

QUESTION PRESENTED

In *Crawford v. Washington*, 541 U.S. 36, 62 (2004), this Court recognized that the forfeiture by wrongdoing rule “extinguishes confrontation claims on essentially equitable grounds.” The question presented by this case is:

Does a criminal defendant “forfeit” his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the California Supreme Court included the State of California and Dwayne Giles. There are no parties to the proceedings other than those named in the petition.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DWAYNE GILES,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari
To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

The petitioner, Dwayne Giles, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the California Supreme Court filed on March 5, 2007.

OPINIONS BELOW

The opinion of the California Supreme Court was filed on March 5, 2007, and is attached as Appendix A. It is reported at 40 Cal.4th 833, 152 P.3d 433, 55 Cal.Rptr.3d 133 (2007). The California Supreme Court's one-page order denying rehearing was filed on May 23, 2007, and is attached as Appendix B. The opinion of Division Six of the Second District Court of Appeal of the State of California was filed on October 25, 2004, and is attached as Appendix C. The Court of Appeal's order modifying its opinion and denying rehearing was filed on November 22, 2004, and is attached as Appendix D. The Court of Appeal's modified opinion is reported at 123 Cal.App.4th 475, 19 Cal.Rptr.3d 843 (2004).

JURISDICTION

The decision of the California Supreme Court was filed on March 5, 2007. Petitioner filed a timely Petition for Rehearing on March 23, 2007. The California Supreme Court denied the Petition for Rehearing on May 23, 2007. This petition is filed within 90 days of that date. Rule 13. The jurisdiction of this Court rests on 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”

STATEMENT

Petitioner was convicted after a jury trial in California state court of murdering his former girlfriend Brenda Avie. At trial, the prosecution, over petitioner's objection, admitted out-of-court statements that Avie made to a police officer about a prior assault by petitioner. While his appeal was pending this Court issued its decision in *Crawford v. Washington, supra*, 541 U.S. 36. At the request of the Court of Appeal, the parties filed briefs on *Crawford's* impact on petitioner's case. The California Court of Appeal and the California Supreme Court rejected petitioner's argument that the admission of Avie's testimonial hearsay violated the Confrontation Clause and affirmed his conviction.

1. Trial Proceedings

a. Admission of Avie's Testimonial Hearsay Statements

The prosecution, in its case-in-chief and over petitioner's objection, presented the testimony of a Los Angeles police officer who interviewed Brenda Avie on September 5, 2002 about an assault by petitioner. The officer testified that he and his partner went to an address in Los Angeles County on September 5, 2002. Petitioner answered the door, apparently agitated. Avie was sitting on the bed, crying. The officer interviewed Avie while his partner interviewed petitioner separately. Avie told the officer that she had been talking on the phone

with a female friend when her boyfriend, petitioner, got angry with her and accused her of having an affair with the friend. Avie ended the phone call and argued with petitioner. He lifted her off the floor, put her down, and choked her. She broke free and fell to the floor. He climbed on top of her and punched her face and head. She broke free and crawled onto the bed. Then he opened the blade of a folding knife, held it about three feet from her, and said, "If I catch you fucking around I'll kill you." The officer didn't see any physical marks on her but felt a bump on her head. RT 611-618.

The trial court admitted the evidence under California Evidence Code section 1109, which permits the admission of evidence of prior acts of domestic violence to prove the defendant has a propensity to commit acts of domestic violence, and California Evidence Code section 1370, which establishes a hearsay exception for certain out-of-court statements describing the infliction of physical injury on the declarant when the declarant is unavailable to testify at trial and the statements are trustworthy. RT 1-2, 606-610; *People v. Giles, supra*, 19 Cal.Rptr.3d at 846.

The testimonial hearsay about the prior assault also permitted the trial court to instruct the jury that if the jury found that he had committed a prior offense involving domestic violence, the jury may infer that he "had a disposition to commit another offense involving domestic violence" and to further infer that he was "likely to commit and did commit" the charged murder. CT 92.

b. Evidence of the Homicide

On the night of September 29, 2002, petitioner was socializing with his new girlfriend, Tameta Munks, his friend, Marie Banks, and his niece, Veronica Smith, in the garage behind his grandmother's house, where he was living. He received a telephone call from Avie and then asked Munks to leave, which she did. Shortly thereafter, Avie arrived. Banks noted that Avie argued with petitioner, and he tried to pacify her. *People v. Giles, supra*, 152 P.3d at 435-436; RT 917-920, 926.

Smith went inside the house. Avie left with Banks, intending to go to her father's house. On the way, she saw Munks. She told Banks that she was going back because she didn't intend to let "that bitch" visit petitioner. Avie returned to petitioner's home by herself. *Giles, supra*, 152 P.3d at 436; RT 922, 927.

