No. 07-6053

In the Supreme Court of the United States

DWAYNE GILES,

PETITIONER,

v.

CALIFORNIA,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a criminal defendant forfeit his or her Sixth Amendment Confrontation Clause claims upon a showing that the defendant engaged in intentional misconduct that foreseeably caused a crucial prosecution witness to be unavailable to testify at trial, or must there also be an additional showing that the defendant's actions were undertaken for the specific purpose of preventing the witness's testimony?

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INTEREST OF THE *AMICI CURIAE*

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court recognized the ongoing importance of forfeiture by wrongdoing—an exception to the general rule that, absent prior cross-examination, testimonial statements by an unavailable witness are inadmissible at trial. This case asks whether forfeiture occurs when a defendant engages in intentional misconduct that foreseeably causes a crucial witness to be unavailable to testify at trial, or whether the defendant enjoys the benefit of his wrongdoing unless the prosecution can prove that he acted with a specific intent to prevent the witness from testifying.

This question has monumental implications for the conduct of state criminal trials, and the *amici* States therefore have a substantial interest in the outcome of this case. Prosecutions for crimes including murder, domestic violence, and child abuse often depend on statements from victims and other witnesses who are unavailable to testify as a result of a defendant's intentional misconduct. In many cases, however, the prosecution will be unable to demonstrate that the defendant acted with the specific aim of preventing future testimony. Accordingly, the petitioner's narrow forfeiture rule would, at best, undermine prosecutions and, at worst, make them impossible in cases involving some of the most serious crimes. The *amici* States have a powerful stake in avoiding this inevitable result of petitioner's rule, and in protecting their citizens from the obvious effects of a rule that rewards defendants with the foreseeable benefits of violent or intimidating conduct toward victims and witnesses.

STATEMENT

A jury found petitioner Dwayne Giles guilty of murdering his former girlfriend, Brenda Avie. J.A. 32-33, 36. Petitioner admitted he killed Avie, but argued that he acted in self-defense. J.A. 31.

1. The evidence showed that, on the evening of Avie's death, petitioner was in his grandmother's garage socializing with his niece Veronica Smith, his friend Marie Banks, and his new girlfriend Tameta Munks. J.A. 33. Shortly after Munks left, Avie arrived. *Ibid.* While Smith was in the house, she heard Avie speaking with petitioner outside. *Ibid.* Smith then heard Avie call for "Granny" several times, followed by the sound of gunshots. *Ibid.* Smith and petitioner's grandmother ran outside, where they found petitioner holding a handgun and standing approximately 11 feet from Avie, who was lying on the ground bleeding. *Ibid.* Petitioner fled the scene, and he was arrested approximately two weeks later. *Ibid.*

2. At trial, petitioner testified that Avie had a history of violent behavior and that, after arriving at his grandmother's house, she threatened to kill him and Munks, of whom she was jealous. J.A. 34. Afraid, petitioner retrieved a loaded gun from the garage and disengaged the safety. *Ibid.* Avie "charged" petitioner, and he closed his eyes and shot her because he thought she had something in her hand. *Ibid.* Avie was not carrying a weapon. *Ibid.*

3. Petitioner shot Avie six times in the torso. J.A. 33. Among Avie's wounds, one was consistent with her holding up her hand while being shot, one with her

having turned to her side, and one with being shot while lying on the ground. J.A. 33-34.

4. Over petitioner's objection, Police Officer Stephen Kotsinadelis also testified. J.A. 35. He explained that approximately three weeks before the murder he had responded to a domestic violence call involving petitioner and Avie. *Ibid.* Avie was crying, and she told the officer that petitioner had accused her of infidelity and assaulted her, choking her, punching her in the face and head, and threatening her with a knife, stating, "If I catch you fucking around I'll kill you." J.A. 35-36. Officer Kotsinadelis saw no marks on Avie but felt a bump on her head. J.A. 36. The trial court admitted Officer Kotsinadelis's testimony under section 1370 of California's Evidence Code, which establishes a hearsay exception for out-of-court statements describing the infliction of physical injury on a declarant who is unavailable to testify at trial, where the statements were made at the time of the injury and are otherwise trustworthy. J.A. 15-16 & n.1.

5. On appeal, petitioner relied on this Court's intervening decision in *Crawford* to argue that the admission of Avie's prior out-of-court statements violated his Sixth Amendment right of confrontation. J.A. 16. The court of appeals held that the statements were admissible because petitioner, by intentionally murdering Avie, had forfeited his right to assert a Confrontation Clause objection. J.A. 18.

6. The California Supreme Court affirmed. The court rejected petitioner's attempt to limit forfeiture to circumstances where the prosecution establishes that the defendant was motivated by a specific desire to

prevent testimony, because the doctrine is grounded in "the equitable principle that no person should benefit from his wrongful acts," which is equally applicable "whether or not the defendant specifically intended to prevent the witness from testifying." J.A. 54-55 (internal quotation marks omitted). The court went on to identify several limits to forfeiture's scope. First, the doctrine applies only where a witness is "genuinely unavailable" and that unavailability is "caused by defendant's intentional criminal act." J.A. 63. Second, a trial court's finding of forfeiture must be based on evidence beyond the unavailable witness's testimony. J.A. 64. Third, the forfeiture doctrine is not coextensive with the rules of evidence; accordingly, even if forfeiture is found, out-of-court statements are admissible only if they fall within a recognized hearsay exception and their probative value exceeds their prejudicial effect. *Ibid.* Finally, to ensure that the jury does not infer guilt from the court's finding of forfeiture, the jury must not be advised of the underlying determination that the defendant committed an intentional criminal act. *Ibid.*

