No. 07-6053

IN THE SUPREME COURT OF THE UNITED STATES

DWAYNE GILES,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

DONALD E. DE NICOLA
Deputy Solicitor General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SUSAN D. MARTYNEC
Supervising Deputy Attorney General

KRISTOFER JORSTAD
Deputy Attorney General

RUSSELL A. LEHMAN
Deputy Attorney General

300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 897-2280
Facsimile: (213) 897-6496
DocketingLAAWT@doj.ca.gov

Counsel for Respondent

QUESTION PRESENTED

Does the "forfeiture by wrongdoing" doctrine extinguish a murder defendant's right to confront and cross-examine his victim?

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STATEMENT OF THE CASE

Petitioner was charged with the murder of Brenda Avie. Prior to trial, the court considered the admissibility of evidence of a number of prior incidents between petitioner and the victim, including evidence of an incident involving petitioner's infliction of domestic violence on Ms. Avie that occurred twenty-four days before the charged murder. Immediately after that incident, Ms. Avie had made certain statements concerning it to a responding police officer that the prosecution sought to present under the California Evidence Code hearsay exception for evidence of the infliction or threat of physical injury.

As summarized by the California Supreme Court (Pet., App. A [*People v. Giles*, 40 Cal. 4th 833, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007)]), the evidence at the trial showed that petitioner had dated Brenda Avie for several years. On the night of September 29, 2002, petitioner was at his grandmother's house, socializing in the garage with his niece Veronica Smith, his friend Marie Banks, and his new girlfriend, Tameta Munks. Petitioner's grandmother called him into the house to take a telephone call from Avie. After the call, petitioner returned to the garage and spoke to Munks, who left. (Pet., App. A at 29.)

Avie arrived at the house about fifteen minutes later and spoke with Smith and Banks in the garage for about half an hour. Smith went into the house to lie down and heard petitioner and Avie speaking to one another outside in a normal conversational tone. Avie then yelled "Granny" several times, and Smith heard a series of gunshots. (Pet., App. A at 29.)

Smith and petitioner's grandmother ran outside and discovered petitioner holding a nine-millimeter handgun and standing about eleven feet from Avie, who was lying

on the ground, bleeding. Petitioner's grandmother took the gun from him and called 911.

Avie had been shot six times in the torso area. Two of her wounds were fatal. One wound was consistent with her holding up her hand at the time she was shot, one was consistent with her having turned to her side when she was shot, and one was consistent with her being shot while she was lying on the ground. Avie was not carrying a weapon when she was shot. (Pet. App. A at 30.)

At petitioner’s request, Smith drove him away from the house; but petitioner jumped out of her car and ran away after they had traveled several blocks. Petitioner did not turn himself in to police and was eventually arrested on October 15, 2002. (Pet. App. A at 29.)

At the close of the prosecution’s case-in-chief, the prosecutor sought to call the responding officer to testify about Avie’s statements describing petitioner’s prior domestic violence against her pursuant to California Evidence Code sections 1109 and 1370. The trial court found that the foundational elements for the admission of the statements had been laid, and admitted the evidence.

The officer testified that when he and his partner responded to the call, petitioner answered the door, apparently agitated, and allowed them to enter. Avie was sitting on the bed, crying. The officer interviewed Avie, who said she had been talking to a female friend on the telephone when petitioner became angry and accused her of having an affair with that friend. Avie ended the call and began to argue with petitioner, who grabbed her by the shirt, lifted her off the floor, and began to choke her with his hand. She broke free and fell to the floor, but petitioner climbed on top of her and punched her in the face and head. After Avie broke free again, petitioner opened a folding knife, held it about three feet away from her, and said, "If I catch you fucking around I'll kill you." The officer saw no marks on Avie, but felt a bump on her head. (Pet., App. A at 31.)

In his defense, petitioner testified and admitted shooting Avie, but claimed he had acted in self-defense. He explained that he had a tumultuous relationship with Avie and was trying unsuccessfully to end it. Avie was very jealous of other women, including Munks. Petitioner knew that Avie had shot a man before she met him, and he

had seen her threaten people with a knife. He claimed that Avie had vandalized his home and car on two separate occasions. (Pet., App. A at 30.)