Smith heard Avie and petitioner talking outside but couldn't tell what they were saying. Then she heard Avie yell "Granny" and heard a series of gunshots. Smith ran outside. Avie was lying on her back in the driveway. Petitioner was standing nearby, holding a nine-millimeter handgun. Avie did not have a weapon. *Giles, supra*, 152 P.3d at 436.

The autopsy revealed that Avie had six gunshot wounds in her torso area, two of which were fatal. The coroner testified that one wound was consistent with her holding up her hand when she was shot, one was consistent with her having turned to the side when she was shot, and one was consistent with her

being shot while she was lying on the ground. *Giles, supra*, 152 P.3d at 436; RT 376-377.

c. Petitioner's Testimony

Petitioner testified and claimed self-defense. He had dated Avie for several years. He broke up with her in January of 2002, but she continued to call and harass him. *Giles, supra*, 152 P.3d at 435-436; RT 638.

He knew that she was volatile and had a history of violence, particularly when she was jealous. She had vandalized his car and his house. She had shot a man during an argument. She had threatened to kill him and his former girlfriend if she saw them together. She had an army-style knife. She had brandished a knife at a woman, after saying she wanted to "kill that bitch." She had attacked him with a knife in a fit of jealousy. She had brandished a knife at Munks, after saying she wanted to "check that bitch." *Giles, supra*, 152 P.3d at 436, 443-444; RT 633-636, 638-641, 686-687, 693-695. Other defense witnesses corroborated some of these incidents. RT 698-708, 734-735, 741-742.

Petitioner testified that when Avie telephoned him on the night of the shooting, he told her that Munks was there. She got upset and threatened to kill Munks. When Avie arrived and found Munks gone, she threatened to kill Munks when she saw her. He told her to leave, but she didn't. Eventually, he told everyone to leave. *Giles, supra*, 152 P.3d at 436; RT 643, 645, 651.

After Avie and Banks left, he stayed in the garage, putting his CDs away. When Avie appeared in the driveway, she said, "I know that bitch going to come back here. I'm going to kill you and that bitch." He told her to leave, but she refused. When she started to run towards him, he grabbed his uncle's loaded gun, which in the garage. He was very afraid that she had a weapon, although he didn't see one because it was dark. As she charged directly at him, he aimed the gun at her, closed his eyes, and fired several shots. He did not intend to kill her. *Giles, supra*, 152 P.3d at 436; RT 646-648.

d. Conviction and Sentencing

On April 3, 2003, the jury convicted petitioner of first degree murder and found a firearm allegation true. CT 162. He was sentenced to prison for 50 years to life. CT 177-178.

2. The Decision of the California Court of Appeal

Petitioner appealed. On March 8, 2004, while his appeal was pending in Division Six of California's Second Appellate District, this Court issued its decision in *Crawford v. Washington, supra*, 541 U.S. 36. At the request of the Court of Appeal, both parties filed briefs regarding *Crawford's* impact on petitioner's case.

On October 25, 2004, the Court of Appeal affirmed the judgment of conviction. *People v. Giles*, 123 Cal.App.4th 475, 19 Cal.Rptr.3d 843 (2004). The court rejected petitioner's argument that the admission of Avie's hearsay statements to

the officer violated his Sixth Amendment right of confrontation under *Crawford*. 19 Cal.Rptr.3d at 846-847. The court held that the rule of forfeiture by wrongdoing barred petitioner from raising a Confrontation Clause objection to the admission of Avie's out-of-court statements to the officer, because petitioner caused her unavailability at trial by killing her. *Id.* at 847-848. He forfeited his confrontation rights, the court held, even though there was no evidence that he killed Avie for the purpose of preventing her testimony at some future trial. *Id.* at 848.

3. The Decision of the California Supreme Court

The California Supreme Court affirmed. *People v. Giles*, 152 P.3d 433 (Ca. 2007). The court adopted the equitable forfeiture by wrongdoing rule in the State of California for all cases. *Id.* at 444-446. The court concluded that the forfeiture rule does not contain an intent-to-silence element. *Id.* at 443. Rather, it found that "wrongfully causing one's own inability to cross-examine is what lies at the core of the forfeiture rule." *Id.* at 442.