SUMMARY OF ARGUMENT

The cramped forfeiture rule that petitioner proposes fails on multiple grounds.[1] First, the rule cannot be squared with this Court's decision in *Reynolds v. United States*, 98 U.S. 145 (1879)—on which *Crawford* relied—or with this Court's later

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[1] One of these grounds is petitioner's misreading of Framing-era authority, but respondent and other *amici* persuasively discredit petitioner's historical analysis elsewhere, and we do not cover that same ground here.

jurisprudence. *Reynolds* announced a broad forfeiture rule, without mention of an intent requirement, and subsequent decisions followed suit. Moreover, *Reynolds* rooted forfeiture in the longstanding equitable "maxim that no one shall be permitted to take advantage of his own wrong," 98 U.S. 159, a point reaffirmed in *Crawford*, see 541 U.S. at 62 (describing forfeiture as "essentially equitable" in nature), and properly recognized by the California Supreme Court, J.A. 52. Critically, this equitable principle from which the forfeiture doctrine derives, and other, analogous variations on the same principle—including the prohibition on recovery arising from an injured party's own wrongful conduct, the "Slayer's Rule," and "Son of Sam" laws—refuse to reward wrongdoing regardless of intent.

Second, petitioner errs in relying on Federal Rule of Evidence 804(b)(6) as the supposed codification of the modern forfeiture doctrine. This rule was a targeted response to concerns over witness tampering, specifically; therefore, it has little relationship to the forfeiture doctrine recognized in cases like *Reynolds*, much less to the equitable principles that underlie that doctrine. And while some federal courts had recognized an intent requirement at the time of the rule's enactment, this was not the prevailing view, as petitioner contends.

Finally, the practical effect of petitioner's rule would be to reward wrongdoing with its foreseeable benefits, in direct violation of the equitable principle from which forfeiture derives. These real-world effects would be substantial, not only in murder cases, but also in prosecutions for child and domestic abuse, for

example, where victims are frequently unavailable to testify as a direct result of their abusers' unlawful conduct.

Amici States respectfully urge this Court to affirm the judgment of the California Supreme Court, which applied the forfeiture doctrine in a manner consistent with this Court's prior decisions and the equitable principles from which the doctrine derives, without rewarding defendants with the obvious and foreseeable consequences of witness abuse and intimidation.

ARGUMENT

This Court's decisions in *Crawford* and *Davis v. Washington*, 547 U.S. 813 (2006), reaffirm the vitality of the forfeiture doctrine in modern Confrontation Clause jurisprudence. Indeed, the Court acknowledged that, if anything, the doctrine has an increasing role to play in the post-*Crawford* era. See *Davis*, 547 U.S. at 833-834 (although "[t]he [*Ohio v. Roberts*, 448 U.S. 56 (1980)] approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, * * * *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings"). However, petitioner invites the Court to limit the doctrine in a way that would reward defendants with the foreseeable effects of their intentional wrongdoing. The Court should reject petitioner's invitation for several reasons.

I. AN INTENT-TO-PREVENT-TESTIMONY REQUIREMENT IS IRRECONCILABLE WITH *REYNOLDS* AND ITS PROGENY, INCLUDING *REYNOLDS'S* RECOGNITION THAT FORFEITURE IS ROOTED IN EQUITY.

Crawford not only reaffirmed the importance of forfeiture in modern Confrontation Clause analysis, but it also emphasized that doctrine's origins in equity. Forfeiture by wrongdoing is not a "means of determining reliability," the Court explained; rather, it "extinguishes confrontation claims on essentially equitable grounds." 541 U.S. at 62. The Court relied for this proposition on its prior decision in *Reynolds*, which described forfeiture in broad terms, without regard to intent:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.

98 U.S. at 158. *Reynolds* provided two bases for the doctrine: first, the sweeping principle that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts," *ibid.*; and, second, the equitable "maxim that no one shall be permitted to take advantage of his own wrong," *id.* at 159.[2]

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[2] As petitioner points out, the underlying facts in *Reynolds* involved both witness tampering and a declarant who had previously been cross-examined. See Pet. Br. 22. But

The Court has addressed forfeiture only once since *Crawford*, and there again the Court stressed the doctrine's equitable grounding, "reiterat[ing] what [it] said in *Crawford*: that 'the rule of forfeiture by wrongdoing * * * extinguishes confrontation on essentially equitable grounds." *Davis*, 547 U.S. at 833 (omission in original).

As explained below, cases following *Reynolds* have reaffirmed its broad forfeiture rule, without the intent requirement that petitioner seeks to add. The recognized, equitable bases for the doctrine are likewise incompatible with such a requirement.

A. Cases Following *Reynolds* Do Not Require Intent.

As an initial matter, we may put to the side petitioner's claim that "[t]his Court's decisions applying *Reynolds* and its progeny * * * provide no support" for the decision of the California Supreme Court but instead "confirm" a specific intent requirement. Pet. Br. 32-33. Petitioner relies on three cases citing *Reynolds*—*Eureka Lake & Yuba Canal Co. v. Superior Court of Yuba County*, 116 U.S. 410 (1886), *Motes v. United States*, 178 U.S. 458 (1900), and *Diaz v. United States*, 223 U.S. 442 (1912), and a fourth case, *Douglas v. Alabama*, 380 U.S. 415 (1965), that cites *Motes*, see Pet. Br. 32-33—but the Court did not require intent in any of these decisions. Thus, petitioner's cases do not endorse his view of forfeiture. If anything, these cases reaffirm the broad forfeiture rule announced in *Reynolds*.