According to petitioner, he had argued with Avie when she called him on the telephone on the day of the shooting. He told her that Munks was at the house and Avie said, "Oh, that bitch is over there. Tell her I'm on my way over there to kill her." Petitioner told Munks to leave because he was worried about the situation, and Avie arrived soon afterwards. Petitioner told everyone to leave and began closing up the garage where they had congregated. Avie walked away with Marie Banks, but she returned a few minutes later and told petitioner she knew Munks was returning and she was going to kill them both. Petitioner stepped into the garage and retrieved a gun stowed under the couch. He disengaged the safety and started walking toward the back door of the house. Avie "charged" him, and petitioner, afraid she had something in her hand, fired several shots. Petitioner testified that it was dark and that his eyes were closed as he fired the gun. He claimed that he did not intend to kill her. (Pet., App. A at 30.)

Marie Banks testified that she had seen petitioner and Avie get into arguments before. Avie seemed angry on the day of the shooting, and she talked to petitioner for about half an hour until petitioner told everyone to leave. Avie and Banks left together, but as they were walking away they saw Munks. Avie said, "Fuck that bitch. I'm fixin' to go back." She walked back toward petitioner's grandmother's house and Banks went home. Banks did not see the shooting. (Pet., App. A at 30-31.)

The jury found petitioner guilty of deliberate premeditated first degree murder. (Pet., App. A at 32.)

The single issue petitioner raised on appeal to the California Court of Appeal was whether the evidence was sufficient to support the jury's necessarily included finding in its first degree murder verdict that the murder was premeditated and deliberate. The Court of Appeal requested supplemental briefing from the parties on whether the evidence of Ms. Avie's statements to the officer was inadmissible as a violation of petitioner's rights under the Confrontation Clause as interpreted in this Court's then-recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The Court of Appeal held that the equitable doctrine of forfeiture by

wrongdoing barred petitioner from asserting his Confrontation Clause arguments because he had caused the victim's unavailability to testify at trial by his own intentional criminal conduct in shooting her to death. (Pet., App. C at 61, 65-69.)

The California Supreme Court granted petitioner's petition for review and unanimously concluded that petitioner equitably forfeited his right to confront Ms. Avie by killing her. (Pet., App. A at 29, 32-47.) The court expressly considered and rejected petitioner's argument that the equitable doctrine of forfeiture by wrongdoing was inapplicable in this case because petitioner did not kill his victim and thereby render her unavailable with the intent of preventing her testimony at a judicial proceeding. (Pet., App. A at 34.)

REASONS WHY THE PETITION SHOULD BE DENIED

THE CALIFORNIA SUPREME COURT'S INTERPRETATION AND APPLICATION OF THE DOCTRINE OF FORFEITURE BY WRONGDOING WAS CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND RAISES NO CONFLICT WITH OTHER LOWER COURTS

In this case, the California Supreme Court unanimously held, under the doctrine of forfeiture by wrongdoing, that a defendant who intentionally kills a witness forfeits his Sixth Amendment right to confront and cross-examine his victim. Petitioner asks this Court to hold that this was a misapplication of the doctrine because there was no separate showing that at the time he murdered Brenda Avie he intended to prevent her from testifying against him. The California Supreme Court rejected such a requirement in case of murder, the ultimate act of domestic violence and the ultimate act of rendering a witness "unavailable." At the time he murdered Ms. Avie, petitioner's intent to kill her necessarily included an intent to silence her. Petitioner knew that killing her meant that she could not testify against him.

The California Supreme Court's interpretation and application of the doctrine of forfeiture by wrongdoing was analytically sound. It was derived from and is fully

consistent with this Court's long-standing explication of the basis for the doctrine. Petitioner has not shown that there is any significant conflict in the lower courts on the question of the applicability of forfeiture by wrongdoing in a case where the victim was unavailable to testify because of her death and that death was undeniably caused by the defendant's intentional criminal act. As every court to have considered this situation since *Crawford* has recognized, forfeiture by wrongdoing must encompass the situation where a defendant's act of murder is directly and undeniably responsible for his inability to confront a witness. Forfeiture by murder is a form of forfeiture by wrongdoing that requires no additional finding of intent to silence the witness.