California's equitable forfeiture rule requires a showing that the witness is unavailable for trial and the defendant caused the witness's unavailability by an intentional criminal act. *People v. Giles, supra*, 152 P.3d at 446. To apply the forfeiture rule, the trial court must find the elements of the rule are proven by a preponderance of the evidence. *Ibid.* In making this finding, the trial court may consider the proffered hearsay, but the hearsay must be supported by inde-

pendent corroborative evidence. *Ibid.* If the elements are proven, the defendant forfeits his right to object under the Confrontation Clause to the admission of the witness's hearsay statements. However, the defendant may still object to the admission of the statements on hearsay and other statutory grounds. *Id.* at 446-447.

The California Supreme Court relied on *Reynolds v. United States*, 98 U.S. 145, 158 (1879) and *Crawford v. Washington*, *supra*, 541 U.S. at 62, to justify its holding that intent to silence is not an element of the forfeiture rule. *People v. Giles*, *supra*, 152 P.3d at 437-439, 442-443. Although the court acknowledged that the facts of *Reynolds* involve witness tampering, the court found that *Reynolds* "described the rule without reference to a defendant's motivation," *id.* at 442, and "did not suggest that the rule's applicability hinged on Reynolds's purpose or motivation in committing the wrongful act." *Id.* at 438, n. omitted. Moreover, the court found that *Crawford's* characterization of the rule as a "forfeiture" rather than as a waiver and as based on "essentially equitable grounds" strongly suggests that the applicability of the rule does not depend on the defendant's motive. *Id.* at 442-443. Accordingly, the court concluded:

Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing. As the Court of Appeal here stated, "Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's

unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.

Id. at 443.

REASONS FOR GRANTING THE PETITION

All courts that have faced the issue agree that a person who deliberately intends to, and actually prevents a witness from testifying, loses the right to confront that witness. The Court articulated this rule of forfeiture by wrongdoing in *Reynolds v. United States, supra*. Federal and state courts applied the forfeiture rule for some thirty years only in cases where there was witness-tampering. The rule was codified in Federal Rule of Evidence 804(b)(6) in 1997 and specifically requires that the defendant intend to prevent the witness from testifying. No pre-*Crawford* case held that the forfeiture rule was satisfied because the defendant was the procuring, but not the intentional, cause of the witness's absence.

In *Crawford*, this Court reformulated the constitutional standard required by the Confrontation Clause and held that an absent witness's testimonial hearsay is admissible only if the defendant has had an opportunity to cross-examine the witness. 541 U.S. at 53-54. This stringent standard for the admission of testimonial hearsay excludes some hearsay that would have been admitted under the former standard established in *Ohio v. Roberts*, 448 U.S. 56 (1980), which required

only that the hearsay be reliable. *Crawford* recognized that the rule of forfeiture by wrongdoing is an exception to the new standard and “extinguishes confrontation claims on essentially equitable grounds.” *Crawford, supra*, 541 U.S. at 62.

After *Crawford*, some courts, citing equitable grounds, have expanded the forfeiture exception by eliminating any requirement of proof that the defendant intended to silence the witness. This recent development has created a deep split with other courts that apply the forfeiture rule, as in *Reynolds*, only when the defendant deliberately acts to prevent a witness from testifying. The forfeiture issue arises in every case when witness tampering is alleged, and the expanded rule applies in every homicide case and may arise in any domestic violence and sexual assault case when it is asserted that the defendant may be the reason for the witness’s reluctance or refusal to testify.

This case squarely presents the question of whether a defendant forfeits his confrontation right when the declarant’s absence from trial is an unintended result of the defendant’s wrongful act. It is a pressing question of national importance that the lower courts have thoroughly evaluated but cannot agree upon. Only this Court may resolve the split among the lower courts.

I. Ten State Supreme Courts And One Federal Circuit Court of Appeals Have Split On The Question Presented.

Since *Crawford* was decided in March of 2004, ten state supreme courts and one federal circuit court of appeals have ruled on the question whether

intent to silence is an element of the forfeiture by wrongdoing rule. These courts have split on the issue six to five.

Five state supreme courts, including the court below, and the United States Court of Appeals for the Sixth Circuit have held that intent to silence is not an element of the forfeiture rule. *State v. Mason*, 2007 Wash. LEXIS 553, *18-20 (Wash. 2007); *State v. Jensen*, 727 N.W.2d 518, 536 (Wis. 2007); *State v. Mechling*, 633 S.E.2d 311, 326 (W.Va. 2006); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004), overruled in part on another ground by *State v. Davis*, 158 P.3d 317, 322 (Kan. 2006); *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005).

Five state supreme courts have reached the opposite conclusion. *State v. Romero*, 156 P.3d 694, 703 (N.M. 2007), petition for certiorari filed July 6, 2007, No. 07-37; *People v. Stechly*, 870 N.E.2d 333, 353 (Ill. 2007); *People v. Moreno*, 160 P.3d 242, 247 (Colo. 2007); *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005); *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004).