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petitioner cannot square *Reynolds*'s broad language with his effort to limit that decision to its facts.

In *Eureka Lake*, the Court acknowledged that a defendant may forfeit a right through "wrongful acts," without mention of intent. 116 U.S. at 418. The fact that defendant's agent purposefully evaded service in that case, and defendant therefore forfeited any complaint based on lack of process, see *ibid.*, does not detract from the opinion's reaffirmation of the broad rule in *Reynolds*.

And although the Court declined to find forfeiture of the confrontation right in *Motes*, this was because the witness's absence was attributable to prosecutorial negligence, rather than to any wrongdoing whatsoever on the defendant's part. See 178 U.S. at 473-474. Again, the Court reiterated the broad rule that forfeiture applies whenever a defendant seeks "'to take advantage of his own wrong.'" *Id.* at 472 (quoting *Reynolds*, 98 U.S. at 159). The Court followed the same approach in *Douglas*, where it found that a crucial witness "was acting entirely in his own interests" when he invoked the privilege against self-incrimination and thereby made himself unavailable to testify, 380 U.S. at 420, and, accordingly, the defendant simply committed no wrongdoing that worked a forfeiture of his right to confrontation.

Finally, in *Diaz*, the Court confirmed yet again that "[n]either in criminal nor in civil cases will the law allow a person to take advantage of his own wrong." 223 U.S. at 458 (citation and internal quotation marks omitted). In that case, the principle barred defendant's Confrontation Clause claim, for defendant himself had introduced the hearsay statements about which he later complained. See *id.* at 452-453.

In sum, far from supporting petitioner's proposed, intent-based rule, this Court's decisions following *Reynolds* reiterate and reaffirm that case's intent-neutral principle, rooted in equity, that defendants may not use the Sixth Amendment to achieve the benefits of their own wrongdoing. Additional decisions, which petitioner does not address, are to the same effect. For example, in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964), Justice Cardozo, writing for the Court, discussed the defendant's right to confront witnesses, without doubting that "the privilege" of personally confronting a witness is subject to forfeiture not only "by consent" but "by misconduct." 291 U.S. at 106.

The Court followed this approach in *Illinois v. Allen*, 397 U.S. 337 (1970), where it found no Confrontation Clause violation in a trial court's expulsion of an unruly defendant from the courtroom. See *id.* at 342-343. Although the Court acknowledged that "[o]ne of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial," *id.* at 338, and "that courts must indulge every reasonable presumption against the loss of constitutional rights," *id.* at 343, the Court nevertheless rejected the defendant's complaint that both jury selection and the State's case-in-chief were conducted in his absence, see *id.* at 340-341. Relying on *Snyder*, the Court held that the defendant's misconduct had resulted in forfeiture of his confrontation rights. See *id.* at 342-343.

Similarly, in *Taylor v. United States*, 414 U.S. 17 (1973) (per curiam), the Court held that when a criminal defendant voluntarily absents himself from

trial, he forfeits his confrontation rights. See *id.* at 18-20. In reaching this conclusion, the Court rejected the defendant's view that forfeiture cannot be found "unless it is demonstrated that he knew or had been expressly warned by the trial court" that, by making himself absent, he would "effectively foreclose his right * * * to confront witnesses against him." *Id.* at 19.

In these decisions, the Court reaffirmed time and again that forfeiture follows from intentional misconduct alone, regardless of the defendant's specific aim or understanding of its effect on his trial.[3]

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[3] To be sure, when an accused is absent from his trial either because he forfeited his right to be present by his misconduct, as in *Allen*, or voluntarily, as in *Taylor*, his counsel is still available to cross-examine witnesses. But this, as the first of the modern confrontation cases observed, is not a "distinction * * * of constitutional significance." *United States v. Carlson*, 547 F.2d 1346, 1358 n.11 (8th Cir. 1976). As *Carlson* explained, "[s]ince confrontation is a right which is personal to the accused, *Faretta v. California*, [422 U.S. 806, 819 (1975)], the question in all waiver cases is whether the defendant forfeited his right to confront his accusers personally." *Carlson*, 547 F.2d at 1358 n.11. In *Taylor* and *Allen*, therefore, this Court found forfeiture based on the defendants' conduct alone, and "no significance was placed on the fact that the defendants maintained the right to confront witnesses vicariously through counsel." *Ibid.*

B. The Equitable Principles That *Reynolds* Acknowledged As The Basis For The Forfeiture Doctrine Are Incompatible With Petitioner's Proposed Rule.

Petitioner's rule is not merely irreconcilable with *Reynolds* and this Court's later jurisprudence. It cannot be squared with the equitable principles from which the forfeiture doctrine derives. The maxim that defendants should not benefit from their own wrongdoing has a long history at common law. See, *e.g.*, *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) (describing the "general, fundamental maxims of the common law" that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime"); see generally 1 Am. Jur. 2d, *Actions* § 39, at 825 (2005). This principle was "founded upon public policy, not for the sake of the defendant, but for the law's sake, and that only." *McDearmott v. Sedgwick*, 39 S.W. 776, 778 (Mo. 1897) (citations and internal quotation marks omitted). And it remains "the prevailing rule in American jurisdictions." *Feltner v. Casey Family Program*, 902 P.2d 206, 208 (Wyo. 1995).

Consistent with the equitable maxim *Reynolds* cites, and as the California Supreme Court recognized, this Court applied forfeiture in *Reynolds* without regard to the defendant's motive in procuring the witness's silence. J.A. 40-41. Critically, the same is true in other contexts where courts have applied this equitable principle to deny benefits arising from a party's own wrongdoing.

