No. 07-6053

IN THE

Supreme Court of the United States

DWAYNE GILES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari
to the Supreme Court of the State
of California

REPLY BRIEF OF PETITIONER

SAMUEL ESTREICHER
NYU SCHOOL OF LAW
SUPREME COURT CLINIC
40 Washington Sq. S.
New York, NY 10012
(212) 998-6226

MARILYN G. BURKHARDT
Counsel of Record
11301 Olympic Blvd.
#619
Los Angeles, CA 90064
(818) 905-3380

JAMES F. FLANAGAN
701 Main Street
Columbia, SC 29208
(803) 777-7744

DONALD B. AYER
MEIR FEDER
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE STATEMENT AT ISSUE HERE WOULD HAVE BEEN EXCLUDED AT COMMON LAW 2

A. The State's Homicide-Victim Exception Conflicts With Framing-Era and Traditional Forfeiture Doctrine, Which Required Intent to Prevent Testimony 3

B. The State's Attempt to Turn the Dying Declaration Exception Into an Open-Ended "Equitable" Exception is Unavailing 7

II. FEDERAL RULE OF EVIDENCE 804(b)(6) CONFIRMS THAT THE COMMON LAW OF FORFEITURE REQUIRED AN INTENT TO INTERFERE WITH THE JUDICIAL PROCESS 13

III. PUBLIC POLICY FAVORS CONTINUED ADHERENCE TO THE COMMON LAW FORFEITURE RULE 16

CONCLUSION 23

TABLE OF AUTHORITIES

Page

UNITED STATES CASES

Carver v. United States, 164 U.S. 694 (1897) 10

Commonwealth v. Edwards, 830 N.E.2d 158 (Mass. 2005) 14

Crawford v. Washington, 541 U.S. 36 (2004) ..... *passim*

Davis v. Washington, 547 U.S. 813 (2006) 13, 15, 16, 18

Jackson v. Kniffen, 2 Johns. 31 (N.Y. Sup. Ct. 1806) 10

Kirby v. United States, 174 U.S. 47 (1899) 10

Lewis v. Mississippi, 1 Morr. St. Cas., 1847 WL 1803 (Miss. Er. & App. 1847) 4

Mattox v. United States, 156 U.S. 237 (1895) 10

McDaniel v. State, 16 Miss. 401 (1847) 11

Nelson v. State, 26 Tenn. 542, 7 Hum. 542 (Tenn. 1847) 4

People v. Giles, 152 P.3d 433 (Cal. 2007) 5, 19

People v. Stechly, 870 N.E.2d 333 (Ill. 2007) 13

Reynolds v. United States, 98 U.S. 145 (1878) 17, 20

State v. Alvarez-Lopez, 98 P.3d 699 (N.M. 2004) 13

State v. Bohan, 15 Kan. 407 (1875) 10

State v. Ferguson, 20 S.C.L. (2 Hill) 619 (S.C. App. 1835) 10

TABLE OF AUTHORITIES
(Continued)

Page

State v. Moody, 3 N.C. 31, 1798 WL 93 (N.C. Super. L. & Eq. 1798) 4

State v. Thomas, 64 N.C. 74 (1870) 11

Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982) 17, 18

United States v. Cherry, 217 F.3d 811 (10th Cir. 2000) 13

United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001) 14, 15

United States v. Gray, 405 F.3d 227 (4th Cir. 2005) 13

United States v. Johnson, 219 F.3d 349 (4th Cir. 2000) 20, 21

United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982) 15, 21

United States v. Miller, 116 F.3d 641 (2d Cir. 1997) 15

United States v. Ochoa, 229 F.3d 631 (7th Cir. 2000) 13

United States v. Ramirez-Guardado, 292 F. Supp. 2d 827 (E.D. Va. 2003) 14

United States v. Rouco, 765 F.2d 983 (11th Cir. 1985) 15

United States v. Thevis, 665 F.2d 616 (5th Cir. 1982) 15, 21

TABLE OF AUTHORITIES
(Continued)

Page

W. Va. St. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) 16

Wilson v. Borem, 15 Johns. 286 (N.Y. Sup. Ct. 1818) 10

ENGLISH CASES

Henry Welbourn's Case, *cited in King v. Woodcock*, 168 Eng. Rep. 352, 353 n.a3 (1789) 4

John's Case (1790), *cited in* 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 357-58 (1803) 4

King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (K.B. 1779) 6, 7

King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (Old Bailey 1791) 3, 4

Lord Morley's Case, 6 How. St. Tr. 769 (H.L. 1666) 5

Raleigh's Case, 2 How. St. Tr. 1 (1603) 16, 17

CONSTITUTION AND RULE

U.S. CONST., amend VI ..... *passim*

FED. R. EVID. 804(b)(6) ..... *passim*

TABLE OF AUTHORITIES
(Continued)