The forfeiture rule has arisen in different types of prosecutions. In six of these eleven cases, the forfeiture rule involved the use of a murder victim's testimonial hearsay: petitioner's case, *Romero*, *Jensen*, *Garcia-Meza*, *Mason*, and *Meeks*. The remaining cases involved witnesses who survived the crime charged but did not testify. *Stechly* and *Moreno* both involved the use of the victim's testimonial statements in prosecutions for sexual assault of a child. *Mechling* involved the use of the testimonial statements of a domestic violence victim. *Edwards* and *Fields*

involved the forfeiture rule in the context of influencing or threatening a witness to a crime.

These courts have reached diametrically opposite conclusions based on the same pronouncements by this Court in *Reynolds*, *Crawford*, and *Davis v. Washington*, 547 U.S. ___, 126 S.Ct. 2266, 2279-2280 (2006).

The lower courts differ radically in their interpretation of *Reynolds v. United States*, *supra*. For example, the California Supreme Court found that *Reynolds* “described the [forfeiture] rule without reference to a defendant’s motivation,” 152 P.3d 442, and “did not suggest that the rule’s applicability hinged on Reynolds’s purpose or motivation in committing the wrongful act.” *Id.* at 438, fn. omitted. The Illinois Supreme Court reached the opposite conclusion, finding that “the rule laid down by the Supreme Court in *Reynolds* contemplates an accused intentionally procuring a witness’ absence,” *People v. Stechly*, *supra*, 870 N.E.2d at 350, and that “*Reynolds* unequivocally imposed an ‘intent’ requirement.” *Id.* at 349.

The lower courts sharply disagree over the inference to be drawn from the use of the term “forfeiture” by wrongdoing. The California Supreme Court found that the “forfeiture” label strongly suggests that broad forfeiture principles apply. *People v. Giles*, *supra*, 152 P.3d at 442-443. In contrast, the New Mexico Supreme Court, in finding intent to silence necessary, concluded, “we cannot say the distinction between waiver and forfeiture has proved helpful, although we

agree that forfeiture is the preferred term.” *State v. Romero, supra*, 156 P.3d at 702-703.

The California Supreme Court and the Sixth Circuit interpreted the use of the phrase “essentially equitable grounds” as endorsing an expansive forfeiture rule based upon their own sense of fairness. *Giles, supra*, 152 P.3d at 442-444; *United States v. Garcia-Meza, supra*, 403 F.3d at 370-371. In contrast, the New Mexico Supreme Court found it improper “to balance a constitutional right against a somewhat vague and amorphous sense of what ought to be permitted.” *State v. Romero, supra*, 156 P.3d at 702.

The Court’s discussion of the forfeiture rule in section IV of *Davis v. Washington, supra*, did not resolve the question. Seven of the eleven cited cases were decided after *Davis*. The supreme courts of New Mexico, Colorado, and Illinois interpreted the comments in *Davis* to mean that the forfeiture doctrine requires intent to prevent testimony. These courts focused in particular on two pronouncements in *Davis, supra*, 126 S.Ct at 2280. The first is that the doctrine is codified in Federal Rule of Evidence 804(b)(6), which has an intent to silence element. The second is that the forfeiture rule applies to defendants who “seek to undermine the judicial process by procuring or coercing silence from witnesses and victims” and whose conduct “destroy[s] the integrity of the criminal-trial system.” *State v. Romero, supra*, 156 P.3d at 701, 703; *People v. Moreno, supra*, 160 P.3d at 244-245; *People v. Stechly, supra*, 870 N.E.2d at 350.

The supreme courts of Wisconsin, Washington, and West Virginia read *Davis* to permit an expansive forfeiture doctrine. They focused on *Davis*' reaffirmation of *Crawford*'s statement that the forfeiture rule "extinguishes confrontation claims on essentially equitable grounds." *Giles, supra*, 152 P.3d at 443, n. 5; *Jensen*, 727 N.W.2d at 531, n. 12; *Mason, supra*, 2007 Wash. LEXIS 553 at *17; *Mechling, supra*, 633 S.E.2d at 325 (quoting this statement in context). All of these courts ignored *Davis*' statement that Federal Rule 804(b)(6) codifies the forfeiture doctrine. They did not attempt to explain any of language in *Davis* that contradicts their expansive views of the forfeiture rule. The California Supreme Court simply asserted that such language "only describes the traditional form of witness tampering cases . . . without limiting the forfeiture doctrine to witness tampering cases. *Giles, supra*, 152 P.3d at 443, n. 5.