For example, courts routinely deploy the principle to bar plaintiffs from recovering damages for injuries incurred while engaging in intentional criminal conduct. See, *e.g.*, *Manning by Manning v. Brown*, 689 N.E.2d 1382, 1384-1385 (N.Y. 1997) (passenger injured in accident while riding in stolen vehicle could not recover from vehicle's owner or driver for personal injuries); *Oden v. Pepsi-Cola Bottling Co.*, 621 So.2d 953, 944-945 (Ala. 1993) (estate of minor, killed when vending machine fell on him while he was trying to steal soft drinks, could not recover from machine's owner or manufacturer on product liability theory); *Lord v. Fogcutter Bar*, 813 P.2d 660, 663 (Ak. 1991) (intoxicated man who left bar with woman and was later convicted of raping her could not recover on theory that bartender was negligent in continuing to serve him after he became intoxicated); *Glazier v. Lee*, 429 N.W.2d 857, 859 (Mich. Ct. App. 1988) (man who murdered his girlfriend could not recover on theory that psychiatrist had negligently failed to stop him).

These tort plaintiffs did not engage in criminal conduct with an eye toward a future civil recovery, yet the equitable bar on reaping the benefits of wrongdoing applied just the same. Indeed, the principle applies even where the plaintiff's injuries are attributable to wrongdoing by another. In *Cole v. Taylor*, 301 N.W.2d 766 (Ia. 1981), for example, the court held that just as a patient could not recover from her psychiatrist for negligently failing to prevent her from committing murder, her husband could not recover for loss of consortium following the patient's murder conviction. See *id.* at 768. As the court explained, public policy disfavored the husband's lawsuit because his "claim would also arise from a criminal act," and, accordingly,

"the policies should not allow indirectly for the husband what they disallowed directly for the wife." *Ibid.* Likewise, in *Feltner*—a lawsuit by foster parents and their biological son against a foster care placement program—the court held that neither the son nor the parents could recover for the son's sexual assault of a foster daughter. See 902 F.2d at 208-209. Just as in *Cole*, the court saw no basis to distinguish between the son's and the parents' claims on public policy grounds. See *id.* at 209.

Along similar lines, the maxim that one may not profit from wrongdoing is the basis for the so-called "Slayer's Rule," which prohibits a life insurance beneficiary who murders an insured from recovering under the policy. See, *e.g.*, *Mutual Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886). The rule is deeply ingrained in the common law and codified in numerous modern statutes. See, *e.g.*, *Lofton v. West*, 198 F.3d 846, 850 (Fed. Cir. 1999); *Prudential Ins. Co. v. Athmer*, 178 F.3d 473, 475-476, 478 (7th Cir. 1999); *Metropolitan Life Ins. Co. v. White*, 972 F.2d 122, 124 & n.11 (5th Cir. 1992); see generally 44A Am. Jur. 2d, *Insurance* § 1689, at 162 (2003).

Originally recognized by this Court at the time of its decision in *Reynolds*, the Slayer's Rule is premised on the view that "[i]t would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken." *Armstrong*, 117 U.S. at 600. Like Sixth Amendment forfeiture, the rule "is based upon public policy and upon the principle that no one shall be allowed to benefit from his own wrong." *Moore v. Moore*, 186 S.E.2d 531, 533 (Ga. 1971) (quoting 44 Am. Jur. 2d 653, *Insurance* § 1741); see

also *Lofton*, 198 F.3d at 850; *Prudential*, 178 F.3d at 475-476; *Draper's Estate v. C.I.R.*, 536 F.2d 944, 945 (1st Cir. 1976); *Shoemaker v. Shoemaker*, 263 F.2d 931, 932 (6th Cir. 1959). And critical for present purposes, the beneficiary's purpose in killing the insured need not have been "to obtain the proceeds of the policy"; rather, "it is sufficient that the killing" itself was the beneficiary's "intentional and wrongful act." *Moore*, 186 S.E.2d at 533 (quoting 44 Am. Jur. 2d 653, *Insurance* § 1741); *Carter v. Carter*, 88 So.2d 153, 157 (Fla. 1956) (same); see also *National Life Ins. Co. v. Hood's Adm'r.*, 94 S.W.2d 1022, 1023 (Ky. Ct. App. 1936) ("There is no difference of opinion among the courts that a beneficiary cannot recover the insurance when he feloniously kills the insured, irrespective of the purpose."). Once again, the equitable prohibition applies regardless of the wrongdoer's specific motive or intent, for the bar works simply to decouple misconduct from its reward.

Finally, many States and the federal government have enacted "Son of Sam" or "antiprofit" statutes to stop criminals from financially exploiting their own crimes. See Karen M. Ecker & Margot J. O'Brien, Note, Simon & Schuster, Inc. v. Fischetti: *Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 Notre Dame L. Rev. 1075, 1075-1076 (1991) (approximately 40 state legislatures and the federal government have passed such laws). These laws, which usually divert proceeds derived from media exploitations of crimes from criminal offenders to their victims, exist in part to "prevent[] criminals from profiting from their crimes." *New York State Crime Victims Bd. v. T.J.M. Prods., Inc.*, 673 N.Y.S.2d 871, 874 (N.Y. App. Div. 1998); accord, *e.g.*, *In re*

Opinion of Justices to the Senate, 764 N.E.2d 343, 346 (Mass. 2002); *Curran v. Price*, 638 A.2d 93, 96 (Md. 1994).