Page

MISCELLANEOUS

Advisory Committee on Evidence Rules, Minutes of the Meeting of May 4-5, 1995 WL 870911 14

1 ANNALS OF CONG. 439 (1789) 16

Joanne Belknap & Dee L.R. Graham, U.S. Dep't of Justice, *Factors Related to Domestic Violence Court Dispositions in a Large Urban Area: The Role of Victim/Witness Reluctance and Other Variables* (Aug. 2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/184232.pdf..... 18

4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND (9th ed. 1783) 7

1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN (1803) 4, 8, 9, 10

GEOFFREY GILBERT, THE LAW OF EVIDENCE (1756 ed.)..... 5

SIMON GREENLEAF, TREATISE ON EVIDENCE (1842)..... 10

2 WILLIAM HAWKINS, PLEAS OF THE CROWN (Thomas Leach ed. 1787)..... 6

JAMES PARKER, CONDUCTOR GENERALIS (printed by James Patterson for Robert Hodge, New York 1788)..... 6

TABLE OF AUTHORITIES
(Continued)

Page

3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (2d ed. 1923) 15

INTRODUCTION

We established in our opening brief that the decision below should be reversed because it erroneously read *Crawford v. Washington*, 541 U.S. 36 (2004), as authorizing an open-ended "equitable" forfeiture doctrine which eliminates the traditional "need for evidence of witness tampering and [thereby] broaden[s] the scope of the [forfeiture] rule to all homicide cases." J.A. 46. In view of the undisturbed finding in this case that "there was no evidence [Petitioner] shot [the victim in this case] with the intention of preventing her testimony at some future trial," J.A. 20, the state supreme court below could not uphold Petitioner's conviction without creating a broad "equitable" murder-victim exception to confrontation rights that did not exist at common law.

Respondent's brief does nothing to cast doubt on the conclusion that the decision below is irreconcilable with historical doctrine and this Court's Confrontation Clause jurisprudence. In particular, Respondent is unable to counter the critical fact that the evidence at issue here would have been excluded by Framing-era courts, which recognized neither a homicide-victim exception nor the more generalized "equitable" exception to the right of confrontation urged by California and its *amici.* To the contrary, common law courts uniformly excluded unsworn hearsay statements by alleged murder victims—all of which would have been admissible under the lower court's broad forfeiture rule—unless the statements met the strict requirements of the dying declaration exception. And although courts would admit a validly taken Marian

pretrial examination if the witness was kept away from trial by the accused, no case ever applied that forfeiture rule—and no authority so much as hinted that the rule would apply—outside the narrow context of witness-tampering. Thus, it is clear that California's sweeping forfeiture-by-causation rule constitutes a radical break with the historical, traditional, and mainstream understanding of the forfeiture by wrongdoing exception. That break is fatal to California's rule, because the Sixth Amendment "admit[s] only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54.

I. THE STATEMENT AT ISSUE HERE WOULD HAVE BEEN EXCLUDED AT COMMON LAW

As developed in our opening brief, California's broad "equitable" exception to confrontation rights had no analogue at common law, and Ms. Avie's testimonial hearsay statement would have been inadmissible under Framing-era and traditional confrontation analysis. Pet. Br. 20-34, 41-42. Indeed, California and its *amici* do not contest that statements like the one at issue here were repeatedly excluded by Framing-era courts, which admitted unsworn statements of homicide victims *only* when they satisfied the strict requirements of the dying declaration exception. Nor can they point to any case at common law—homicide or non-homicide—in which the forfeiture doctrine was applied in the absence of intent to make the witness unavailable. Under *Crawford*, the clear inadmissibility of statements like Ms. Avie's at the time of the Framing and the clear inapplicability of the traditional forfeiture doctrine

preclude the adoption of the much broader exception California now advocates.

A. The State's Homicide-Victim Exception Conflicts With Framing-Era and Traditional Forfeiture Doctrine, Which Required Intent to Prevent Testimony

The State and its *amici* do not contest that the common law cases applying the forfeiture doctrine uniformly involved witness-tampering. Indeed, Professor Friedman concedes that "the cases admitting statements under an explicit forfeiture rationale concerned witness tampering." Br. of Richard D. Friedman as *Amicus Curiae* in Support of Resp't 23 [hereinafter Friedman Br.]. The State contends, however, that the doctrine nonetheless extended beyond witness-tampering, Resp't Br. 17-19, 27-28, and that common law courts *would have* applied the forfeiture doctrine to cases not involving intentional witness-tampering, if only such fact patterns had been presented.

