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### **Giles v. California: Sixth Amendment Confrontation Right, Forfeiture by Wrongdoing, and a Misguided Departure from the Common Law and the Constitution, 40 U. Tol. L. Rev. 577 (2009)**

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# ARTICLES

## GILES v. CALIFORNIA: SIXTH AMENDMENT CONFRONTATION RIGHT, FORFEITURE BY WRONGDOING, AND A MISGUIDED DEPARTURE FROM THE COMMON LAW AND THE CONSTITUTION

Ralph Ruebner\* & Eugene Goryunov\*\*†

### I. INTRODUCTION

THE debate about the nature of the Sixth Amendment confrontation rights of the criminally accused has been lively in recent years. The United States Supreme Court addressed a key confrontation issue definitively during its most recent term in its controversial opinion in *Giles v. California*.<sup>1</sup> The issue in *Giles* was whether intent to prevent live in-court testimony is a necessary element of the constitutional forfeiture analysis. State courts had been split on this point for a number of years.<sup>2</sup> Many, including the California Supreme Court in *People v. Giles*, rejected the element of intent.<sup>3</sup> Conversely, some, including the Illinois Supreme Court in *People v. Stechly*, mandated the inclusion an intent element.<sup>4</sup> In *Giles*, the U.S. Supreme Court sided with the seeming minority view and held that unopposed out-of-court statements are admissible only where the witness is unavailable as a direct result of conduct that

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1. *Giles III*, 128 S. Ct. 2678 (2008).

2. See, e.g., *People v. Giles (Giles II)*, 152 P.3d 433, 443 (Cal. 2007) (holding that intent is not a required element for forfeiture by wrongdoing), *vacated*, *Giles III*, 128 S. Ct. 2678; *State v. Jensen*, 2007 WI 26, ¶ 40 n.13, 299 Wis. 2d 267, ¶ 40 n.13, 727 N.W.2d 518, ¶ 40 n.13 (distinguishing forfeiture from waiver in that forfeiture does not require intent). But see, e.g., *People v. Stechly*, 870 N.E.2d 333, 372 (Ill. 2007) (holding that intent is required for the forfeiture-by-wrongdoing doctrine); *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005) (holding that forfeiture by wrongdoing requires: (1) declarant's unavailability; (2) that defendant was involved in, or responsible for, procuring the unavailability; and (3) that defendant intended to procure such unavailability).

3. *Giles II*, 152 P.3d at 443.

4. 870 N.E.2d 333, 372 (Ill. 2007).

was intended by the accused to render the witness unavailable for live in-court testimony.<sup>5</sup>

In this article, we contend that the common law does not support including the element of intent in the forfeiture analysis under the Confrontation Clause. Justice Scalia's plurality opinion in *Giles* misreads the common-law cases as requiring intent to procure unavailability before a court may apply forfeiture by wrongdoing.<sup>6</sup> Our analysis of the historical record demonstrates that the English common-law judges who fashioned the forfeiture doctrine and American courts that further explained the principle did not make intent to render unavailable an element of the confrontation exception.

The Sixth Amendment to the U.S. Constitution fully protects the criminally accused against the admissibility of an unavailable declarant-witness's testimonial<sup>7</sup> out-of-court statement where the accused did not have a prior opportunity to cross-examine him or her.<sup>8</sup> To best serve the interests of justice, a prosecutor must be allowed to introduce a testimonial out-of-court statement when the accused forfeits the right of confrontation by his or her own voluntary and wrongful conduct. This must be the case even if the accused did not have a prior opportunity to cross-examine the out-of-court declarant. There are a number of such situations that render a witness unavailable to present live in-court testimony, including the murder of the out-of-court declarant, intimidation of the declarant, improper payments or other inducements to the declarant, concealment of the declarant's whereabouts, or persuasion of the declarant to absent himself or herself from the trial.<sup>9</sup>

In these circumstances, where the prosecution establishes that the accused caused or procured the declarant's unavailability, the dispositive constitutional question is not whether the accused intended to prevent the out-of-court declarant's testimony, but whether the accused's voluntary wrongful conduct actually caused the out-of-court declarant to be unavailable for live in-court testimony. Thus, the constitutional forfeiture rule is an equitable principle that allows the use of a declarant's out-of-court statement without distinction as to whether it is a pre-crime statement, a statement made during the crime, or a post-crime statement.<sup>10</sup> As a result, a statement's relevancy is the only remaining limitation to admissibility.<sup>11</sup>

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5. *Giles III*, 128 S. Ct. at 2687.

6. *See id.* at 2682-86.

7. The Confrontation Clause only limits the admissibility of testimonial hearsay statements, which are defined as "pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

8. *Id.* at 59.

9. Methods defendants employ to "procur[e] or coer[c]e silence from witnesses and victims" is wrongful forfeiture of the constitutional right to confrontation. *See Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

10. *Crawford*, 541 U.S. at 62.