The essential conflict is between those who interpret the forfeiture rule expansively to mitigate the stringent new standard that *Crawford* adopted and those who interpret it as it has traditionally been applied since *Reynolds*, and who see it as necessary to enforce the stringent new standard that *Crawford* adopted. The Wisconsin Supreme Court summarized the former view: "In essence, we believe that in a post-*Crawford* world the broad view of forfeiture by wrongdoing . . . utilized by various jurisdictions since *Crawford*'s release is essential." *State v. Jensen, supra*, 727 N.W.2d at 535. The Colorado Supreme Court has summarized the latter view:

To find the forfeiture of a protection so integral to the truth-seeking process, quite apart from any design or attempt by the defendant to subvert that process, would not only divorce the forfeiture by wrongdoing doctrine from its very reason for existing but would emasculate the newly-articulated cross-examination guaranty of the Confrontation Clause. It seems hardly conceivable that the Supreme Court would understand the confrontation clause to guarantee so absolutely a particular method of testing the reliability of testimony, see *Crawford*, 541 U.S. at 68, and yet allow criminal defendants to be stripped of that guarantee so casually and virtually by definition in entire classes of prosecutions.

People v. Moreno, supra, 160 P.3d at 246-247.

The lower courts are well aware of the diverging lines of authority. E.g., *People v. Moreno, supra*, 160 P.3d at 245-246; *People v. Stechly, supra*, 870 N.E.2d at 349, 351-352; *State v. Romero, supra*, 156 P.3d at 701-702; *Gonzales v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006), cert. denied, 127 S.Ct. 564 (2006) (acknowledging deep split of authority over the intent issue but declining to decide the issue because intent to silence could be inferred from the record). They are facing the same types of factual situations, reading the same precedents, considering the same arguments, and reaching opposite conclusions on the most important exception to the Confrontation Clause. They are hopelessly divided, and no new arguments are likely to emerge.

Only this Court can resolve the conflict over whether the forfeiture by wrongdoing exception to the Confrontation Clause requires proof of an intent to

silence the witness. A prompt decision is necessary to ensure uniform application of the fundamental right to confrontation.

II. This Case Presents An Issue Of National Importance Because The Broad Forfeiture Rule Adopted By The Court Below Emasculates The Right To Confrontation In All Homicide Cases And In Many Other Prosecutions And Creates A Perverse Incentive For Prosecutors To Introduce Hearsay Rather Than Provide An Opportunity For Cross-examination.

The California Supreme Court's expansive interpretation of the forfeiture by wrongdoing rule has broad implications for many criminal cases. A forfeiture rule that is triggered by mere causality emasculates the right to confrontation guaranteed in *Crawford*, because this exception will swallow the rule and it creates a perverse incentive for prosecutors to introduce hearsay rather than provide an opportunity for cross-examination.

The expanded forfeiture rule has wide application because it makes forfeiture of confrontation rights virtually automatic in every homicide case. For the first time, an entire class of defendants has been stripped of the right to confrontation.

The expanded forfeiture rule also applies to cases where the witness could testify but does not. Prosecutors have argued that the defendant forfeits the right to confrontation whenever the witness's absence is due to the trauma of the criminal act. Domestic violence and sexual abuse cases can present the situation. E.g., *People v. Stechly*, *supra*, 870 N.E.2d at 340-341, 349 (noting the

state's argument that the trauma of sexual assault made the child witness unavailable to testify); Adam M. Krischer, "*Though Justice May be Blind, It Is Not Stupid,*" *Applying Common Sense To Crawford In Domestic Violence Cases*, 38 PROSECUTOR at 14 (Nov.-Dec. 2004) (arguing that perpetrators of domestic violence automatically forfeited their right to confront their victims). Thus, once there is plausible evidence that the defendant is responsible for the traumatising crime, the victim's testimonial hearsay would be admitted. This is so even though a witness may have independent, personal, and sometimes self-serving reasons for not appearing, such as concerns about privacy, possible self-incrimination, prior inconsistent statements, or the desirability of preserving pre-existing relationships. *State v. Mechling, supra*, 433 S.E.2d at 325, n. 12 (recognizing that some domestic violence complainants refuse to testify because initial accusations were untrue or exaggerated or an attempt to gain an advantage in other proceedings); *State v. Romero*, 133 P.3d 842, 863-64 (Ct. App. (concurring opinion) *aff'd*, 156 P.3d 694 (N.M. 2007) (same).