This argument is fundamentally flawed because there were numerous cases at common law in which—under the expansive theory adopted below—a homicide victim's statement would have been admissible under the forfeiture doctrine, and yet the courts excluded the proffered evidence. Indeed, California's rule was so clearly *not* the rule at common law that forfeiture was not even argued as a basis for admissibility in these cases; rather, the potential admissibility of a homicide victim's statement was typically analyzed—and rejected—under the dying declaration doctrine. A leading example is *King v. Dingler*, 2 Leach 561, 563, 168

Eng. Rep. 383, 384 (Old Bailey 1791), which this Court discussed in *Crawford*, 541 U.S. at 46, 54 n.5, and *Davis v. Washington*, 547 U.S. 813, 828 (2006), and which excluded the testimonial statement of the deceased victim because it was not a dying declaration (the victim was not then aware of impending death) and not a valid Marian examination. In addition, see *John's Case* (1790), *cited in* 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 357-58 (1803) [hereinafter EAST] (statement inadmissible because "there was no foundation for supposing that the deceased considered herself in any danger at all"); *Henry Welbourn's Case*, *cited in King v. Woodcock*, 168 Eng. Rep. 352, 353 n.a3 (1789) (same); *State v. Moody*, 3 N.C. 31, 1798 WL 93 (N.C. Super. L. & Eq. 1798) (same); *Nelson v. State*, 26 Tenn. 542, 7 Hum. 542 (Tenn. 1847) (same); *Lewis v. Mississippi*, 1 Morr. St. Cas., 1847 WL 1803 (Miss. Er. & App. 1847) (same); Br. of Nat'l Ass'n of Crim. Defense Lawyers as *Amicus Curiae* in Support of Pet. 17-22 [hereinafter NACDL Br.]. The exclusion of the evidence in these cases demonstrates conclusively that there was no broad forfeiture exception for homicide victim statements at the time of the Framing.

Contemporary descriptions of the forfeiture rule confirm this point. Although the State insists that the term "means" used in some authorities' discussions of the rule could sometimes merely mean "caused," Resp't Br. 19, the term surely connoted deliberate witness-tampering when used in conjunction with phrases like "detained," "withdrawn," and "kept away." Pet. Br. 29-31. For example, the connotation of deliberate witness

tampering is patent in Chief Baron Gilbert's statement of the forfeiture rule that applied to Marian coroner's examinations when there was proof "that the Witness is *detained* and *kept back* from appearing" by "evil Practices on the Witness." GEOFFREY GILBERT, THE LAW OF EVIDENCE 141 (1756 ed.) (emphasis added). Moreover, although some statements of the rule used the term "means," many others did not. *See, e.g.*, *Lord Morley's Case*, 6 How. St. Tr. 769, 776-77 (H.L. 1666) (witness "*withdrawn* by the *procurement* of the Prisoner") (emphasis added); NACDL Br. 13-14 (citing additional cases). Clearly, no one at the time of the Framing attached the significance to the word "means" that the State now attributes to it.

Furthermore, the efforts of the State and its *amici* to explain why there is no common law case applying the forfeiture doctrine outside the witness-tampering context are futile. Some assert that there were no cases involving a pre-crime out-of-court statement (as in this case) because domestic violence was not an important concern or a criminal act at the time of the Framing. *See, e.g.*, Friedman Br. 23-24. But that is no explanation at all, because under the broad forfeiture-by-causation rule adopted below, there is no difference between a pre-crime statement and a post-crime statement—*both* types of statements by a homicide victim would be admissible on the ground that the defendant caused the witness's unavailability. *See People v. Giles*, 152 P.3d 433, 446 (Cal. 2007). And, as demonstrated *supra*, common law courts consistently excluded such statements unless they satisfied the dying declaration doctrine.

In any event, whatever the historical treatment of domestic abuse, there surely were many instances in which a homicide victim, prior to the fatal attack, had previously reported threats made by the killer in the course of seeking help from a relative, neighbor, local vicar, or even local constable (who actually was duty-bound to suppress all "affrays," including domestic violence).[1] Yet, the State and its *amici* cannot identify a single reported decision in which any such report of a threat by a person who was later the victim of a homicide was admitted in a criminal homicide trial.[2]

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[1] *See, e.g.*, 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 139 [sect. 8] (Thomas Leach ed. 1787) (stating that "[w]here an affray is made in a house in the view or hearing of a constable" he may break down the door and enter "to suppress the affray"); JAMES PARKER, CONDUCTOR GENERALIS 12-13 (printed by John Patterson for Robert Hodge, New York 1788) (entry for "AFFRAY" stating that a constable is "bound at his peril to use his best endeavours" to suppress any affray and that "if an affray be in [a person's] house, the constable may break open the doors to preserve the peace").