A. The California Supreme Court's Interpretation And Application Of The Forfeiture By Wrongdoing Doctrine Is Supported By This Court's Precedents

Petitioner argues that the California Supreme Court's decision is contrary to or at least inconsistent with this Court's pronouncements on the doctrine of forfeiture by wrongdoing in such cases as *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879), and *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 2280 (2006). (Pet. at 19-21.) An examination of this Court's

decisions in *Reynolds*, *Crawford* and *Davis* shows that the California Supreme Court's decision applying the doctrine in the circumstances of this case is fully congruent with the principles this Court identified as the basis for the doctrine in *Reynolds* and only recently reiterated in *Crawford* and *Davis*. The opinion of the California Supreme Court includes a comprehensive examination of the development of the doctrine that demonstrates its complete and correct understanding of this Court's definition of the rule. There is no "conflict" between this Court's decisions and the decision in this case that warrants review on certiorari. *See* Sup. Ct. R. 10(c).

In arriving at its conclusion, the California Supreme Court first reviewed the historical development of the forfeiture by wrongdoing doctrine, paying careful attention to this Court's early discussion of it in *Reynolds*. The court noted that this Court had cited *Reynolds* in *Crawford* in the course of commenting that the forfeiture by wrongdoing doctrine remains a valid exception to the confrontation clause. (Pet., App. A at 34.) The California court took particular note of this Court's explanation of the reasoning underlying

the equitable doctrine of forfeiture by wrongdoing in *Reynolds*, which emphasized that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." The state court also quoted this Court's formulation of the doctrine's core foundational rationale in *Reynolds*, i.e., the equitable "maxim that no one shall be permitted to take advantage of his own wrong." (Pet., App. A at 34-35.)

Even though the facts in *Reynolds* concerned a situation involving dissuasion of a witness from testifying in a known trial, the state court recognized that, "in describing the rule," the *Reynolds* Court "did not suggest that the rule's applicability hinged on Reynolds's purpose or motivation in committing the wrongful act." (Pet., App. A at 35.) This perception properly supports the California court's ultimate conclusion that, in a case involving the murder of a witness, the purpose of the doctrine is to enforce one of the most basic and durable rules of equity. A murderer who seeks to use the death he caused as a shield to exclude relevant and admissible evidence has unclean hands. Equity will not permit that murderer to profit

from his own wrong. The California Supreme Court's application of the doctrine of forfeiture by wrongdoing in this case is based on this elementary principle derived from *Reynolds*. It is thus fully in accord with *Reynolds*.

The California Supreme Court found further support for its application of the forfeiture by wrongdoing doctrine in this Court's recent decision in *Davis*, which "affirmed the equitable nature of the doctrine" in the following language: "We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitably grounds.' [Citations.] That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (Pet., App. A at 35-36, quoting *Davis*, 126 S. Ct. at 2280, in turn quoting *Crawford*, 541 U.S. at 62.) In the final section of its opinion in *Davis*, this Court noted that crimes involving domestic violence are more susceptible than most to the commission of wrongdoing that keeps the victim from testifying at trial and that, "[w]hen this occurs, the Confrontation Clause gives the criminal a windfall." *Davis*, 126 S. Ct. at 2279-80. While this

Court noted that constitutional guarantees cannot be vitiated simply because they may have the effect of allowing the guilty to go free, it further explained that when a defendant undermines the judicial process by procuring the absence of the victim or other declarant,

> the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: That "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." 541 U.S., at 62, [] (citing *Reynolds*, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

Id. at p. 2280. "*Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings." *Id.* This principle is also central to the holding in the present case, and shows that the California Supreme Court's analysis of

forfeiture by wrongdoing fully comports with this Court's precedents.