11. There is a concern that without an intent element the forfeiture doctrine may render the "dying declaration" hearsay exception meaningless. We suggest that this argument is without merit because a dying declaration is most likely not testimonial, and therefore falls outside the parameters of the Confrontation Clause. *See id.* at 56 n.6 (stating that the dying-declaration exception to the

Part II of this article examines the development of the doctrine of forfeiture by wrongdoing in common law, concluding that the common law did not include an intent element. Part III discusses the U.S. Supreme Court's recognition of the forfeiture doctrine and examines the differences between forfeiture and waiver. Next, in part IV, we survey different jurisdictions' approaches to the forfeiture doctrine, focusing on whether the jurisdictions include an intent element. Some courts, like the California Supreme Court, do not require a showing of intent in applying the forfeiture doctrine, while others, like the Illinois Supreme Court, do. Part V analyzes the U.S. Supreme Court's recent decision in *Giles v. California*, which misguidedly resolved the split in favor of requiring a showing of intent. To further support our contention that the forfeiture doctrine does not require intent, in part VI we clarify the difference between the confrontation rights of the Sixth Amendment and the residual exception to hearsay under the Federal Rules of Evidence. Last, we conclude that requiring an element of intent in forfeiture analysis is inconsistent with the common law at the time of the nation's founding.

## II. THE ENGLISH AND EARLY AMERICAN COMMON-LAW DOCTRINE OF FORFEITURE BY WRONGDOING DID NOT RECOGNIZE AN INTENT REQUIREMENT

The doctrine of forfeiture by wrongdoing was first developed in seventeenth-century England as a means of preventing witness tampering.<sup>12</sup> Early English cases focused on the accused's post-crime attempts to prevent the trial testimony of a previously deposed witness.<sup>13</sup> The first time a court applied the doctrine was during the 1666 murder trial of Lord Morley before the British House of Lords.<sup>14</sup> Before the trial began, the Law Lords met at Serjeants-Inn on Fleet-Street to discuss the evidentiary issues that they thought may arise at trial.<sup>15</sup> At that meeting, they agreed that if a previously examined witness were absent from trial and the court found that the absent witness "was detained by means or procurement of the prisoner . . . then the examination might be read."<sup>16</sup>

During the trial, Thomas Snell, an apprentice who had provided an incriminating deposition to the coroner, disappeared.<sup>17</sup> His master, Thomas Harding, testified that Snell told him that "the Lord Morley's Trial was to be shortly but he would not be there."<sup>18</sup> While Snell clearly disappeared in anticipation of the upcoming trial, the court did not read the deposition because the evidence was not sufficient to show that the accused procured Snell's

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rules of evidence is *sui generis*). See generally Michael J. Pofelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285 (2006).

12. James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1214 (2006).

13. *Id.* at 1205.

14. *King v. Morley (Lord Morley's Case)*, (1666) 6 Eng. Rep. 769 (K.B.). Lord Morley was indicted for running his sword through the head of his victim in an argument over a half-crown outside the Fleece-Taverne. *Id.* at 776.

15. *Id.* at 769.

16. *Id.* at 770-71.

17. *Id.* at 777.

18. *Id.*

absence.<sup>19</sup> Lord Morley was acquitted of murder but was found guilty of manslaughter and fined.<sup>20</sup> This case stands for the proposition that where it is sufficiently shown that the accused's voluntary wrongful act resulted in a witness's unavailability at trial, the now-unavailable witness's out-of-court statements will be admitted in evidence against the accused.<sup>21</sup>

Some years later, in 1692, Henry Harrison was charged with the "choke and strangle" murder of Dr. Andrew Clenche.<sup>22</sup> At trial before the House of Lords, Barnabas Smith testified that an apprentice, Andrew Bowsell, told him that while on an errand, a man approached him and asked if he was going to testify against Harrison.<sup>23</sup> When Bowsell said that he would testify, the man offered him money, "desiring him to be kind to Mr. Harrison."<sup>24</sup> Richard Tims, Bowsell's master, testified that three soldiers took Bowsell away later that evening, one soldier returned the next morning to pick up his clothes, and later attempts to locate him were unsuccessful.<sup>25</sup> On this testimony, the court admitted in evidence Bowsell's earlier deposition connecting Harrison to the murder.<sup>26</sup> Relying on the *Lord Morley* precedent, the House of Lords held that a witness's out-of-court deposition would be admissible at trial to replace live in-court testimony of the missing witness if the evidence's proponent "sufficiently" proved that the accused procured the witness's absence.<sup>27</sup>

Four years after *Harrison's Case*, in 1696, the House of Commons expanded the rule of *Lord Morley's Case* to the admissibility of testimony from an earlier trial.<sup>28</sup> Sir John Fenwick, a Jacobite, plotted with many others to restore James II, who lost the throne to William III in the Revolution of 1688.<sup>29</sup> "Before the conspirators could carry out their machinations, however, three members of the group disclosed the plot to [King] William. One by one, [the members of the group] were arrested, tried, and convicted of treason."<sup>30</sup> Fenwick knew that only two witnesses could prove his guilt, George Porter and Cardell Goodman.<sup>31</sup> Under then-existing law, two witnesses were needed for a high-treason conviction.<sup>32</sup>

In an effort to subvert this requirement, Fenwick first sent his agent to bribe Porter to leave for France.<sup>33</sup> Porter, however, took the money and alerted the

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19. *Id.*

20. *Id.* at 785-86.