[2] One of respondent's *amici* claims that there was a "tender years" hearsay exception under which English courts "routinely" admitted hearsay accounts of testimonial statements by child victims and suggests that this somehow supports California's rule at issue here. Br. of Nat'l Ass'n of Counsel for Children & the Amer. Prof'l Soc'y on the Abuse of Children as *Amicus Curiae* in Support of Resp't 7 [hereinafter NACC Br.]. However, although English courts may have made inconsistent rulings on that issue in an earlier period, the ruling in *King v. Brasier*, 1 Leach 199, 201, 168 Eng. Rep. 202, 203 (K.B. 1779), prohibited such hearsay, holding: "[T]he evidence of the information which the infant had given to her mother and the other witness, ought not to have been received." Thus, Blackstone, one of the judges who decided *Brasier*, wrote in 1783 that "no hearsay evidence

In sum, it is clear that statements like Ms. Avie's were inadmissible at common law and that the forfeiture doctrine recognized at the time of the Framing did not provide a basis for admitting them.

B. The State's Attempt to Turn the Dying Declaration Exception Into an Open-Ended "Equitable" Exception is Unavailing

Having failed to connect California's novel forfeiture-by-causation rule to the historical forfeiture doctrine, Respondent alternatively claims that the forfeiture-by-causation rule shares the same common law roots as the dying declaration exception. To this end, Respondent claims that the dying declaration rule at common law rested on "equitable considerations" and bears a "striking resemblance" to Ms. Avie's testimonial statement. Resp't Br. at 20-22. These claims also do not withstand scrutiny.

Most importantly, even if the State were correct that the dying declaration doctrine was founded on "equitable" considerations, this would provide no basis for expanding the doctrine beyond the bounds that were recognized at common law. Just as the Framers did not "leave the Sixth Amendment's protection to . . . amorphous notions of 'reliability,'" *Crawford*, 541 U.S. at 61, they equally

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can be given of the declaration of a child who hath not capacity [that is, is not old enough] to be sworn . . . ." 4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 214 (9th ed. 1783) (citing *Brasier*). In any event, no issue of children's statements is before the Court in this case, and nothing in the cases cited by NACC supports California's novel rule.

did not leave those protections to amorphous notions of "equity." Accordingly, as *Crawford* makes clear, the Sixth Amendment recognizes "*only* those exceptions established at the time of the founding." *Id.* at 54 (emphasis added). Under this clear command, the existence of a narrowly-drawn dying declaration exception—even if based in part on equitable considerations—does not give the courts carte blanche to eclipse the Sixth Amendment confrontation right with other exceptions that appeal to a particular court's sense of equity.

In any event, historical sources show that the dying declaration of a murder victim exception was grounded, not on equitable principles, but on *a combination* of necessity and trustworthiness considerations. The necessity requirement referred to a unique aspect of a homicide prosecution—namely, that the deceased victim's account might be the only source of crucial information such as the identity of the attacker and thus a homicide prosecution might be impossible without the exception. Consistent with this necessity consideration, the content of an admissible dying declaration was limited to a victim's statement, made after the attack, regarding the immediate facts and circumstances of the infliction of the fatal wound itself. *See* 1 EAST at 353-54. The trustworthiness requirement was expressed in the limitation of the exception to a statement made after the infliction of the fatal wound and while the victim was aware of impending death and, thus, was aware of the solemnity of his or her situation as would have been the case if a judicial oath had been administered. *See id.* at 354; NACDL Br. 16-22. The exception applied

only if *both* aspects of this necessity/trustworthiness rationale were satisfied.

To support its claim that the dying declaration exception simply rested on an equitable rationale, the State arbitrarily renames necessity as equity. For example, the State characterizes as equitable Edward Hyde East's statement that the rationale for the dying declaration exception was that the victim of a homicide "is gotten rid of" by the defendant. Resp't Br. 20-22 (quoting 1 EAST at 353). *See also* Friedman Br. 22 n.23 (quoting same but claiming East gave a forfeiture rationale). However, East actually wrote that "the declaration of the deceased after the mortal blow, *as to the fact itself*, and the party by whom it was committed" was admissible "on the fullest *necessity; for it often happens that there is no third person present to be an eye-witness* to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of." 1 EAST at 353 (emphasis added). East then made perfectly clear, however, that necessity alone was not sufficient grounds to admit such statements: "[I]n order to preserve as far as possible the purity and rectitude of such evidence, it *must appear that the deceased at the time of making such declarations was conscious of his danger*; such consciousness being considered as *equivalent to the sanction of an oath* . . . ." *Id.* at 353-54 (emphasis added). Thus, East clearly rested the exception on necessity, not equity, and also required that the declarant be aware of

imminent death. East did not state an equitable or forfeiture rationale.[3]

The cases from this Court that Respondent cites are similarly unavailing. *See Carver v. United States*, 164 U.S. 694, 697 (1897) ("[dying declarations] are received from the necessities of the case . . . . They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible . . . ."); *Kirby v. United States*, 174 U.S. 47, 61 (1899) (stating in dicta that "the ground upon which such exception rests is that, from the circumstances under which dying declarations are made, they are equivalent to the evidence of a living witness upon oath"); *Mattox v. United States*, 156 U.S. 237, 244 (1895) ("[Dying declarations] are admitted . . . simply from the necessities of the case . . . . [T]he sense of impending