The expanded rule of forfeiture by wrongdoing also creates a perverse incentive that undermines the prosecution's incentive to locate and present the witness when testimonial hearsay is available. *Cf. Mechling, supra*, 433 S.E.2d at 314 (subpoena mailed but not physically served, and complaining witness did not appear at trial where only hearsay offered). Child witnesses are particularly problematic because parents or others may desire to avoid their appearance at

trial. Richard D. Friedman, *Children As Victims And Witnesses In The Criminal Trial Process: The Conundrum of Children, Confrontation, and Hearsay*, 65 *Law & Contemp. Prob.* 243, 254 (Winter 2002). In many cases the prosecution prefers testimonial hearsay. The prosecution typically introduces testimonial hearsay through law enforcement personnel who may be perceived to be neutral and more credible than the declarant, particularly because the hearsay cannot be modified or recanted by the witness who only heard the statement.¹ Thus, the broad rule of forfeiture adopted by the court below undermines the purpose of *Crawford* by creating an exception that applies in all homicides and many other cases and by encouraging trial by hearsay rather than by confrontation.

III. This Case Is An Ideal Vehicle For Resolving The Question Presented.

This case is an ideal vehicle for the Court to resolve the question whether intent to prevent testimony is an element of the forfeiture by wrongdoing rule. This constitutional issue is starkly presented here because it is the only disputed

¹ “Of course a prosecutor who has useful hearsay might prefer to offer it, since bringing the speaker to court may be hard or costly or time-consuming. Disappointing as well: The speaker may be frightened or reluctant, and testifying visibly on the record under oath and subject to cross may persuade him to back away from what was more easily said in private to a sympathetic audience of prosecutors and agents. Hence prosecutors sometimes prefer to offer statements rather than produce the speaker, and it is not always easy to distinguish between the effort one might make to find and produce a speaker and an effort to show he cannot be produced.” Mueller & Kirkpatrick, *EVIDENCE*, § 8.87 at 977 (3rd ed. 2003).

material issue of fact or law. There is no dispute that Avie was genuinely unavailable to testify at trial, that petitioner caused her unavailability, and that he had no opportunity to cross-examine her prior to trial. Moreover, there is no dispute that he did not, even in part, cause her unavailability to prevent her from testifying, since the Court of Appeal expressly found that “no evidence” indicated he shot her with the intention of preventing her testimony at some future trial. *Giles, supra*, 19 Cal.Rptr. at 848. Finally, as the California Supreme Court found, there is no dispute that her statements to the police officer were “testimonial in nature.” *Giles, supra*, 152 P.3d at 438, citing *Davis, supra*, 126 S.Ct. at 2273-2274, 2278-2279. Thus, the only remaining issue is the question of law as to whether the forfeiture rule allows the admission of testimonial hearsay without proof that petitioner caused Avie’s absence at trial to prevent her testimony.

The admission of the testimonial hearsay cannot be excused as harmless error. Petitioner had a substantial claim of self-defense. There were no witnesses to the shooting, it occurred outdoors in the dark, a few minutes after Avie returned unexpectedly to petitioner’s home after angrily encountering his new girlfriend, Tameta Munks. Petitioner knew that Avie was a violent and jealous person, and this was corroborated by independent witnesses. She threatened the lives of petitioner and Munks, and then she charged toward petitioner, prompting the shooting. Under these circumstances, the testimonial hearsay about the prior assault was critical to the prosecution’s case because it was the only

testimony that suggested that petitioner would violently attack Avie and because it triggered a propensity instruction. The instruction was very adverse to petitioner because it stated that if the jury found that he had committed a prior offense involving domestic violence, the jury may infer that he “had a disposition to commit another offense involving domestic violence” and to further infer that he was “likely to commit and did commit” the charged murder. RT 983; CT 92. The jury followed the instruction and rejected petitioner’s claim of self-defense.

Neither the California Supreme Court nor the Court of Appeal considered harmless error as a possible alternate ground of decision. The supreme court, however, did cite Avie’s testimonial statement to support its conclusion that there was sufficient proof to support the finding that the homicide was unlawful, and that petitioner had forfeited his right to confrontation. *Giles, supra*, 152 P.3d at 447. Thus, Avie’s statement was central to the verdict, and its admission was not harmless error.

The only issue remaining to be determined is the question presented by this case: whether the rule of forfeiture by wrongdoing requires that petitioner intend to silence the witness. That issue is decisive to this case and has irreconcilably divided the courts below, making this case an ideal vehicle to hear and determine this important constitutional issue.

IV. The Expanded Forfeiture Rule Is Not Supported by This Court’s Cases on the Confrontation Clause or the Rule of Forfeiture by Wrongdoing

Applied at Common Law and Adopted in *Reynolds*, Nor is the Right to Object Under *Crawford* an Inequitable Benefit to Petitioner.

A. The California Supreme Court's Expanded Forfeiture Rule Violates *Crawford*'s Command That The Right To Confrontation Must Be Based On The Law As It Existed When The Sixth Amendment Was Adopted.