21. *Id.*

22. *Harrison's Case*, (1692) 12 State Trials 833, 834 (Eng.).

23. *Id.* at 851.

24. *Id.*

25. *Id.* at 851-52.

26. *Id.* at 852-53. Bowsell's deposition was given before the coroner. *Id.*

27. *Id.* at 853.

28. *Carmell v. Texas*, 529 U.S. 513, 530 (2000).

29. *Id.* at 526.

30. *Id.* (citations omitted).

31. *Id.*

32. *Id.* at 526-27 (referring to "An Act for Regulating of Tryals in Cases of Treason and Misprision of Treason").

33. *Id.* at 527.

authorities.<sup>34</sup> Having failed with Porter, “Fenwick threw himself on the mercy of the court and offered to disclose all he knew of the Jacobite plotting” to delay his trial.<sup>35</sup> Meanwhile, Lady Fenwick, his wife, helped Goodman escape.<sup>36</sup> Although foul play appeared to be afoot, the court refused to admit Goodman’s prior testimony from the trial of one of Fenwick’s co-conspirators against Fenwick because no evidence could link Lady Fenwick’s conduct to her husband.<sup>37</sup> Nevertheless, perhaps because the court still suspected that Lady Fenwick’s cunning actions were in consort with her husband, the House of Commons passed a bill of attainder against Fenwick, with the Crown’s consent, nullifying the two-witness requirement after reviewing the contents of Goodman’s sworn deposition.<sup>38</sup> On Porter’s testimony alone,<sup>39</sup> the court convicted Lord Fenwick of treason and beheaded him on January 28, 1697.<sup>40</sup>

The common-law forfeiture doctrine was further refined in *Regina v. Scaife*.<sup>41</sup> Mathew Scaife appealed a larceny conviction after he was tried jointly with Thomas Rooke and John Smith.<sup>42</sup> At trial, the prosecution presented evidence that Smith bribed Sarah Ann Garnet, a prosecution witness, to prevent her trial testimony.<sup>43</sup> Consequently, the judge allowed her sworn deposition to be read in open court against Smith.<sup>44</sup> On appeal, the Queen’s Bench held that the jury should have been instructed that the deposition evidence could only be used against Smith, the party who caused her absence.<sup>45</sup> “[I]t ought to have been applied to the case against him only, and not to the case against the other prisoners” because there was no evidence that they attempted to procure the witness’s absence.<sup>46</sup> Lord Coleridge explained that “if a witness was absent, either by reason of death of the witness, or by the procurement of the prisoner, the deposition was receivable in evidence against him.”<sup>47</sup>

The Georgia Supreme Court reached the same result in *Williams v. State*,<sup>48</sup> the first American case to apply the forfeiture doctrine. There, the defendant was convicted of the larceny of a watch.<sup>49</sup> At trial, the prosecutor suggested that the

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34. *Id.* (citations omitted).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 528. There was extensive discussion about the *ex post facto* application of the new statute against Lord Fenwick. The House of Lords declared that Lord Fenwick was “so inconsiderable a Man, as to the endangering the Peace of the Government” that it justified the retroactive application of the law. Sir J. Fenwick’s Bill of Attainder, (1696) 16 Will. III 48 (H.L.).

39. *Carmell v. Texas*, 529 U.S. 513, 528 (2000).

40. *Id.*

41. (1851) 117 Eng. Rep. 1271 (Q.B.).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1272.

46. *Id.* (discussion by Judge Patteson).

47. *Id.*

48. 19 Ga. 402 (1856).

49. *Id.*

accused induced the watch's rightful owner "to absent himself from court," and consequently the trial judge admitted into evidence the owner's written testimony to a Magistrate.<sup>50</sup> On appeal, the Georgia Supreme Court found that there was no evidence that the accused procured the owner's absence.<sup>51</sup> The evidence only showed that the accused and the owner had settled their disagreement about ownership of the watch.<sup>52</sup> As such, the owner's out-of-court deposition was not admissible.<sup>53</sup>

These cases demonstrate that the common-law forfeiture rule focused exclusively on the accused's voluntary wrongful conduct in causing the unavailability of the out-of-court declarant's live in-court testimony.<sup>54</sup> This approach to forfeiture did not require a showing that the accused acted with intent to prevent the witness from testifying, and it steadfastly preserved the right of confrontation where there was no causal link between the accused and the witness's failure to appear at the proceedings.<sup>55</sup> While the early common-law cases addressed the accused's post-crime conduct, there is nothing in the forfeiture doctrine's historical development to suggest that it should be limited to post-crime conduct. We will show that a modern application of the common-law principle of forfeiture has no temporal or subject-matter limitations. The constitutional forfeiture doctrine should apply whenever the accused's voluntary and wrongful conduct causes unavailability, whether pre-crime, post-crime, or during the very crime for which the accused is on trial.

