *Vasquez,* the defendant was convicted of murdering his wife. He was then tried for violating a restraining order and bond conditions barring contact with her. Her testimonial hearsay was admitted at that trial. *Vasquez*, 2007 WL 3342707 at *2. On appeal, the state argued that the murder was sufficient to justify the admission of testimonial hearsay in that case. The Colorado Supreme Court reaffirmed its decision in *Moreno* requiring intent to silence the witness, and stated that Colorado had joined those jurisdictions with an intent requirement. *Id.* at *3.

In *Pena*, the defendant had been convicted of the declarant's murder, and then was tried and convicted of assaulting her before the murder. As in *Vasquez*,

the Colorado Supreme Court held that there must be proof that Pena had intended to prevent the victim's testimony. *Pena*, 2007 WL 3342709 at * 2.

Thus, the Colorado Supreme Court has reaffirmed *Moreno* in the context of murder cases. Significantly, it did not consider a homicide exception when it did so. There is no concrete basis for excluding Colorado from the split of authority.

D. The Lower Courts Are Deeply Divided Even In Homicide Cases

The lower courts are in conflict on the intent-to-silence issue even when a homicide is the basis of a claim of forfeiture by wrongdoing. Two states require proof of intent to silence: New Mexico (*Romero*) and Colorado (*Moreno*, *Vasquez*, and *Pena*). Five states and one federal circuit court of appeals do not: California, Kansas (*Meeks*, 88 P.3d at 793-94); Washington (*State v. Mason*, 162 P.3d 396, 403-04 (Wash. 2007)), Wisconsin (*State v. Jensen*, 727 N.W.2d 518, 536 (Wisc. 2007)); and the Sixth Circuit (*United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005)). Thus, even in this narrow class of cases, the lower courts are deeply split on whether intent to silence the witness is required to support forfeiture of the constitutional right of confrontation.

E. The Forfeiture Rule Applies Equally To All Crimes And Wrongdoing

There is no support for respondent's attempt to treat homicide differently

from other wrongdoing under the forfeiture rule. Respondent does not cite any case where a court limited its forfeiture doctrine solely to homicides. Petitioner knows of none. The California Supreme Court certainly did not limit its forfeiture doctrine to homicides. On the contrary, it specifically stated that the doctrine applies when the declarant is "genuinely unavailable" to testify due to "any intentional criminal act" by the defendant. (Pet., App. A at 52.) Similarly, other lower courts have adopted a general forfeiture rule that applies to all crimes and wrongdoing, whether requiring or not requiring proof of intent to silence. E.g., *Edwards*, 830 N.E.2d at 170; *Fields*, 679 N.W.2d at 347. Stated another way, no court has limited the forfeiture rule to the specific crime for which the defendant was prosecuted. All cases ruling on the intent element are relevant to the split because they define the foundation for admitting testimonial hearsay under the forfeiture doctrine regardless of the crime charged.

F. The Resolution Of The Split of Authority Should Not Be Delayed Due To The Theoretical Possibility That States Might Develop A Homicide Exception

Respondent argues that the issue presented by petitioner is not yet ripe because *Romero, Moreno, and Stechly* "generally allow for or at least do not decide against a murder or homicide exception, and all were rendered within the last eight months." (Brief in Opp. at 33-34.) These opinions, as well as *Vasquez,* are particularly important because they were decided after *Davis v. Washington*, 547

U.S. __, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) and are the reasoned judgment of three state supreme courts that fully considered all the arguments for and against an intent requirement and held that intent to silence is required.

Moreover, two of the courts provide no support for a homicide exception. In *Romero*, the Supreme Court of New Mexico effectively rejected the notion by specifically requiring a showing of intent to prevent testimony when the wrong-doing is a homicide. Likewise, the Supreme Court of Colorado effectively rejected the notion by applying *Moreno's* intent-to-silence requirement to homi-cides in *Vasquez* and *Pena.*

The Illinois Supreme Court in *Stechly* noted a homicide exception as a "theoretical possibility." *Stechly,* 870 N.W.2d at 352-53. That did not prevent the court from adopting an intent-to-silence requirement on the authority of *Reynolds v. United States,* 98 U.S. 145 (1879) and *Davis. Stechly* at 353. The logic of *Stechly* and the other opinions requiring proof of intent to silence the witness cannot be limited to murder cases. The Confrontation Clause applies "In all criminal prosecutions." U.S. Const., Amend. VI. It is a fundamental procedural protection that is essential to the fairness of every trial. *Crawford v. Washington*, 541 U.S. 36 (2004). This Court has never indicated that Sixth Amendment pro-tections vary according to the crime charged.