[3] Virtually all the other authorities that Respondent cites likewise state this combined necessity/trustworthiness rationale. Respondent simply relabels the necessity rationale as "equity-based" and then ignores the fact that even necessity was only a necessary, not a sufficient, condition of admissibility. Resp't Br. 20-22. *See Jackson v. Kniffen*, 2 Johns. 31, 32 (N.Y. Sup. Ct. 1806) (Livingston, J., concurring) (noting necessity consideration that, except for admitting the victim's dying declaration, justice might otherwise "be defeated"); *Wilson v. Borem*, 15 Johns. 286, 291 (N.Y. Sup. Ct. 1818) (same); *State v. Ferguson*, 20 S.C.L. (2 Hill) 619, 624 (S.C. App. 1835) (stating exception based on "necessity" arising from circumstance "that none but the victim witnesses the [infliction of wound]" and "[t]he sanction is that of approaching death"); SIMON GREENLEAF, TREATISE ON EVIDENCE 187-92 [secs. 156-162] (1842) (giving detailed but essentially similar description as EAST); *State v. Bohan*, 15 Kan. 407, 418 (1875) (basing dying declaration on the necessity consideration that otherwise the loss of the "sole witness" might allow murderer to escape).

death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath.").

The only authorities Respondent cites that even arguably invokes an equitable rationale is *McDaniel v. State*, 16 Miss. 401 (1847), and *State v. Thomas*, 64 N.C. 74 (1870). *See* Resp't Br. 21-22. However, in *McDaniel* the equitable rationale consists of one sentence at the end of a discussion of the traditional necessity rationale and the traditional trustworthiness requirement that the declarant must be aware of impending death. 16 Miss. at 415-16. In *Thomas*, the equitable rationale consists of one sentence of dictum in a case that did not involve any dying declaration. 64 N.C. at 75. Two oblique sentences in cases decided sixty and eighty years, respectively, after the Framing are not persuasive evidence of the Framing-era rationale for the dying declaration rule, especially in view of the dozens of much earlier authorities that ground that rule in necessity/reliability rather than equity.

The trustworthiness requirement was crucial. As Professor Friedman concedes, "the cases admitting statements under a 'dying declaration' exception, usually articulated a trustworthiness rationale, based on the imminence of apparent death." Friedman Br. 22. Hearsay statements were never admitted as dying declarations in the absence of proof that the declarant was aware of the imminence of death. *See supra* Part I.A; NACDL Br. 17-22. Respondent attempts to explain away the trustworthiness requirement by asserting that it reflected only a hearsay concern, not a confrontation concern. Resp't Br. 23. This "distinction" is pure

invention. None of the authorities that Respondent cites suggests that there is one forfeiture or dying declaration exception for hearsay purposes but a different one for confrontation purposes.

There is no substance to Respondent's claim that the forfeiture-by-causation rule created by the court below even resembles the dying declaration exception. As *Crawford* observed, the dying declaration exception is "*sui generis*." 541 U.S. at 56 n.6. The historical cases and other authorities refute the assertions of Respondent and its *amici* that there is historical justification for an expansive equitable principle that defendants forfeit their confrontation rights where there is no finding or evidence that defendants killed for the purpose of witness-tampering, simply because they are alleged to have killed a victim.

As *Crawford* also teaches, the scope of the confrontation right is limited by the hearsay exceptions that were recognized at the time of the Framing. 541 U.S. at 54. Valid dying declarations would be an allowable exception to the confrontation right only because historically such declarations were admitted into evidence when the settled requirements for such declarations were met. Thus, the scope of the dying declaration exception to the Confrontation Clause should be understood to be coextensive with, and limited to, the common law dying declaration hearsay exception. It makes no sense to say that Ms. Avie's testimonial statement is admissible because it resembles the common law dying declaration exception or the common law forfeiture exception, even though those historical

exceptions would not have covered Ms. Avie's statement.

II. FEDERAL RULE OF EVIDENCE 804(b)(6) CONFIRMS THAT THE COMMON LAW OF FORFEITURE REQUIRED AN INTENT TO INTERFERE WITH THE JUDICIAL PROCESS