Continuing its analysis, the California Supreme Court also reviewed the pertinent forfeiture by wrongdoing cases in the lower federal courts decided after *Reynolds* but before *Crawford*. This group of cases, dating from the 1970's on, typically involved witness tampering situations arising in federal prosecutions of organized crime and drug conspiracies. Some of the cases involved witness tampering where the defendants murdered the witnesses. In those pre-*Crawford* cases, the federal courts applied the forfeiture by wrongdoing doctrine in situations where the defendant procured the unavailability of the hearsay declarant with the intent of making the declarant unavailable as an actual or potential witness against the defendant. The rule that applied to this category of cases, as articulated by the lower federal courts, was codified in 1997 as a statutory exception to the federal rule against hearsay. The statute requires that the party against whom a statement is offered must have engaged or acquiesced in wrongdoing that was intended to procure the unavailability of the declarant as a witness. Fed. R.

Evid. 804(b)(6). The addition of this specific intent requirement had the effect of limiting the federal hearsay exception to witness tampering cases. (Pet., App. A at 36-38.) The California Supreme Court also acknowledged a similar development of this limited forfeiture by wrongdoing rule in certain states prior to *Crawford*. In those cases, as well, the state courts generally applied the rule to situations where the defendant intended to and did tamper with an actual or potential witness to prevent the witness from cooperating with authorities or testifying. (Pet., App. A at 38, listing cases.)

After this Court's decision in *Crawford* "reshaped the confrontation landscape," however, courts dealing with questions of the applicability of the doctrine have focused more on the equitable forfeiture rationale than on the question of the defendant's intent. (Pet., App. A at 38-39.) This is especially so in cases in which the defendant kills the declarant. The California Supreme Court found that in virtually every case in which the defendant intentionally and wrongfully kills the declarant, and so is indisputably responsible for her unavailabity, the defendant has been found to have

forfeited his right to confront and cross-examine that declarant. None of these cases have required the additional showing of a specific intent to prevent future testimony. (Pet., App. A at 39-41, citing and explaining *State v. Meeks*, 88 P.3d 789 (Kan. 2004), *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005), *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005), and *People v. Moore*, 117 P.3d 1 (Colo. Ct. App. 2004).) Indeed, the California court aptly observed that this "focus on the equitable forfeiture rationale . . . could eliminate the need for evidence of witness tampering and broaden the scope of the rule to all homicide cases." (Pet., App. A at 39.)

The California Supreme Court thus rejected petitioner's contention that, because courts have traditionally applied the forfeiture doctrine in the context of witness tampering cases and the federal rules have "codified" this approach, it would result in an improper "expansion" of the doctrine to "eliminate" an intent-to-prevent-testimony requirement. As the state supreme court noted in rejecting that argument, other courts have also explained that any intent-to-silence requirement is only mandated by the federal statutory

hearsay exception, not by the Constitution. (Pet., App. A at 41-42.) The Sixth Circuit Court of Appeals, in language approved and adopted by the California Supreme Court, explained this point:

> There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness's unavailability, he intended to prevent the witness from testifying. . . . The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, based on principles of equity, does not permit.

(Pet., App. A at 42, quoting *Garcia-Meza*, 403 F.3d at 370-71.)

The California court also explained that petitioner's argument for an intent-to-silence requirement rests on the erroneous premise that the forfeiture by wrongdoing doctrine is not based on the broad equitable forfeiture principles discussed above, but instead on narrow principles of waiver. In support of this premise petitioner pointed to certain cases that have referred to the rule as the "waiver by wrongdoing" doctrine. In response, the California Supreme Court explained that the underlying premise of such cases, and of petitioner's argument in this regard, is that a defendant who intentionally prevents an actual or potential witness from testifying at a trial knows that the witness is no longer available and cannot be cross-examined, and thus has impliedly, if not expressly, "waived" his confrontation rights by his misconduct. (Pet., App. A at 43.) The court found this premise untenable because this Court has expressly characterized the operation of the rule as a "forfeiture" that "extinguishes confrontation claims on essentially equitable grounds," not a waiver. (Pet., App. A at 43, quoting *Crawford*, 541 U.S. at 62.) Although some courts have conflated the terms "waiver" and "forfeiture,"

this Court has stressed that they are quite different. (Pet., App. A at 45, citing *United States v. Olano*, 507 U.S. 725, 733 (1993), and *Freytag v. Commissioner*, 501 U.S. 868, 894-895, fn. 2 (1991) (conc. opn. of Scalia, J.) ("[t]he two are really not the same").