In sum, respondent asks this Court to ignore the clear, concrete, growing division in the lower courts on the intent-to-silence issue in favor of a theoretical homicide exception that no court has ever adopted or seriously considered. However, it is intolerable that the constitutional right to object to testimonial hearsay depends on the state in which the crime was committed.

II. The Error Was Not Harmless

Respondent argues that this case is a poor vehicle for certiorari review because, even if admission of the testimonial hearsay statements violated petitioner's confrontation right, the error was harmless beyond a reasonable doubt. (Brief In Opp. at 34-35.) Respondent bases his argument on one sentence in the California Supreme Court's opinion: "As noted by the Court of Appeal, 'the evidence supporting [petitioner's] [self-defense] theory was weak and it is inconceivable that any rational trier of fact would have concluded the shooting was excusable or justifiable.' " (Brief in Opp. at 35, citing Pet., App. A at 53-54.)

Respondent takes this statement out of context. The court made the statement in the context of considering whether the evidence was sufficient to support the Court of Appeal's finding that petitioner forfeited his right to object on confrontation ground to admission of the testimonial hearsay at trial. In analyzing the issue, the court relied upon the following evidence: (1) petitioner shot the victim six times in the torso, (2) the victim was unarmed, and (3)

petitioner fled the scene after the shooting and did not turn himself in to the police. (Pet., App. A at 53.) The court then concluded:

> The above independent evidence, *considered with the victim's prior statements,* supports the Court of Appeal's conclusion that defendant did not shoot in self-defense, and instead committed an unlawful homicide that caused the victim's unavailability to testify at trial. As noted by the Court of Appeal, "the evidence supporting this [self-defense] theory was weak and it is inconceivable that any rational trier of fact would have concluded the shooting was excusable or justifiable." Thus, defendant has forfeited his confrontation clause challenge to the victim's prior out-of-court statements to the police.

(Pet., App. A. at 53-54, italics added.)

Thus, the court simply decided that the cited evidence established the elements of California's forfeiture rule by a preponderance of the evidence. It did not consider harmless error as a possible alternate ground of decision, and neither did the Court of Appeal. The statement respondent cites does not say that the admission of the testimonial hearsay was harmless error.

Rather than being harmless error, the testimonial hearsay was critical to the prosecution's case. If, as petitioner argues, it was admitted in violation of the constitution, the error cannot be harmless beyond a reasonable doubt. The testimonial hearsay related Avie's statement that petitioner assaulted and threat-

ened to kill her. Avie made the statement about three weeks before he did kill her. It was the only evidence suggesting that he might violently attack her. It triggered a propensity instruction under California law. The instruction told the jury that if it found that petitioner committed a prior offense involving domestic violence, it may infer that he "had a disposition to commit another offense involving domestic violence" and further infer that he was "likely to commit and did commit" the charged murder. (Pet. at 3-4, 18-19.)

Respondent does not dispute the importance of the hearsay statement or that it justified the propensity instruction that was so adverse to petitioner. Nor does respondent dispute that petitioner had a substantial claim of self-defense. There were no witnesses to the shooting, and it occurred outdoors in the dark a few minutes after Avie returned unexpectedly to petitioner's home after angrily encountering his new girlfriend. Avie was a violent and jealous person. This fact was known by petitioner and was corroborated by independent witnesses. She threatened to kill petitioner and his new girlfriend and then charged toward him, prompting the shooting. (Pet. at 5-6, 18-19.) The testimonial hearsay, and the propensity instruction were critical to the jury's determination that this was a homicide rather than self-defense.

The California Supreme Court's reliance on Avie's testimonial statement to support its conclusion that the statement was properly admitted under California's forfeiture rule demonstrates its importance. Without the statement, respondent might not have proven, by a preponderance of the evidence, that

petitioner committed an intentional criminal act. Respondent has a far greater burden of proving that the testimonial hearsay, if admitted in violation of the constitution, was harmless beyond a reasonable doubt. In view of respondent's heavy burden of proving harmless error, respondent's flawed, superficial argument does not provide a basis for denying the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons and for the reasons given in the Petition for Certiorari, this Court should issue its writ of certiorari to review the judgment and opinion of the California Supreme Court.

Dated: December 21, 2007

Respectfully submitted,

____

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