### III. RECOGNITION AND AFFIRMATION OF THE CONSTITUTIONAL DOCTRINE OF FORFEITURE BY THE UNITED STATES SUPREME COURT

#### A. *Reynolds v. United States: Recognition of the Common-Law Equitable Doctrine of Forfeiture*

More than 200 years after *Lord Morley's Case*, the U.S. Supreme Court, in *Reynolds v. United States*,<sup>56</sup> first recognized the doctrine of forfeiture by wrongdoing.<sup>57</sup> The case arose in the Territory of Utah, where George Reynolds was convicted of bigamy based on his marriage to Amelia Jane Schofield while he was still married to his first wife, Mary Ann Tuddenham.<sup>58</sup> The dispositive facts begin with a marshal who arrived at the accused's home to serve a subpoena

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50. *Id.*

51. *Id.* at 403.

52. *Id.*

53. *Id.*

54. *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878); *Williams*, 19 Ga. at 402; *Regina v. Scaife*, (1851) 169 Eng. Rep. 505 (Q.B.); *Fenwick's Case*, (1696) 13 State Trials 538 (Eng.); *Harrison's Case*, (1692) 12 State Trials 833 (Eng.); *King v. Morley*, (1666) 6 Eng. Rep. 769 (K.B.).

55. *Reynolds*, 98 U.S. at 159.

56. 98 U.S. 145 (1878).

57. Flanagan, *supra* note 12, at 1205.

58. *Reynolds*, 98 U.S. at 146, 148.

on Amelia Jane Schofield.<sup>59</sup> Although the subpoena was issued incorrectly in the name of Mary Jane Schobold, the marshal knew Amelia Jane Schofield as Mary Jane Schofield or Mrs. Reynolds.<sup>60</sup> The prosecution also established in court that Amelia Jane Schofield was living with the accused at the time that the marshal appeared at their home.<sup>61</sup> The marshal testified that he spoke to the accused, who claimed that Mary Jane Schofield was not at home and refused to say where she was.<sup>62</sup> Reynolds also told the marshal that “[Schofield] did not appear in this case.”<sup>63</sup>

Early on in the trial, the prosecutor discovered the error in misnaming the witness in the subpoena and issued a new subpoena with her correct name.<sup>64</sup> The same marshal returned to the accused’s home that evening and spoke with his first wife.<sup>65</sup> She told the marshal that the wife named in the subpoena was not home and had not been there for three weeks.<sup>66</sup> The marshal returned the next morning but had the same result.<sup>67</sup> The next day, after holding an evidentiary hearing, the judge ruled to admit Schofield’s sworn testimony from a prior trial of the accused, on a different charge, in evidence.<sup>68</sup>

On appeal, the U.S. Supreme Court affirmed Reynolds’s conviction and found no constitutional error, since the evidence supported the trial court’s determination that the accused was responsible for Schofield’s unavailability at trial.<sup>69</sup> Chief Justice Waite, speaking for the Court, reasoned that the prosecutor presented “enough” un rebutted evidence to explain the witness’s unavailability in the presence of the accused.<sup>70</sup> “Clearly, enough had been proven to cast the burden [on Reynolds to show] that he had not been instrumental in concealing or keeping the witness away.”<sup>71</sup> Reynolds did not rebut the prosecution evidence even though he had an opportunity to explain Schofield’s absence from the trial.<sup>72</sup> Chief Justice Waite elaborated:

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. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses

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59. *Id.* at 148.

60. *Id.*

61. *Id.* at 149.

62. *Id.* at 148.

63. *Id.* at 149.

64. *Reynolds v. United States*, 98 U.S. 145, 160 (1879).

65. *Id.* at 149.

66. *Id.*

67. *Id.*

68. *Id.* at 150.

69. *Id.* at 160.

70. *Id.*

71. *Id.*

72. *Id.*



against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.<sup>73</sup>

According to *Reynolds*, the forfeiture rule “has its foundation in the [equitable] maxim that no one shall be permitted to take advantage of his own wrong, and, consequently, if there has not been ... a wrong committed, the way has not been opened for the introduction of the testimony.”<sup>74</sup> The Court noted that “this long-established usage ... has rarely been departed from” and is an “outgrowth of a maxim based on the principles of common honesty.”<sup>75</sup>

What is most striking about the *Reynolds* constitutional analysis is that it focused exclusively on the accused’s voluntary wrongful conduct and its consequences.<sup>76</sup> The *Reynolds* Court did not inject an intent element or suggest that forfeiting confrontation rights depends on the accused’s purpose or motivation in preventing his wife from giving adverse testimony against him at trial.<sup>77</sup>

One confrontation clause scholar, Professor James Flanagan, argues that the *Reynolds* Court applied the waiver doctrine, which was later articulated in *Johnson v. Zerbst*<sup>78</sup> as “an intentional relinquishment or abandonment of a known right or privilege.”<sup>79</sup> He maintains that waiver requires a showing that the accused acted with specific intent to prevent live trial testimony.<sup>80</sup> To support his position, Professor Flanagan relies on language from *Reynolds* concluding that Reynolds had “considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own.”<sup>81</sup> In extrapolating a waiver rationale, he argues that Reynolds knew that his wife had testified against him in a previous trial and the prosecutor was seeking her live testimony.<sup>82</sup> Professor Flanagan additionally notes that Reynolds refused to reveal his wife’s whereabouts to keep the marshal from serving her with a subpoena.<sup>83</sup> He concludes that the accused’s silence in open court after hearing the marshal’s testimony supports an inference that Reynolds knew where she was.<sup>84</sup>

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73. *Id.* at 158.