Thus, as the California Supreme Court concluded:

> Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing. As the Court of Appeal here stated, "Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the

witness from testifying at the time he committed the act that rendered the witness unavailable." (Pet., App. A at 45-46.)

Based on this analysis, the California Supreme Court held that this Court's definition of the doctrine of forfeiture by wrongdoing is grounded in two venerable equitable principles: (1) "[t]he rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong"; and (2) "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." (Pet., App. A at 44, quoting *Reynolds*, 98 U.S. at 159, 158.) In terms more specific to this case, the court held that a defendant who wrongfully causes his own inability to cross-examine by intentionally killing the witness should not be permitted to assert a violation of his right to cross-examine.

There is no question that Ms. Avie was unavailable to testify because petitioner shot her to death. If as a result of that deliberate and premeditated act petitioner were able to exclude evidence of Ms. Avie's earlier statements, the trier of fact would be deprived

of highly probative and otherwise admissible evidence bearing on the question of his guilt, thus undermining the trial's truth-seeking function, i.e., the main component of "the integrity of the criminal-trial system."

Distilled to its essence, equity is simply the concept of fairness. The California Supreme Court here correctly found that there was simply no unfairness in having petitioner bear the consequence of his intentionally wrongful act. Indeed, the application of the equitable rationale underlying the doctrine of forfeiture by wrongdoing to prevent petitioner from excluding evidence of his victim's statements to the police is particularly fair, equitable, and appropriate on this record. The California court noted that in support of his proffered defense that he shot Ms. Avie in self-defense, petitioner presented a wealth of evidence to show that Ms. Avie "was very jealous of other women, and was a violent person who had previously shot a man, threatened people with knives, and vandalized his home and car on two separate occasions." (Pet., App. A at 46.) Petitioner presented much of such evidence in the form of numerous threats and

other hearsay statements purportedly made by Ms. Avie which he employed to "portray[] her as a violent, aggressive, foulmouthed, jealous, and volatile person." (Pet., App. A at 47.) Thus, as the court reasoned, under these circumstances it was particularly fair and equitable to hold that petitioner "should not be able to take advantage of his own wrong by using the victim's statements to bolster his self-defense theory, while capitalizing on her unavailability and asserting his confrontation rights to prevent the prosecution from using her conflicting statements." (Pet., App. A at 47.)

Nothing in the California Supreme Court's definition or application of the doctrine of forfeiture by wrongdoing in this case is at odds with the approach this Court has traditionally taken to the doctrine since *Reynolds*, and has recently re-affirmed in *Crawford* and *Davis*.

B. There Is No Conflict In The Lower Courts On The Question Of Whether The Forfeiture By Wrongdoing Doctrine Applies In Cases Where The Defendant Intentionally Kills The Witness

Petitioner asserts that, of the ten state supreme courts and one federal circuit court of appeals that have ruled on the question of whether intent to silence future testimony is an element of the forfeiture by wrongdoing

rule since this Court's decision in *Crawford*, such courts "have split on the issue six to five." (Pet. at 10.) More particularly, he asserts that, in addition to the California Supreme Court's decision in this case, the decisions of four other state supreme courts and the Sixth Circuit Court of Appeals have held that an intent to silence future testimony is not a requirement of the forfeiture rule: *State v. Mason*, 162 P.3d 396 (Wash. 2007); *State v. Jensen*, 727 N.W.2d 518 (Wis. 2007); *State v. Mechling*, 633 S.E.2d 311 (W.Va. 2006); *State v. Meeks*, 88 P.3d 789 (Kan. 2004); and *United States v. Garcia-Meza*, 403 F.3d 364. On the other hand, he asserts that five other state supreme courts have "reached the opposite conclusion," citing *State v. Romero*, 156 P.3d 694 (N.M. 2007), certiorari petition pending, No. 07-37, *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007), *People v. Moreno*, 160 P.3d 242 (Colo. 2007), *Commonwealth v. Edwards*, 830 N.E.2d 158 (Mass. 2005), and *State v. Fields*, 679 N.W.2d 341 (Minn. 2004). (Pet. at 11.) Close examination of the cases cited by petitioner shows that there is no "split" of authority, and thus no real "conflict" within the meaning of Supreme Court Rule 10(b) sufficient to warrant this Court's review on certiorari.