Respondent and its *amici* claim that Rule 804(b)(6) has no bearing on the forfeiture doctrine because it simply codified a hearsay rule, not the common law forfeiture doctrine that extinguishes confrontation claims. *See* Resp't Br. 34-35; Br. of Illinois *et al.* as *Amici Curiae* in Support of Resp't 18-22 [hereinafter Illinois Br.]. This is flatly contrary to this Court's observation in *Davis v. Washington*, 547 U.S. 813, 833 (2006), that Rule 804(b)(6) "codifies the forfeiture doctrine." The lower courts have taken the same view. *See, e.g.*, *People v. Stechly*, 870 N.E.2d 333, 350 (Ill. 2007) (noting that this Court in *Davis*, as well as numerous lower courts, have found that "Rule 804(b)(6) and its intent requirement reflect the common law equitable doctrine"); *United States v. Ochoa*, 229 F.3d 631, 639 (7th Cir. 2000) ("[t]he doctrine that a defendant may waive his or her constitutional right to confront witnesses by misconduct has been codified in Rule 804(b)(6)").[4]

[4] The lower courts' statements on this point clearly show that they view Rule 804(b)(6) as a codification of the common law forfeiture rule that extinguishes confrontation claims. *See, e.g., United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005) (stating that Rule 804(b)(6) "codifies the common law doctrine of forfeiture by wrongdoing"); *State v. Alvarez-Lopez*, 98 P.3d 699, 704 (N.M. 2004) (recognizing that Rule 804(b)(6) codifies the constitutional forfeiture doctrine); *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000) ("Rule 804(b)(6) . . . represents

Neither respondent nor its *amici* cite any authority to the contrary.

It was plainly the intention of the Advisory Committee on the Federal Rules of Evidence to decide "whether it should codify the *generally recognized principle* that hearsay statements become admissible on a waiver by misconduct notion when the defendant *deliberately causes* the declarant's unavailability." Advisory Committee on Evidence Rules, Minutes of the Meeting of May 4-5, 1995, 1995 WL 870911, at *3 (emphasis added).[5] Additionally, in both of the murder cases cited by the Committee in its published notes to Rule 804(b)(6), the forfeiture rule was applied when the defendant murdered the witness for the specific purpose of preventing the witness's testimony. *See* FED. R. EVID. 804(b)(6) Advisory Committee Note, 163 F.R.D. 91, 157 (1996)

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the codification, in the context of federal hearsay rules, of [the] long-standing doctrine of waiver by misconduct."); *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001) ("Rule 804(b)(6) was intended to codify the waiver-by-misconduct rule as it was applied by the courts at that time."); *United States v. Ramirez-Guardado*, 292 F. Supp. 2d 827, 830 (E.D. Va. 2003) (Rule 804(b)(6) "codified the already existing common law forfeiture-by-misconduct doctrine"); *Commonwealth v. Edwards*, 830 N.E.2d 158, 166 (Mass. 2005) (same).

[5] The Committee debated the following four issues regarding the rule: "the degree to which defendant must have participated in procuring the declarant's unavailability; the burden of proof that the government must meet in proving the defendant's misconduct; the consequences of a waiver finding; and the appropriate rule of evidence in which to place such a provision." May 4-5 Advisory Committee Minutes, *supra*, at *3.

(citing, *inter alia*, *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982) and *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982)).

There is likewise no substance to the assertion in one *amicus* brief that the intent-to-prevent-testimony requirement was the minority position of the federal courts before Rule 804(b)(6) was adopted. *See* Illinois Br. 23.[6] The forfeiture rule has always been a rule about witness tampering. That is why Wigmore justified the rule on the ground that "any *tampering with a witness* should once [sic] for all estop the tamperer from making any objection based on the results of his own chicanery." 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1405, at 120 (2d ed. 1923) (emphasis added). That is why the Court in *Davis* described the rule in terms of defendants who "seek to undermine the judicial process" by "acting in ways that destroy the integrity of the criminal-trial system." 547 U.S. at 833. And that is why the Federal Rules of Evidence, and the "as many as forty-one" state evidence codes patterned

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[6] It is telling that Respondent's *amicus* can identify only two cases that even arguably do not involve witness-tampering, *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997) and *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985), *see* Illinois Br. 24 n.7. Those cases do little to assist *amicus*' argument. The Second Circuit's ruling in *Miller* predated its ruling in *United States v. Dhinsa*, 243 F.3d at 651-53, 656-58, which clearly required intent to prevent testimony. The Eleventh Circuit's ruling in *Rouco* relied on its previous ruling in *Thevis*, which clearly required specific intent to prevent testimony. 765 F.2d at 995, *citing Thevis*, 665 F.2d at 630.

on those rules, Resp't Br. 39-40, all define forfeiture in terms of witness-tampering.

III. PUBLIC POLICY FAVORS CONTINUED ADHERENCE TO THE COMMON LAW FORFEITURE RULE

Unable to justify the lower court's open-ended exception to the confrontation right through doctrine or history, Respondent and its *amici* fall back on a policy argument[7] for rejecting the common law rule—that a broad forfeiture-by-causation exception is necessary for the successful prosecution of domestic violence cases.[8]

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[7] Clearly, no court's *post hoc* considerations of public policy can override the Confrontation Clause—a "procedural guarantee," *Crawford*, 541 U.S. at 42, intentionally adopted to prevent the "use of *ex parte* examinations as evidence against the accused." *Id.* at 50. *See id.* at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers'] design."); *Davis*, 547 U.S. at 833 ("We may not . . . vitiate constitutional guarantees when they have the effect of allowing the guilty to go free."); *W. Va. St. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); 1 ANNALS OF CONG. 439 (1789) ("If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.") (statement of James Madison).