The California Supreme Court's expanded forfeiture rule is a post-*Crawford* development aimed at eliminating the intent-to-silence requirement found in the common law and early American precedents supporting the forfeiture rule in *Reynolds*. The court's approach is inconsistent with the historical underpinnings of the Confrontation Clause established in *Crawford*.

In *Crawford*, this Court emphasized that the right of confrontation, and any exception to it, were to be found in the original understanding of the purpose and scope of the Confrontation Clause. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right ... to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. *Crawford, supra*, 541 U.S. at 54. Only the forfeiture rule, and perhaps the dying declaration, were exceptions to the Confrontation Clause when the Sixth Amendment was adopted. *Id.* at 56, n. 6 (discussing dying declaration). The forfeiture rule clearly was limited to deliber-

ate activities aimed at preventing the witness from testifying. *Reynolds* cited only authorities involving post-crime activities by the defendant aimed at interfering with the witness's appearance at trial. The principal common law precedents were Lord Morley's Case in 1666, 6 How. St. Tr. 770 (1666), and Harrison Case in 1692, 12 How. St. Tr. 833 (1692), both of which involved allegations that witnesses were made unavailable. *Reynolds* also cited early American case law and commentaries, and summarized the forfeiture rule as follows:

In *Regina v. Scaife* (17 Ad. & El. N. S. 242), all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way. *Drayton v. Wells*, 1 Nott & M. (S. C.) 409; *Williams v. The State*, 19 Ga. 403. So that now, in the leading text-books, it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence. 1 Greenl. Evid., sect. 163; 1 Taylor, Evid., sect. 446.

Reynolds, supra, 98 U.S. at 158-159.

Thus, the forfeiture rule described in *Reynolds* in 1879 was derived from some two hundred years of case law that consistently applied the rule only when there was evidence that the defendant intentionally prevented the witness from testifying. Other historical evidence supports this conclusion. The existence of the dying declaration exception to the hearsay rule, which predates the Constitution, would have been unnecessary if the forfeiture rule lacked an intent-

to-silence element. Moreover, the California Supreme Court has not cited any authority remotely contemporaneous with the adoption of Sixth Amendment, or of *Reynolds, supra*, that holds that the commission of a crime alone is sufficient to support a forfeiture. As the lower court recognizes, *Giles, supra*, 152 P.3d at 439-40, the application of the forfeiture rule in the thirty years prior to *Crawford* focused on cases of deliberate witness tampering. Indeed, the forfeiture rule has been applied consistently only to witness tampering cases for more than 300 years.

The only reasonable conclusion that can be drawn from the precedents cited in *Reynolds*, the case law, the dying declaration doctrine, and the lack of pre-*Crawford* authority applying the expansive rule adopted in California, is that it was well understood by all that the forfeiture rule required a deliberate act aimed at silencing a potential witness. Consequently this recent development in the law of the Confrontation Clause must be rejected.

- B. The California Supreme Court's Rationale for the Expanded Forfeiture Rule Is Deeply Flawed Because It Uses the Protection Provided by the Right to Confrontation as the Equitable Justification for Forfeiting It.**
 - 1. The Lower Court's Rationale that the Protection Provided by the Right of Confrontation is an Inequitable Benefit is Inconsistent with the Purpose of Constitutional Rights.**

The core of the California Supreme Court's argument is that petitioner should not be able to benefit from his act of homicide by excluding the victim's testimonial hearsay. *Giles, supra*, 152 P.3d at 443 (adopting the Court of Appeal's statement that "Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts"). This argument is fundamentally flawed for two reasons. First, it requires that the right of confrontation be viewed as a "benefit." Constitutional rights, however, are not "benefits" of a crime. They do not derive from the crime at all, and certainly no one commits crimes in order to obtain constitutional rights in a criminal trial. Rather, confrontation and the other constitutional rights are the personal rights of the individual, inherent in citizens and those tried in our courts. *Faretta v. California*, 422 U.S. 806, 819, 829-830 (1975) (identifying notice, confrontation and compulsory process as personal rights). They are the fundamental law of the land and specifically limit the government's power to use certain types of evidence to obtain convictions. Confrontation, in particular, is a procedural right deemed necessary to ensure the fairness of the criminal process. *Crawford, supra*, 541 U.S. at 50-51, 61-63. To treat a constitutional right as a benefit of a crime, and particularly one that can be lost because it is a benefit, is to ignore the nature of constitutional rights.