More precisely, there is no conflict on the crucial issue of whether a defendant who intentionally kills a declarant forfeits the Sixth Amendment right to confront and cross-examine his victim.

First, examination of four of the eleven cases cited by petitioner (two of which petitioner characterizes as in agreement with the California Supreme Court's decision in this case (*Mechling* and *Meeks*), and two of which petitioner characterizes as reaching "the opposite conclusion" (*Edwards* and *Fields*)), shows that the courts in question did not actually reach or consider any question concerning whether a defendant must intend at the time he renders the declarant unavailable that his act prevent future testimony. None of these cases can form any part of a purported "split" of authority.

In *Mechling*, the trial court admitted over the defendant's objections evidence of certain hearsay statements made by the victim of a domestic battery to others immediately after the defendant was alleged to have committed that battery on her. *State v. Mechling*, 633 S.E.2d at 314-15. On appeal, the Supreme Court of Appeals of West Virginia relied on this Court's decisions in *Crawford* and *Davis* to hold that, because the

statements at issue were "testimonial" within the meaning of *Crawford* and *Davis*, it was error for the trial court to admit them. *Id.* at 317-23. The court went on to find that because the state did not argue that the issue was harmless beyond a reasonable doubt, it had to set aside the defendant's conviction and remand the case for further proceedings. *Id.* at 323. The court in *Mechling* left it to the parties on remand to develop a record whether certain other statements by the victim were testimonial or nontestimonial. *Id.* at 324. While the *Mechling* court then went on to comment on the doctrine of forfeiture by wrongdoing and its potential application on remand in the trial court, it closed by noting that, absent a finding of forfeiture by wrongdoing on remand, the Confrontation Clause of the Sixth Amendment would operate to exclude testimony given by responding sheriff's deputies and possibly certain testimony given by an eyewitness to the alleged battery because the statements at issue were "testimonial." *Id.* at 325-26. Specifically, the court provided that, on remand, the trial court could determine whether a claim of forfeiture was properly raised and, if so, whether such a claim was meritorious. *Id.* at 326. There is, however, no

discussion in *Mechling* about whether a defendant must intend his unavailability-causing wrongful act to prevent testimony at a future trial. The court in *Mechling* simply had no occasion to consider or rule on such a question.

Similarly, an examination of the decision of the Supreme Court of Kansas in *State v. Meeks*, 88 P.3d 789, shows that no such question was addressed by that court either. In *Meeks*, the defendant shot the victim, James Green, during an argument and fistfight. About ten minutes after the shooting, Green identified the defendant as the shooter to an officer at the scene, but died soon thereafter. During trial, the prosecution introduced Green's statement identifying the defendant to the police. Although the court in *Meeks* noted that the victim's response to the officer's question might arguably be testimonial, the court found it unnecessary to decide that issue. Instead, it held that the defendant "forfeited his right to confrontation by killing the witness, Green." *Meeks*, 88 P.3d at 793-94. Noting that this Court in *Crawford* "continued to accept the [*Reynolds*] rule of forfeiture by wrongdoing which 'extinguishes confrontation claims on essentially

equitable grounds,'" the court in *Meeks* relied on the reasoning set forth in *Reynolds* that "'if a witness is absent by his own [the accused's] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.'" *Id.* at 794. At no point in its decision, however, was the *Meeks* court ever asked to consider any question of whether, in order for the doctrine of forfeiture by wrongdoing to apply, there must be some further showing that the defendant intended to prevent testimony by the declarant/witness. Consequently, it did not.