[8] This argument bears a striking similarity to the justification offered to Sir Walter Raleigh for refusing him access to his accusers, namely that "many horse stealers should escape if they may not be condemned without witnesses." *Raleigh's Case*,

Like the Confrontation Clause generally, the strict limits of the common law forfeiture rule are not designed to make convictions easier to obtain; rather, they are designed to exclude, except in narrow circumstances, evidence untested by cross-examination. But alternative mechanisms for proving domestic abuse exist that are fully consistent with our constitutional commitment to offering the accused a chance to confront and cross-examine his accusers. Respondent's and its *amici*'s premise—that the right to confrontation should be cut back in the interest of securing domestic violence convictions through the use of untested testimonial hearsay—is thus incorrect for several reasons.

First, the requirements of the common law forfeiture rule will be satisfied in a large number of domestic violence cases. Under that rule, a court may infer intent to interfere with the judicial process where a defendant's actions evidence a purpose to render a complaining witness unavailable through physical or emotional domestic abuse. Thus, where a defendant induces a witness-victim not to testify through threats, intimidation, bribery, or perhaps even promises of reconciliation, the witness-victim becomes "absent by [the defendant's] own wrongful procurement, [and] he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." *Reynolds v. United States*, 98 U.S. 145, 158 (1878). *See, e.g.*, *Steele v. Taylor*, 684

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2 How. St. Tr. 1, 18 (1603). That justification plainly has been rejected by this Court. *See Crawford*, 541 U.S. at 43-44.

F.2d 1193, 1201 (6th Cir. 1982) ("Wrongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant's direction to a witness to exercise the fifth amendment privilege.").[9]

Second, and more generally, prosecutors are equipped to respond to the problems of witness recantation and absenteeism by proving guilt through physical evidence, statements that do not implicate the defendant's constitutional rights, and expert testimony. *See* Joanne Belknap & Dee L.R. Graham, U.S. Dep't of Justice, *Factors Related to Domestic Violence Court Dispositions in a Large Urban Area: The Role of Victim/Witness Reluctance and Other Variables* 168-69 (Aug. 2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/184232.pdf (reporting that in up to 90 percent of cases, prosecutors are able to secure domestic violence convictions through the introduction of, *inter alia*, crime scene and victim photographs, police testimony, emergency 911 calls, and the testimony of witnesses other than the victim).[10]

This is not to say the Court should in this case definitively resolve which methods of proving domestic abuse implicate the Confrontation Clause. Rather, the point is that there exist a number of

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[9] In this case, as previously noted, the appellate court below agreed that defendant had not killed Avie for the purpose of preventing her testimony. J.A. 20.

[10] Of course, police testimony, like all other forms of testimonial evidence, is now subject to the limitations imposed in *Crawford* and *Davis*.

methods of proving domestic abuse that do not raise constitutional concerns; that prosecutors continue to innovate in this area; and that *amici*'s contention that the Court confronts a choice between protecting domestic violence prosecutions and preserving the Confrontation Clause is overblown.

There are also weighty policy considerations on the other side of the balance. One such consideration is that adoption of the lower court's unmoored "equitable" forfeiture rule would unavoidably open a Pandora's Box, with effects far beyond homicide cases. In stating its test, the lower court made clear that its rule was not limited to homicide but purports to reach every case of genuine unavailability of witnesses "caused by the defendant's intentional criminal act," when supported by "independent corroborative evidence." *Giles*, 152 P.3d at 446; J.A. 64. *See, e.g.,* Resp't Br. 36 (arguing that forfeiture-by-causation theory would apply, "for example, in domestic-violence cases that represent a serious problem"); Brief of the Domestic Violence Legal Empowerment and Appeals Project *et al.* as *Amici Curiae* in Support of Resp't 32 (same). Even if forfeiture were limited to cases in which the witness's unavailability is caused by the defendant, courts inevitably will be faced with efforts to protect witnesses from the rigors of testifying on the ground that defendant caused them to become psychologically unavailable to testify. And the courts will be required to define what constitutes "unavailability," and what constitutes sufficient causation, without any relevant guidance beyond what result is "equitable." It is hard to imagine that the Framers, who chose not "leave the Sixth

Amendment's protection to . . . amorphous notions of 'reliability,'" *Crawford*, 541 U.S. at 61, would have found bald appeals to "equity" any more reliable a guide.[11]

Moreover, at least one *amicus* does not even limit the doctrine to forfeiture by causation: "[T]here is no valid distinction between the actions of a defendant that cause a witness's unavailability and those that take advantage of a vulnerable witness's prospective unavailability." NACC Br. 19. Respondent itself argues that *Reynolds* does not even require an intentional act by the defendant, but merely a "voluntary" one. Resp't Br. 28.