Thus, these statutes, too, bar offenders from receiving the benefit of their own misconduct, and the laws work without requiring an intent to profit later from the crime. Moreover, although courts have expressed First Amendment concerns about early versions of these laws, they have never suggested that the absence of an intent requirement is problematic. See, *e.g.*, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-123 (1991) (state law not narrowly tailored to achieve compelling governmental interest in compensating victims with profits from crime); *Keenan v. Superior Court of Los Angeles County*, 40 P.3d 718, 725-735 (Cal. 2002) (same); *In re Opinion of Justices to the Senate*, 764 N.E.2d at 348-350 (same).

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In sum, the rule that petitioner espouses cannot be squared with *Reynolds* or this Court's subsequent decisions, and it would represent an unprecedented break from the equitable principles underlying forfeiture.

II. NEITHER FEDERAL RULE OF EVIDENCE 804(B)(6) NOR THE MODERN FORFEITURE CASES SUPPORT AN INTENT-TO-PREVENT-TESTIMONY REQUIREMENT.

In 1997, Federal Rule of Evidence 804 was amended to create a hearsay exception, entitled "Forfeiture by wrongdoing," for "statement[s] offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the

unavailability of the declarant as a witness." Fed. R. Evid. 804(b)(6). As its plain language indicates, Rule 804(b)(6) applies only where the defendant acts with intent to prevent testimony. Both petitioner and NACDL rely on Rule 804(b)(6) as support for their claim that forfeiture requires this same intent. See Pet. Br. 36-37; NACDL Br. 5.[4] They are incorrect.

Initially, this Court has long emphasized that the Sixth Amendment and modern hearsay rules are not coextensive. See, *e.g.*, *Dutton v. Evans*, 400 U.S. 74, 86 (1970) ("[T]he Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now."); *California v. Green*, 399 U.S. 149, 155 (1970) ("Our decisions have never established such a congruence" between the Confrontation Clause and hearsay rules). As recently as *Crawford*, the Court reiterated that just as a

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[4] The reliance by petitioner and NACDL on Rule 804(b)(6) is in tension with their historical argument. Both maintain that, at the time of the Framing, an unavailable witness's prior statement was inadmissible unless the defendant had an opportunity for cross-examination. See Pet. Br. 18; NACDL Br. 6-12. Thus, were the Court to adopt the forfeiture rule that petitioner and NACDL claim the Framing-era cases require, the Court would necessarily invalidate Rule 804(b)(6) insofar as that rule permits admission of testimonial statements without prior cross-examination. NACDL expressly acknowledges this problem but claims that the Court "need not address the constitutionality of * * * Federal Rule 804(b)(6)." NACDL Br. 13. To the contrary, should the Court accept the historical argument forwarded by petitioner and NACDL, Rule 804(b)(6) would be in jeopardy.

Confrontation Clause violation may exist even though the statement in question is admissible under modern hearsay rules, admission of evidence in violation of the hearsay rules may not violate the confrontation right. See 541 U.S. at 51.

Accordingly, the fact that Rule 804(b)(6) limits forfeiture to circumstances where the defendant acted with an intent to prevent testimony is no indication that the Confrontation Clause is so limited. In fact, as we now explain, Rule 804(b)(6) was enacted in response to a specific concern about witness tampering. It has little relationship to the forfeiture doctrine recognized in *Reynolds*, much less to the equitable principles that underlie the doctrine. And contrary to NACDL's suggestion that Rule 804(b)(6) "reflects the modern understanding of forfeiture applied in federal courts," NACDL Br. 5, the prevailing rule among courts at the time of the rule's enactment did not require intent. In short, neither Rule 804(b)(6) nor the modern cases that inspired it support petitioner's approach to forfeiture.

A. Rule 804(b)(6) Was Designed To Address Witness Tampering, Specifically, And Does Not Alter The Scope Of Forfeiture Under The Confrontation Clause.

The note by the Advisory Committee on Evidence Rules to the 1997 Amendments to the Federal Rules of Evidence states that "Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness," and the text of the rule itself

makes clear that it is available only when the defendant acts with intent to prevent testimony. Fed. R. Evid. 804 Advisory Committee Notes (1997). The note further provides that Rule 804(b)(6) "recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'" *Ibid.* (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)).

The Advisory Committee's reliance on *Mastrangelo* is critical to a proper understanding of the rule. There, the defendant, after first unsuccessfully using threats to deter a witness from testifying, caused the witness to be murdered on his way to court. See *Mastrangelo*, 693 F.2d at 271. At trial, the defendant objected to the admission of the witness's prior grand jury testimony, arguing that neither the hearsay rules nor the Confrontation Clause permit the use of such testimony. See *id.* at 272. The Second Circuit, in an opinion by Judge Ralph Winter, rejected the defendant's Confrontation Clause argument in no uncertain terms: the court deemed the prior testimony admissible because "[a]ny other result would mock the very system of justice the confrontation clause was designed to protect." *Id.* at 273.

The facts of *Mastrangelo* reflect crime trends in the 1990s, when Rule 804(b)(6) was enacted. See Leonard Birdsong, *The Exclusion of Hearsay through Forfeiture by Wrongdoing—Old Wine in a New Bottle—Solving the Mystery of the Codification of the Concept into Federal Rule 804(b)(6)*, 80 Neb. L. Rev. 891, 904-905 (2001). These trends, which were known to Committee members, showed an increase in the murder and intimidation of federal trial witnesses, perhaps due to the advent of gang-controlled crack sales. See *ibid.*

Indeed, *Mastrangelo* itself was a drug case, the defendant having been charged with importing and distributing various narcotics. See 693 F.2d at 270. In addition, in 1994, Judge Winter, the author of *Mastrangelo*, became Chairman of the Committee and, in that capacity, told Committee members that the case had "affected him deeply and led [him] to believe that the long standing concept of forfeiture should be codified in the Federal Rules." Birdsong, *supra*, at 905-906. According to a participant in Committee meetings, the enactment of Rule 804(b)(6) "all had to do with Circuit Judge Ralph K. Winter" and the *Mastrangelo* case. *Ibid.*