This Court in *Davis* rejected the California Supreme Court's proposition that constitutional rights may be forfeited because they provide protection. "We

may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.” *Davis, supra*, 126 S.Ct. at 2280 (citation omitted.) Moreover, this Court’s precedents on the loss of the right to confrontation all focus on whether the defendant acted to knowingly forego that right. *Reynolds v. United States, supra*, 98 U.S. 145, 160 (defendant’s deliberate concealment of witness was choice to rely on weakness of government’s case rather than cross-examine the witness); *Diaz v. United States*, 223 U.S. 442 (1912) (voluntary absence from trial waives Sixth Amendment rights); *Illinois v. Allen*, 397 U.S. 337 (1970) (defendant’s disruptive conduct after warning justified removal from courtroom until he behaved); cf. *Davis v. Washington, supra*, 126 S.Ct. at 2280 (forfeiture rule applies to those who seek to undermine the integrity of the judicial process by procuring the silence of witnesses); *Motes v. United States*, 178 U.S. 458 (1900) (defendants did not forfeit their confrontation rights in absence of evidence connecting defendants with witness’s absence from trial). The California Supreme Court does not reconcile its expansive forfeiture rule with this consistent line of precedent.

Second, the court’s forfeiture argument is based on the assumption that a defendant necessarily benefits by causing a witness to be unavailable for trial if he can use that unavailability to exclude the witness’s damaging hearsay statements by asserting constitutional rights. That assumption is not true generally and certainly is not true as applied to petitioner. Had Avie survived and

petitioner been charged with attempted murder, he would have welcomed an opportunity to cross-examine her about her statements to the police. The record shows that she was a highly impeachable and unlikable witness and had a substantial history of violent and threatening conduct. RT 629, 632-636, 639-641, 734-735, 741, 922. If a party benefited from Avie's absence at trial, it was the prosecution because she was not seen by the jury and instead her testimony was given by a more presentable witness repeating the more sanitized and unalterable hearsay. As a result, petitioner had no opportunity to explore whether she embellished or provoked or fabricated the incident.

2. The California Supreme Court Improperly Justifies the Admission of Testimonial Hearsay in the State's Case-in-Chief on Petitioner's Proper Introduction of the Decedent's Threats to Support His Claim of Self-Defense.

The California Supreme Court's opinion improperly attempts to justify the admission of testimonial hearsay in the state's case-in-chief as an equitable response to testimony in the defense case about Avie's statements both during and prior to the incident. The court argued that because petitioner introduced Avie's threats in the defense case to support his claim of self-defense, Avie's testimonial hearsay about a prior assault by petitioner was admissible to preserve the integrity of the judicial process. *Giles, supra*, 152 P.3d at 443-444. This argument turns trial procedure and equity on their head. The state has an obligation to use only constitutionally-acceptable evidence, and that evidence must stand on its own

merits at the time it was introduced. The officer's testimony repeating Avie's statements was concededly testimonial hearsay, and as such was subject to an objection under *Crawford*.

More fundamentally, petitioner's proper introduction of evidence cannot trigger the forfeiture rule because it is not wrongdoing, let alone an intentional criminal act. Petitioner was entitled to support his claim of self-defense by introducing evidence of all the relevant circumstances, including Avie's threats at the time of the incident, her prior threats against him, and her prior threats against others of which he was aware. This evidence was relevant and admissible to prove the reasonableness of his fear and his conduct when she appeared at his home unexpectedly, threatened his life, and charged toward him. *People v. Spencer*, 51 Cal.App.4th 1208, 59 Cal.Rptr.2d 627, 633-635 (1996); *People v. Pena*, 151 Cal.App.3d 462, 474-478, 198 Cal.Rptr. 819, 824-826 (1984); *People v. Humphrey*, 921 P.2d 1, 6-7 (Ca. 1996). The admissibility of this evidence did not depend on her unavailability to testify, because the evidence was admissible regardless of whether or not she testified for the state. Moreover, the evidence of his prior assault on her did not contradict the evidence that she had threatened him on other occasions. The evidence of her threats was offered to show his state of mind. It is a tenuous argument at best that his use of her threats could serve as any predicate for admission of the testimonial evidence whenever offered.

The California Supreme Court's opinion exemplifies the potential misuse of the essentially equitable rationale for the forfeiture rule. The court's argument arbitrarily treats constitutional rights as benefits that can be voided because they perform their function of requiring proof in a manner that the framers of the Constitution intended. The argument that petitioner's proper use of evidence justifies the state's use of constitutionally-objectionable evidence is a conception of equity and fairness that places no limits on the introduction of testimonial hearsay in this category of cases. This view of the forfeiture rule suffers from the same defect as the reliability standard of *Ohio v. Roberts, supra*, and must be rejected for the same reason.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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