The same is true as to the decisions in *Edwards* and *Fields*. In *Edwards*, the question before the Supreme Judicial Court of Massachusetts concerning the scope of the doctrine was not whether a defendant must be shown to have intended to prevent future testimony, but whether "collusion" with a witness to procure that witness's unavailability constitutes a sufficient "wrongdoing." *Commonwealth v. Edwards*, 830 N.E.2d at 168. The *Edwards* court found that such collusion might be sufficient, depending on the showing ultimately made on remand. *Id.* at 175. While, in stating the requirements of the rule it adopted in *Edwards*, the court included a finding that

the defendant acted with the intent to procure the witness's unavailability, *Id.* at 170, at no point in its opinion did it ever consider or discuss whether such a requirement was mandatory. There simply was no such issue raised. Rather, given the assertedly wrongful conduct at issue in *Edwards*, i.e., collusion with the witness to prevent testimony, such a requirement was simply taken as a given.

In *Fields*, the Supreme Court of Minnesota simply found, based on its review of the particular underlying record before it, which contained evidence that the defendant had made threatening calls to a witness who subsequently refused to testify at trial, that the trial court's factual findings that the defendant engaged in wrongful conduct, that the defendant intended to procure the unavailability of that witness, and that such intentional wrongful conduct actually did procure the witness's unavailability were not clearly erroneous based on that record. *State v. Fields*, 679 N.W.2d at 345-47. The *Fields* court, however, was not presented with and did not ever consider the question of whether there should be a requirement under the doctrine of forfeiture by

wrongdoing that the defendant intend his wrongdoing to prevent future testimony by the witness.

Thus, a thorough reading of *Mechling*, *Meeks*, *Edwards*, and *Fields* shows that none of those respective courts can be said to have ever considered, reached, or decided any question about whether, in order for the doctrine of forfeiture by wrongdoing to apply, the defendant must be shown to have specifically intended by his wrongdoing to prevent testimony at a future judicial proceeding. Accordingly, these cases form no part of any alleged "split" on such a question.

Most important, there is no conflict among the decisions that deal with the factual scenario presented in this case, in which the defendant is shown to have wrongfully killed the declarant/witness as the currently charged crime. On the contrary, every such case decided after this Court's decision in *Crawford* which reached the question holds that the doctrine of forfeiture by wrongdoing is applicable regardless of whether the defendant intended by his wrongdoing to prevent future testimony by the deceased declarant. Petitioner has failed to identify and respondent has not located any post-*Crawford* case in which a court declined to apply

forfeiture of the right of confrontation in a situation where the declarant/witness is intentionally killed by the defendant.

Thus, while the courts in *Romero*, *Stechly*, and *Moreno* found a an intent-to-silence requirement, none of them did so in a case involving the murder of the declarant. *Romero* concerned a situation wherein the alleged victim of the charged domestic battery made post-crime statements to a responding police officer and later to a sexual assault nurse examiner. *Romero*, 156 P.3d at 697-99. In *Stechly*, the defendant was convicted of sexual assault of the five-year-old daughter of his girlfriend based on evidence of statements made by the child-victim after and about the alleged abuse to her mother and others which were admitted after a clinical child psychologist testified that the child would likely experience trauma symptoms if she were forced to testify. *Stechly*, 870 N.E.2d at 338-41. *Moreno* similarly involved a defendant convicted of sexual assault on a child at whose trial a videotaped interview of one of child victims was played in lieu of her live testimony. *Moreno*, 160 P.3d at 243.

Indeed, in rendering its decision in *Moreno*, the Supreme Court of Colorado noted that all of the cases not requiring a showing that the defendant intended to prevent the declarant from testifying at trial, including the decision by the California Supreme Court in the instant case, involved the admissibility of prior statements made by victims of the charged homicides. *Moreno*, 160 P.3d at 245-46. It is especially significant that both the Supreme Court of Colorado in *Moreno* and the Supreme Court of Illinois in *Stechly* expressly left open the possibility that there may be a "murder exception" or "homicide exception" to their rules requiring a showing that in committing the subject wrongdoing the defendant intended to prevent the declarant from testifying at trial. *See Moreno*, 160 P.3d at 246; *Stechly*, 870 N.E.2d at 352-53. To the extent such an exception exists or might exist, it would nullify petitioner's claim of a "split" of authority.