The Committee minutes confirm this. The minutes from January 9 and 10, 1995, Judge Winter's inaugural meeting as Chairman, provide the first indication that the Committee "wished consideration of whether * * * [Rule 804] should be amended to cover issues raised by opinions such as *United States v. Mastrangelo*, 722 F.2d 13 (2d Cir. 1983), when the defendant has prevented the declarant from testifying." Advisory Committee on Evidence Rules, Minutes of the Meeting of January 9-10, 1995, *available at* 1995 WL 17050678, at *4. The Committee met again a few months later, and these minutes again show Judge Winter's interest in amending the rules to address the witness tampering issue presented in *Mastrangelo*. See Advisory Committee on Evidence Rules, Minutes of the Meeting of May 4-5, 1995, *available at* 1995 WL 870911, at *3-4. "The Committee agreed that codifying the waiver doctrine was desirable as a matter of policy in light of the large number of witnesses who are

intimidated or incapacitated so that they do not testify." *Id.* at *3.[5]

Then-proposed Rule 804(b)(6) was discussed twice further, and the minutes from both meetings confirm the Committee's intent to target witness tampering cases like *Mastrangelo*. The minutes of the April 22, 1996 meeting show that the Committee rejected a suggestion to redraft the rule to emphasize this intent, but only because "[t]he Committee thought it unnecessary to rewrite the rule to refer specifically to witness tampering because the proposed text states that the rule applies only in instances in which the party's objective was to 'procure the unavailability of the declarant as a witness.'" Advisory Committee on Evidence Rules, Minutes of the Meeting of April 22, 1996, *available at* 1996 WL 936789, at *3-4. Then, at the June 19, 1996 meeting of the Committee on Rules of Practice and Procedure, Judge Winter stressed that the proposed rule "dealt only with witness-tampering." Committee on Rules of Practice & Procedure, Minutes of the Meeting of June 19-20, 1996, *available at* 1996 WL 936792, at *24.[6] At this time, the Rules

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[5] Further confirming the importance of *Mastrangelo*, the Committee chose a version of the rule that would not require a showing that the defendant actively participated in procuring the declarant's unavailability, and rejected imposing a "clear and convincing" burden of proof on the prosecution in favor of a preponderance standard. See 1995 WL 870911, at *3. This approach follows *Mastrangelo*. See 693 F.2d at 273-274.

[6] At one point, Judge Winter agreed to amend the committee note to make clear that the new rule applies only

Committee approved the proposed amendment and sent it to the Judicial Conference, see *ibid.*, which approved new Rule 804(b)(6), as did this Court, see Birdsong, *supra*, at 907.

In sum, both the text and the history of Rule 804(b)(6) demonstrate that it was a specifically targeted response to then-prevalent concerns about witness tampering, and, in fact, was designed as a response to *Mastrangelo*, an archetypal witness tampering case. The drafters of Rule 804(b)(6) did not even address this Court's forfeiture decisions, much less purport to define the outer bounds of forfeiture under the Commerce Clause, and nothing about the rule or its history suggests that the Sixth Amendment requires that all forfeiture rules be limited to witness tampering cases. For these reasons, Rule 804(b)(6) does not cabin the scope of forfeiture for Confrontation Clause purposes.

B. Modern Forfeiture Cases Do Not Limit The Doctrine To Circumstances Where There Is Intent To Prevent Testimony.

The drafters of Rule 804(b)(6) thus purposefully designed the rule to address witness tampering cases, and, not surprisingly, required intent to prevent testimony, the *sine qua non* of witness tampering. This Court's decision in *Davis* is not to the contrary. *Davis* did state that Rule 804(b)(6) "codifies the forfeiture doctrine." 547 U.S. at 833. But this statement is best

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to witness tampering cases. See 1996 WL 936792, at *24. While this apparently was never done, there is no doubt that Rule 804(b)(6) applies only if there is intent to prevent testimony.

understood as dicta, for the Court had no occasion to apply the forfeiture doctrine in *Davis* and expressly took "no position on the standards necessary to demonstrate such forfeiture." 547 U.S. at 833. Indeed, the Court made no reference to an intent-to-prevent-testimony requirement, or lack thereof; its discussion of Rule 804(b)(6) was limited to its requirement that the prosecution demonstrate forfeiture by a preponderance of the evidence. See 547 U.S. at 833.

Nor, as petitioner contends, see Pet. Br. 34-36, was the prevailing view among federal courts to require an intent to prevent testimony. A survey of federal decisions undertaken shortly before the enactment of Rule 804(b)(6) demonstrates that "the intent requirement appear[ed] to be the minority rule" in federal courts at the time. John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. Rev. 835, 856 (Dec. 1996). In particular, while the First and Fifth Circuits had adopted an express intent requirement, the Second, Fourth, Eighth, and Tenth Circuits, as well as the District Court for the District of Columbia, required only that the defendant have procured the delarant's unavailability. See *id.* at 855-856 & nn. 133-143. For their part, the Eleventh and Sixth Circuits had issued conflicting opinions on the issue, so the status of the requirement in those circuits was unclear. See *id.* at 856 & nn. 144-145.