74. *Reynolds v. United States*, 98 U.S. 145, 158 (1879).

75. *Id.*

76. *Id.*

77. *See id.*

78. 304 U.S. 458 (1938).

79. Flanagan, *supra* note 12, at 1200.

80. *Id.*

81. James F. Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant’s Intent to Intimidate the Witness*, 15 J.L. & POL’Y 863, 869 (2007).

82. Flanagan, *supra* note 12, at 1205.

83. *Id.* at 1207.

84. *Id.* at 1208.

From these assumptions, Professor Flanagan deduces that Reynolds had knowingly and intentionally waived his constitutional right to confront his wife in court.<sup>85</sup> For validation, Professor Flanagan relies on the *Johnson v. Zerbst* waiver test, which “looks to the defendant’s knowledge of the right as well as the deliberate intention to relinquish that right.”<sup>86</sup> He concludes that the defendant’s “[k]nowledge of the right of confrontation and the intention to relinquish that specific right are inferred from the defendant’s intentional act aimed at preventing a *witness* from testifying.”<sup>87</sup>

At first blush, Professor Flanagan makes an appealing argument to support his waiver claim, but the *Reynolds* opinion itself does not support his conclusions. The *Reynolds* Court did not suggest that the application of forfeiture hinged on Reynolds’s purpose or motivation in keeping his wife from testifying at the trial.<sup>88</sup> Rather, the Court’s decision focused exclusively on Reynolds’s voluntary wrongful act of keeping his wife away from trial.<sup>89</sup> The triggering event for the forfeiture’s application was Reynolds’s voluntary and wrongful act in preventing her in-court testimony.<sup>90</sup>

A fair reading of *Reynolds* reveals that the accused did not *choose* to forego a constitutional right.<sup>91</sup> Reynolds *lost* his confrontation rights by making his wife unavailable for live testimony; the decision, a judicial ruling, was made for him.<sup>92</sup> There is no evidence that Reynolds was aware that he had a constitutional right to confront witnesses against him or that he knowingly and intentionally relinquished such a right. Rather, Reynolds forfeited his constitutional right, a form of punishment for his voluntary and wrongful act.<sup>93</sup> Additionally, the English common-law cases that the *Reynolds* Court relied on did not make intent an element of the forfeiture analysis.<sup>94</sup> Instead, the “focus was on whether there was adequate proof that the defendants caused the witnesses’ absence.”<sup>95</sup> This shifts the analysis away from intent and waiver to voluntary and wrongful conduct and forfeiture.

Professor Flanagan’s suggestion that the *Reynolds* decision was grounded in waiver would be correct if there was credible evidence that Reynolds knew, understood, and appreciated his constitutional right to confrontation; that he had intended to prevent his wife’s in-court testimony; and that he had knowingly and intelligently waived his right to cross-examine her. No such evidence, however,

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85. *Id.*

86. *Id.* at 1200.

87. *Id.* at 1201.

88. *Reynolds v. United States*, 98 U.S. 145, 160 (1879).

89. *Id.*

90. *Id.* at 159-60.

91. *See id.*

92. *Id.* at 159.

93. *Id.*

94. *People v. Giles (Giles I)*, 152 P.3d 433, 438 n.3 (Cal. 2007), *vacated*, *Giles v. California (Giles III)*, 128 S. Ct. 2678 (2008).

95. *Id.*

is in the Court's opinion.<sup>96</sup> Accordingly, Professor Flanagan's conclusion that "[t]he constitutional rule stated in *Reynolds* was that a deliberate intention to prevent a witness from testifying supports the loss of confrontation as to that witness"<sup>97</sup> is untenable. Intent has no bearing on the constitutional analysis of forfeiture by wrongdoing.

Professor Flanagan also argues that courts will be inclined to use the forfeiture exception to admit untested hearsay in circumstances where witnesses are merely unwilling to cooperate with the prosecution, notably in domestic-violence cases.<sup>98</sup> However, this prediction will not materialize because the constitutional forfeiture-by-wrongdoing analysis requires proof that voluntary and wrongful conduct of the accused actually caused the unavailability of the witness's live testimony.<sup>99</sup>

### B. *Forfeiture and Waiver: Clarifying the Blurred Line*

Waiver and forfeiture are two distinct concepts, yet some courts misapply waiver in confrontation clause analysis.<sup>100</sup> Professor Flanagan posits that "forfeiture by wrongdoing" should actually be termed "estoppel by wrongdoing,"<sup>101</sup> a more neutral label that he argues does not immediately assume the absence of the intent requirement for purposes of the debate.<sup>102</sup> Injecting an additional label into the mix will only further confound and mystify courts. Justice Scalia has noted that "although our cases have so often used them interchangeably," waiver and forfeiture concepts "are really not the same."<sup>103</sup> Waiver is "an intentional relinquishment or abandonment of a known right or privilege," which can occur either before or during a trial.<sup>104</sup> When it comes to waiver, the accused makes personal choices, such as whether to confess,<sup>105</sup> plead

96. See generally *Reynolds*, 98 U.S. at 145.

97. Flanagan, *supra* note 81, at 869.

98. *Id.* at 874-75, 893-95.