The court in *Stechly* also suggested that those cases such as the instant one involving a defendant's killing of the declarant, "might also be reconcilable with the general rule that [an] intent [to prevent future

testimony] is required." *Stechly*, 870 N.E.2d at 352. As the *Stechly* court further elaborated in this regard,

> Notwithstanding that some cases [involving the defendant's killing of the declarant] contain broader language, the above cases have essentially held that the prosecution need not prove that the defendant committed murder with the intent of procuring the victim's absence. This is consistent with presuming such intent when the wrongdoing at issue is murder. When a defendant commits a murder, notwithstanding any protestation that he did not specifically intend to procure the victim's inability to testify at a subsequent trial, he will nonetheless be sure that this would be a result of his actions. Murder is, in this sense, different from any other wrongdoing in which a defendant could engage with respect to a witness – more than a possibility, or a substantial likelihood, a defendant knows with absolute certainty that a murder victim will not be available to testify.

Id. at 352-53. Thus, although the court in *Stechly* expressed no definitive opinion on the topic, it noted that, "the total certainty that a murdered witness will

be unavailable to testify could theoretically support presuming intent in the context of murder, while requiring proof of intent in all other situations." *Id.* at 353. For these reasons, the court in *Stechly* found cases like the instant one involving the murder of the declarant to be "distinguishable." *Id.*

Here, of course, it was petitioner's murder of Ms. Avie that constituted the wrongdoing in question whereby he procured her unavailability at trial. Accordingly, to the extent there is a viable "murder exception" or "homicide exception" to any requirement of an intent to prevent testimony as intimated by the courts in *Moreno* and *Stechly*, this case would fall squarely within such an exception and thus would not conflict with cases finding such an intent requirement in non-homicide situations such as *Moreno*, *Stechly*, and *Romero*.

Furthermore, to the extent that there is any "split" or conflict among the decisions pointed to by petitioner, it is a very recent one which is at this point not yet ripe for this Court's review. The decisions in *Romero*, *Stechly*, and *Moreno*, relied upon by petitioner, generally allow for or at least do not decide against a murder or homicide exception to an intent-to-

prevent-testimony rule, and were all rendered within the last eight months. Allowing further development of issues concerning the applicability or parameters of such an exception would allow the lower courts to consider such issues in the first instance and their resolution might well render any "split" as perceived by petitioner to be illusory and ultimately moot. To the extent a genuine conflict ultimately materializes, this Court will have ample opportunities to resolve it when it is actually presented.

C. Any Error Was Harmless

Finally, because any assumed error in admitting evidence of the victim's statements to the officer was in any event harmless, this case presents a poor vehicle for certiorari review in that the judgment will not change regardless of whether the admission of evidence of the statements was error. As this Court has previously held, violations of a defendant's right to confront witnesses as guaranteed by the Sixth Amendment are subject to harmless-error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 680-84 (1986); *see Neder v. United States*, 527 U.S. 1, 18 (1999). Here, the record shows any error in admitting evidence of the subject statements

was harmless beyond a reasonable doubt. In this regard, as both the California Supreme Court and the Court of Appeal found, “the evidence supporting [petitioner’s] [self-defense] theory was weak and it is inconceivable that any rational trier of fact would have concluded the shooting was excusable or justifiable.” (Pet., App. A at 53-54.) Thus, the verdict would have been the same even in the absence of evidence of the victim’s statements and petitioner would not in any event be entitled to any relief.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

DONALD E. DE NICOLA
Deputy Solicitor General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SUSAN D. MARTYNEC
Supervising Deputy Attorney General

KRISTOFER JORSTAD
Deputy Attorney General

RUSSELL A. LEHMAN
Deputy Attorney General

Counsel for Respondent

RAL:vg
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60263751.wpd