To be sure, many of these courts had no occasion to consider an intent-to-prevent-testimony requirement, specifically, see Kroger, *supra*, at 856, for the cases arose largely in the witness tampering context. See James F. Flanagan, *Confrontation, Equity, & the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 Wm. & Mary Bill Rts. J. 1193, 1209, 1213 (Apr. 2006)

(modern forfeiture doctrine "began to emerge in 1976, principally in the federal courts, to combat rising incidents of witness tampering found in drug and organized crime cases").[7] Nevertheless, many of the holdings strongly suggest that there is no such requirement, or, at the very least, cannot credibly be understood to endorse such a requirement, as petitioner must read them to sustain his claim that Rule 804(b)(6) reflects prevailing case law requiring intent. See Pet. Br. 37.

The difference between the two approaches is perhaps best understood in terms of the distinction between waiver and forfeiture. Although the terms are sometimes used interchangeably, they are not synonymous. Waiver is "an intentional relinquishment or abandonment of a known right or privilege,"

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[7] This was not always the case, however. For example, in *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985), the defendant shot the declarant, an undercover federal agent, in an attempt to avoid arrest. See *id.* at 986-987. There was no indication that the defendant's action was motivated by an intent to prevent the agent from testifying at trial. On appeal, the Eleventh Circuit did not require a showing of specific intent, holding simply that the defendant "waived his right to cross-examine [the agent] by killing him." *Id.* at 995. Similarly, in *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997), the defendants murdered the declarant to steal his drugs. See *id.* at 654. Again, there was no intent to prevent testimony, and, indeed, the Second Circuit expressly disclaimed such a requirement, holding that "[a]lthough a finding that defendants' purpose was to prevent a declarant from testifying * * * is relevant, such a finding is not required." *Id.* at 668 (citation, internal quotation marks, and brackets omitted).

Johnson v. Zerbst, 304 U.S. 458, 464 (1938), while forfeiture is "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty," Black's Law Dictionary 677 (8th ed. 2004); see also Webster's Third New International Dictionary 891 (Merriam-Webster Inc. 1993) (defining "forfeiture" as "loss of something through one's own act"). While the former requires a finding by the trial court that "there is an intelligent and competent waiver by the accused," *Johnson*, 304 U.S. at 465, the latter does not. Thus, as even advocates of an intent-to-prevent-testimony requirement acknowledge, under their view, the forfeiture doctrine is more aptly characterized as one of waiver and therefore is "misnamed." Flanagan, *supra*, at 1196.

The distinction between forfeiture and waiver divides the modern-era cases. For example, in *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), the first of the contemporary decisions, the Eighth Circuit adopted a forfeiture rationale to hold that the prior grand jury testimony of a witness who refused to testify at trial because of the defendant's threats against him was admissible even though the defendant "did not explicitly manifest his consent to a waiver of his confrontation rights." *Id.* at 1352-1353, 1358. The court declined to require that the defendant have undertaken "'an intentional relinquishment or abandonment of a known right or privilege'" to find forfeiture, *id.* at 1358 (quoting *Johnson*, 304 U.S. at 464), holding instead that the confrontation right "may be lost not only by consent, but 'at times even by misconduct,'" *id.* at 1358 (quoting *Snyder*, 291 U.S. at 106).

In reaching this conclusion, the *Carlson* court refused to allow "[t]he Sixth Amendment * * * [to] stand as a shield to protect the accused from his own misconduct or chicanery," 547 F.2d at 1359, regardless of the offender's specific intent. The court expressly adopted the interpretation of *Reynolds* and successive decisions that we forward above—that *Reynolds* was substantially dissimilar factually from the case before it, but "by focusing on the defendant's conduct in each of these cases, there is a similarity and we are guided by the precept articulated in *Reynolds* that 'no one shall be permitted to take advantage of his own wrong.'" 547 F.2d at 1359 n.12 (quoting *Reynolds*, 98 U.S. at 159). Accordingly, without analyzing the defendant's intent, the court concluded that he had forfeited his confrontation right by "pursuing [a] course of conduct, which is itself inimical to the administration of justice." *Carlson*, 547 F.2d at 1358.

In *Steele v. Taylor*, 684 F.2d 1193 (6th Cir. 1982), the Sixth Circuit also followed a forfeiture rather than a waiver approach. On review of the district court's determination that a witness's prior statements should be admitted because the defendant had induced her not to testify at trial, see *id.* at 1197-1199, the court of appeals identified two theories to support admissibility—"either a concept of implicit waiver of confrontation or the principle that a person should not profit by his own wrong," *id.* at 1201. The court embraced the latter theory. See *id.* at 1202.

Preliminarily, the court noted that the use of waiver was "confusing" under the circumstances, because there is no requirement that the defendant have "knowingly, intelligently and deliberately relinquishe[d] his right to exclude hearsay." *Steele*,

684 F.2d at 1201 n.8. To the contrary, "[h]e simply does a wrongful act that has legal consequences * * *." *Ibid.* The court then explained its holding as based both on "public policy" and

> a principle of reciprocity similar to the equitable doctrine of "clean hands." The law prefers live testimony over hearsay, a preference designed to protect everyone, particularly the defendant. A defendant cannot prefer the law's preference and profit from it, as the Supreme Court said in *Reynolds*, while repudiating that preference by creating the condition that prevents it.

Id. at 1202.

Thus, as *Carlson* and *Steele* illustrate, prior to the enactment of Federal Rule 804(b)(6), many federal courts had embraced a true forfeiture approach, that is, one that does not consider the defendant's intent in procuring a witness's unavailability.