99. See *Davis v. Washington*, 547 U.S. 813, 833 (2006).

100. *Id.* at 868.

101. *Id.* at 867.

102. *Id.*

103. *Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part). *Accord* *United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture.").

104. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

105. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). The Fifth Amendment commands that "no person 'shall be compelled in any criminal case to be a witness against himself.'" *Id.* at 461 (quoting U.S. CONST. amend. V). Chief Justice Warren stated that the constitutional rule requires that the accused be made aware that he or she has the right to remain silent and that any statements made by the accused must be made voluntarily. *Id.* at 462. In other words, the accused must not be "involuntarily impelled to make a statement [by improper police influence], when but for the improper influences he would have remained silent." *Id.* The Court established that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444. An accused, however, may always waive his own constitutional rights, "provided the waiver is made voluntarily, knowingly and intelligently." *Id.*

guilty,<sup>106</sup> proceed to a jury,<sup>107</sup> defend through counsel or personally,<sup>108</sup> testify,<sup>109</sup> or present a defense.<sup>110</sup> Waiver depends on a showing that the accused knew the nature of his or her constitutional right and that he or she intentionally relinquished its protection.<sup>111</sup> Professor Peter Westen correctly stated that before the prosecution can assert that the accused has waived a constitutional right, it has to:

[S]how that he made a deliberate decision to forgo [this right], that he made the decision after being fully apprised of the consequences and alternatives, and that the

106. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Justice Douglas explained that a “plea of guilty ... is itself a conviction; nothing remains but to give judgment and determine punishment.” *Id.* Therefore, the validity of a confession “must be based on a ‘reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.’” *Id.* (quoting *Jackson v. Denno*, 378 U.S. 368, 387 (1964)). The record must clearly demonstrate that the accused “intelligently and understandingly” waived his constitutional protection, and “[a]nything less is not waiver.” *Id.*

107. *Patton v. United States*, 281 U.S. 276, 295 (1930). “The Sixth Amendment provides” that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” *Id.* at 288 (citing U.S. CONST. amend. VI). However, “these protective provisions of the Constitution are not so imperative that an accused shall be tried by jury when he desires to plead guilty ... [or in other situations] when he had waived that constitutional right.” *Id.* at 294-95. An accused must have “intelligently refused such constitutional privilege” for the waiver to be effective. *Id.* at 295. The constitutional right to a trial by jury “is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election.” *Id.* at 298.

108. *Faretta v. California*, 422 U.S. 806, 814 (1975). The Sixth Amendment guarantees that “a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” *Id.* at 807. These rights are granted to the accused “personally” and include the accused’s implied right to proceed pro se in his own defense. *Id.* at 819. For an accused to represent himself or herself, he or she must “knowingly and intelligently” waive his or her constitutional rights. *Id.* at 835 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)). The accused should be made aware of the difficulty of proceeding pro se “so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

109. *Ferguson v. Georgia*, 365 U.S. 570, 582-83 (1961). Justice Brennan explained that there is “no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution’s case.” *Id.* at 582.

110. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The Court explained that “the right of an accused in a criminal trial to ... a fair opportunity to defend against the State’s accusations” is essential to due process. *Id.*

A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

*Id.* (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

111. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (stating that a “waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege”).

[prosecution] itself had done nothing to make a decision to assert his rights more “costly” than a decision to relinquish them.<sup>112</sup>

In the end, the accused personally must make the decision to waive a constitutionally protected right.<sup>113</sup>

Forfeiture, on the other hand, is the *loss* of a constitutional right because of the accused’s misconduct.<sup>114</sup> The right is taken away from the accused as a direct consequence of his or her wrongful and voluntary conduct, “regardless of the [accused’s] knowledge thereof and irrespective of whether the [accused] intended to relinquish the right.”<sup>115</sup> It is the “automatic and unintentional loss of a right upon the happening of a specified condition”<sup>116</sup> and “occurs by operation of law without regard to the [accused’s] state of mind.”<sup>117</sup>

The significant difference between waiver and forfeiture analysis is that an accused “can forfeit his [rights] without ever having made a deliberate, informed decision to relinquish them, and without ever having been in a position to make a cost-free decision to assert them.”<sup>118</sup> Ultimately, the trial judge, and not the accused, makes the final decision to strip the accused of his or her confrontation rights.<sup>119</sup> Indeed, forfeiting of confrontation rights is the price that the accused pays as a penalty for having caused the unavailability of the out-of-court declarant’s live testimony through his or her voluntary wrongful conduct.<sup>120</sup> Conversely, where the witness’s unavailability at trial results from the accused’s unintentional act, forfeiture is not justified.<sup>121</sup>

Forfeiting confrontation rights is analogous to the “loss” of the accused’s right to be physically present at his or her own trial. In *Allen v. Illinois*, the accused, after refusing the services of appointed counsel, began to *voir dire* the first juror.<sup>122</sup> After the judge requested that Allen restrict his questions to the prospective juror’s qualifications, Allen began to argue with the judge in an “abusive and disrespectful manner.”<sup>123</sup> He ended his remarks by telling the judge that “[w]hen I go out for lunchtime, you’re going to be a corpse here.”<sup>124</sup> He also

112. Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214 (1977) (discussing the difference between waiver and forfeiture of constitutional rights albeit in the context of a guilty plea).