By contrast, the common law rule sets easily-administered boundaries on when a defendant may not demand confrontation. The inquiry is straightforward. Courts conduct a hearing outside the presence of the jury and require the government to prove that the defendant intended to prevent the witness from testifying. *See, e.g.*, *United States v. Johnson*, 219 F.3d 349, 355-56 (4th Cir. 2000). Such hearings, which focus on whether the defendant entertained a purpose to interfere with the judicial

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[11] Indeed, Respondent offers only the vaguest suggestion as to when courts should find a forfeiture of confrontation rights. Without citation or any connection to the traditional forfeiture rule, Respondent asserts that "the most logical equitable considerations" are "the seriousness of the defendant's wrongdoing, the apparent predictability of the victim's absence, and the seriousness of the charged crime. Other considerations might include the defendant's motive and the nature of the victim's evidence. The balance of such factors in an ambiguous case might be a delicate one." Resp't Br. 12-13.

process, are a familiar feature of pre-trial practice, especially in light of Rule 804(b)(6). *See, e.g.*, *Johnson*, 219 F.3d at 349; *Thevis*, 665 F.2d at 624, 630; *Mastrangelo*, 693 F.2d at 273.

An additional concern raised by the broad forfeiture doctrine advanced below is its deeply corrosive effect on defendants' right to proof beyond a reasonable doubt. Under the California Supreme Court's formulation, the trial judge in a preliminary hearing determines the forfeiture question by deciding, by a preponderance of the evidence, whether the defendant was guilty of the underlying crime. The victim's prior hearsay testimony, once admitted, forms the basis for a jury instruction such as the one given in this case, which directed the jury that it could infer Petitioner was predisposed to commit violent crimes, and that he was "likely to commit and did commit" such offenses, *See* Pet. Br. 4 n.3 (citing the Clerk's Transcript at 92). Thus, by the time the jury is left with the case, it has heard both the un-cross-examined statement of the victim implicating the defendant, and an instruction from the court that it may infer both a criminal predisposition and the ultimate fact to be proved at trial.[12] Moreover, even aside from the instruction, a victim's accusatory hearsay statements are likely to be highly influential evidence in many trials. Allowing such evidence to be admitted based on a

[12] State evidence rules supply few guarantees that such testimony will be accurate or unbiased. Here, for example, Brenda Avie's statements were admitted against Petitioner notwithstanding her demonstrated hostility to him. *See* J.A. 34-35.

judge's preponderance-of-the-evidence finding of guilt on the forfeiture issue comes perilously close to making the judge's finding the "main event" and rendering the jury's determination a foregone conclusion.

Such a proceeding is inconsistent with the design of the Constitution. First, it strongly resembles "the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused" that formed "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. In addition, for all practical purposes the dispositive decisionmaker in the proceeding is the judge. If the judge finds "forfeiture" on the part of the defendant, this finding permits the jury to be exposed to a flood of often highly prejudicial and impossible to cross-examine evidence, which would render even a well-founded claim of self-defense difficult to believe.

Under the traditional witness-tampering conception of the forfeiture doctrine, by contrast, the issue for the judge to decide at the preliminary hearing is not whether the defendant committed the underlying crime for which he is charged, but is typically the discrete question of whether the defendant's motivation was to prevent the alleged victim from giving testimony. That issue would arise in far fewer cases and would not ordinarily focus on the ultimate issues to be decided by a jury under the beyond-a-reasonable-doubt standard.

There are, to be sure, costs to the kind of criminal process envisioned by the Framers. Requiring live, in-court testimony may at times make

it harder for prosecutors to win close cases and may stymie the policy, reflected in California's evidence code, of prosecuting suspected wrongdoers through any and all available evidence. But the Sixth Amendment embodies a near absolute policy against the use of testimonial statements in the absence of an opportunity for confrontation, and the very purpose of the Confrontation Clause is to prevent the state from influencing the jury through evidence that is constitutionally unreliable because it has not been tested by cross-examination.

CONCLUSION

For the forgoing reasons, the decision of the California Supreme Court should be reversed.

Respectfully submitted,

SAMUEL ESTREICHER
NYU SCHOOL OF LAW
SUPREME COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

MARILYN G. BURKHARDT
Counsel of Record
11301 Olympic Blvd.
#619
Los Angeles, CA 90064
(818) 905-3380

JAMES F. FLANAGAN
701 Main Street
Columbia, SC 29208
(803) 777-7744

DONALD B. AYER
MEIR FEDER
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

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Counsel for Petitioner