To be sure, some courts had taken a narrower view. For example, in *United States v. Thevis*, 665 F.2d 616 (5th Cir. Unit B 1982), the Fifth Circuit expressly embraced an intent-to-prevent-testimony requirement and, in so doing, adopted a rule grounded in waiver rather than forfeiture. In particular, the court applied the *Zerbst* standard to hold that "waiver" of the confrontation right required a finding that the defendant had caused the witness to be unavailable "for the purpose of preventing his testifying at trial." *Id.* at 630. But the Fifth Circuit's approach was not the prevailing, much less the universal, one.

In short, like Rule 804(b)(6), the modern Confrontation Clause cases cannot be understood to limit the scope of the confrontation right, as petitioner contends.

III. PETITIONER'S RULE WOULD UNDERMINE PROSECUTIONS AND PERMIT DEFENDANTS TO PROFIT FROM INTENTIONAL WRONGDOING.

Many prosecutions—not only for murder, but for child abuse, domestic violence, and other offenses—rely on statements from victims and witnesses who are unavailable to testify by virtue of the offender's threats or abuse. And although witness unavailability may be a reasonably foreseeable result of the defendant's misconduct, he may not have acted with an intent to prevent testimony, or, if such intent existed, it may be impossible to prove. For these reasons, an intent requirement is likely to result in the exclusion of crucial evidence and to undermine and scuttle prosecutions, to the undeserved benefit of offenders whose own violent or threatening acts are to blame.

For example, witnesses to and, especially, victims of domestic violence and child abuse face myriad pressures not to testify—all of which are the inevitable result of the abusers' intentional misconduct, even if it is not specifically designed to prevent testimony. To start, these crimes generally occur in secret, with the victims themselves as the only witnesses. See, *e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim."). As a result, if the victims do not testify, the offenders likely will not be prosecuted or convicted.

Yet many domestic violence and child abuse victims are unwilling or unable to cooperate in the prosecution of their abusers. Battered women recant or are unavailable to testify 80-90% of the time. See Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 S. Cal. L. Rev. 213, 235-236 (Nov. 2005); Tom Lininger, *Prosecuting Batterers after* Crawford, 91 Va. L. Rev. 747, 751 (May 2005); Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3-4 (2002). And although child sexual abuse has been reported by 27% of women and 16% of men, only about 10% of such abuse is even brought to the attention of police. See Advocates for Youth, *Child Sexual Abuse I: An Overview*, *available at* http://www.advocatesforyouth.org/PUBLICATIONS/factsheet/fsabuse1.htm.

Domestic violence victims may not testify for several reasons. Most tragically, their abusers may have killed them. Alternately, they may fear retaliation, suffer physical terror at seeing their abuser, be economically or emotionally dependent on their abuser, be afraid that the State will remove children from a household that has experienced domestic violence, or suffer "learned helplessness" as a result of repeated abuse. See Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to* Crawford *in Domestic Violence Cases*, 38-DEC Prosecutor 14, *15-16 (Nov./Dec. 2004); Lininger, *supra*, at 769-770; Percival, *supra*, at 236-237. Indeed, trauma is perhaps the most pervasive aspect of domestic violence undermining

victims' ability to testify. Abuse by an intimate partner is often associated with psychological effects, such as Post-Traumatic Stress Disorder ("PTSD"), which may cause victims to refuse to testify, say they cannot remember, become non-responsive, or recant prior accusations. See Krischer, *supra*, at *15-16; Lininger, *supra*, at 812-813.

Similarly, child abuse victims are often unwilling or unable to testify, assuming the abuse comes to light at all. Children are threatened by their abuser in more than one-fourth of child sexual abuse cases. See Barbara Smith & Sharon G. Elstein, *The Prosecution of Child Sexual & Physical Abuse Cases: Final Report* 93, 122 (1993). And although these threats are likely to deter victims from testifying, their purpose is more often to keep the abuse secret in the first place, not to prevent testimony at some hypothetical future trial. See Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, & Confrontation*, 82 Ind. L. J. 1009, 1019 (Fall 2007). Even in cases where child abuse victims are not threatened, they are nevertheless likely to be afraid of their abusers or otherwise unable to testify as a result of the abuse. Like domestic violence victims, child abuse victims are highly susceptible to trauma. Research shows that as many as 50% of assaulted individuals, including children, have had PTSD. See Tom Harbinson, *Using the* Crawford v. Washington *"Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases, Reasonable Efforts* (Am. Prosecutor's Research Inst., Vol. 1, No. 3, 2004), *available at* http://www.ncdsv.org/images/In%20Child%20Abuse%20Cases%20–Harbinson.pdf.

In sum, the pressure not to testify experienced by victims of and witnesses to domestic violence and child abuse is substantial and well known. Regardless of whether those who commit such crimes act with a particularized intent to prevent testimony, there should be little question that this is a foreseeable result of their threats or abuse. In addition, the statements of their victims and witnesses are often crucial to the prosecution. As a result, if this Court were to adopt the narrow view of the forfeiture doctrine advocated by petitioner, the Court would dramatically limit prosecutors' ability to obtain convictions in what are already widely regarded as among the most difficult crimes to investigate and prosecute.[8]

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[8] Petitioner envisions a parade of horribles, in which "an entire class of criminal defendants" is denied the protections of the Confrontation Clause even in cases where "the alleged victim is physically able to appear and testify." Pet. Br. 43-44. But these concerns are readily addressed by enforcement of the requirements, recognized by the California Supreme Court, that the defendant have engaged in intentional wrongdoing that foreseeably prevented a witness from testifying at trial, and that the declarant truly be unable to testify. J.A. 63. To the extent that concerns remain, it should be remembered that the requirements of the Confrontation Clause are but a minimum. Legislatures may—and routinely do—provide additional protections through the hearsay rules.

CONCLUSION

The decision of the Supreme Court of California should be affirmed.

Respectfully submitted.

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