113. See *Faretta*, 422 U.S. at 819 (noting that Sixth Amendment rights are granted to the accused “personally”).

114. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 11.3(c), at 546 n.4 (2d ed. 1992).

115. *Id.* (explaining that, unlike forfeiture, “waiver” refers to an “intentional relinquishment of a known right”).

116. Flanagan, *supra* note 81, at 867.

117. Westen, *supra* note 112, at 1214.

118. *Id.*

119. *Id.*

120. *Id.*

121. See *infra* note 173 for examples.

122. 397 U.S. 337, 339 (1970).

123. *Id.*

124. *Id.* at 340.

tore his standby attorney's file and threw various papers on the floor.<sup>125</sup> The judge again warned Allen to behave, but he continued to talk back to the judge, saying that "[t]here's not going to be no trial either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial."<sup>126</sup> He made additional abusive remarks, at which time "the trial judge ordered the trial to proceed" without the presence of the accused, who was removed from the courtroom.<sup>127</sup>

On appeal, the U.S. Supreme Court affirmed Allen's removal.<sup>128</sup> Speaking for the Court, Justice Black recognized that "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."<sup>129</sup> Allen, however, "lost" his right to be present during the trial proceedings and to confront witnesses against him because of his disruptive behavior.<sup>130</sup> Justice Black explained:

[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.<sup>131</sup>

In upholding Allen's removal from the trial proceedings, Justice Black did not invoke the waiver doctrine but instead focused on the accused's voluntary disruptive conduct.<sup>132</sup> Allen paid a price for his voluntary wrongful conduct; he forfeited his right to be present during the court proceedings.<sup>133</sup> It naturally follows that an accused who renders a witness unavailable for live testimony at trial through voluntary wrongful conduct should be subject to a similar loss of constitutional rights via forfeiture.

### C. *Crawford v. Washington and Davis v. Washington: Affirming the Common-Law Equitable Forfeiture Doctrine*

The *Reynolds* forfeiture analysis, which we have shown did not include an intent element, was affirmed in dicta in *Crawford v. Washington*<sup>134</sup> and *Davis v. Washington*.<sup>135</sup> In *Crawford*, Justice Scalia wrote that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 343.

129. *Id.* at 338 (citing *Lewis v. United States*, 146 U.S. 370 (1892)).

130. *Id.* at 343.

131. *Id.*

132. *Allen v. Illinois*, 397 U.S. 337, 346 (1970).

133. *Id.*

134. 541 U.S. 36, 62 (2004).

135. 547 U.S. 813, 833 (2006).

grounds.”<sup>136</sup> He did not say that the accused *waives* confrontation rights by his or her wrongdoing. Likewise in *Davis*, Justice Scalia reiterated the *Crawford* dictum and added that “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”<sup>137</sup> He noted that:

[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, 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.<sup>138</sup>

Justice Scalia’s focus on the accused’s voluntary wrongful conduct once again supports a forfeiture analysis that implicitly rejects intent as an element and, with it, the waiver principle.<sup>139</sup>

Professor Flanagan argues that the dicta in *Crawford* and *Davis* support his view that the Supreme Court adopted an estoppel- or waiver-by-wrongdoing standard.<sup>140</sup> He acknowledges that the Court “did not explicitly hold that intent was required, but ... it came as close to that conclusion as possible.”<sup>141</sup> He concludes “[t]he words, and the Court’s discussion, are inconsistent with any theory that the defendant’s intent is irrelevant or that merely being the proximate cause of the witness’ unavailability is sufficient grounds to support the loss of confrontation rights.”<sup>142</sup> He argues that Justice Scalia’s use of the phrase “procuring or coercing the silence from witnesses”<sup>143</sup> in *Davis* necessarily implies intent because “coercing” and “procuring” are “purposeful acts” intended to achieve an objective.<sup>144</sup>

We disagree. Standing alone, the words “procuring or coercing the silence from witnesses” do not include or convey an intent element.<sup>145</sup> These words can and do support a contrary conclusion that pins the focus on the consequence of the accused’s voluntary and wrongful conduct that renders the live testimony unavailable. Since Justice Scalia did not explicitly inject an intent element in his articulation, it would be wrong to argue that he did so implicitly.

Although Justice Scalia recognized in *Davis* that Rule 804(b)(6) of the Federal Rules of Evidence (FRE), which contains a statutory intent element, codifies the forfeiture doctrine, he did not say that FRE 804(b)(6) codifies the constitutional doctrine of waiver by wrongdoing.<sup>146</sup> The *Davis* articulation of forfeiture under the Sixth Amendment was not tied to the elements of FRE

136. *Crawford*, 541 U.S. at 62.

137. *Davis*, 547 U.S. at 833.

138. *Id.*

139. *Id.*

140. Flanagan, *supra* note 81, at 886.

141. *Id.*

142. *Id.* at 881.

143. *Davis*, 547 U.S. at 833.

144. Flanagan, *supra* note 81, at 880-81.

145. *Davis v. Washington*, 547 U.S. 813, 833 (2006).

146. *Id.* at 833-34.

804(b)(6).<sup>147</sup> Justice Scalia's use of the word "forfeiture"<sup>148</sup> referred to the *Reynolds* Court's opinion that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."<sup>149</sup> It is therefore reasonable to conclude that Justice Scalia purposely used the word "forfeiture," and not "waiver," to affirm the equitable forfeiture doctrine first developed in English and early American common-law cases to create a constitutional measure.

The language in question is precise. Thus, a reasonable reading of *Reynolds*, *Crawford*, and *Davis* leads to the conclusion that the constitutional analysis under the Sixth Amendment should focus exclusively on the accused's wrongful and voluntary conduct that actually prevents live trial testimony, without reference to the accused's intention or motivation.

#### IV. POST *CRAWFORD-DAVIS*; INTENT OR NO INTENT: CONFLICTING APPLICATIONS OF THE FORFEITURE DOCTRINE

##### A. *People v. Giles: Intent Not Required*

After *Crawford* and *Davis*, jurisdictions have split as to whether intent to procure unavailability is an element in the analysis of the equitable forfeiture doctrine of the Sixth Amendment.<sup>150</sup> California holds that it is not.<sup>151</sup> In *People v. Giles*,<sup>152</sup> the defendant appealed his first-degree murder conviction, arguing that the trial court improperly admitted the victim's statements to police officers regarding an earlier domestic-violence incident.<sup>153</sup>

A few weeks before the murder, police officers investigated a domestic violence report between the defendant and the murder victim.<sup>154</sup> The victim told the officers that the defendant had accused her of having an affair with her friend, beat her, and told her that he would kill her if he caught her cheating on him.<sup>155</sup>

147. *See id.* at 833.

148. *Id.*; *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

149. *Davis*, 547 U.S. at 833.

150. *Compare* *State v. Jensen*, 2007 WI 26, ¶ 57, 299 Wisc. 2d 267, ¶ 57, 727 N.W.2d 518, ¶ 57 (adopting the "broad forfeiture by wrongdoing doctrine" allowing the state to show by "a preponderance of the evidence that the accused caused the absence of the witness"), *with* *People v. Stechly*, 870 N.E.2d 333, 349 (Ill. 2007) ("The statement that the accused forfeits his confrontation rights when he 'voluntarily' keeps the witnesses away is a clear expression of intent.").

151. *People v. Giles (Giles II)*, 152 P.3d 433, 434 (Cal. 2007), *vacated*, *Giles v. California (Giles III)*, 128 S. Ct. 2678 (2008).

152. *Id.* at 433.

153. *Id.* at 437. The defendant was romantically involved with the victim, Brenda Avie, for several years, but was also seeing another woman. *Id.* at 435. Avie arrived at the house where the defendant was staying and had a conversation with him in a normal conversational tone. *Id.* at 436. "Avie then yelled 'Granny' several times," followed by a series of gunshots. *Id.* When people inside the house ran outside, they discovered the "defendant holding a nine millimeter handgun and standing about 11 feet from Avie," who was shot six times in the torso and bleeding on the ground. *Id.* "Avie was not carrying a weapon when she was shot." *Id.*

154. *Id.*

155. *Id.* at 436-37.



Over the defendant's objection, the trial court admitted the victim's hearsay statement to the officers<sup>156</sup> and the jury subsequently convicted the defendant of first-degree murder.<sup>157</sup>

On review, the California Supreme Court observed that *Crawford* changed the admissibility standard for testimonial statements,<sup>158</sup> and there was no dispute that the victim's statements to the police officers were testimonial.<sup>159</sup> The question before the court was whether the statements were nonetheless properly admitted under the forfeiture exception to the Confrontation Clause.<sup>160</sup>

In deciding whether the forfeiture exception was applicable, the California Supreme Court observed that English and early American common-law cases that developed the doctrine of forfeiture by wrongdoing "did not suggest that the rule's applicability hinged on [the accused's] purpose or motivation in committing the wrongful act."<sup>161</sup> It concluded that only a voluntary and wrongful act is required.<sup>162</sup> The court noted that following *Reynolds*, the development of the equitable doctrine of "forfeiture by wrongdoing" was largely insignificant, and it was not until the 1960s and 1970s that lower federal courts began to apply the doctrine in witness-tampering cases where the defendant either murdered or was responsible for the murder of a witness.<sup>163</sup> The *Giles* court found that the federal courts employed this doctrine "where the defendant, by a wrongful act, was involved in or responsible for procuring the unavailability of a hearsay declarant, and did so, at least in part, with the intention of making the declarant unavailable as an actual or potential witness against the defendant."<sup>164</sup> The court observed that after the U.S. Supreme Court in *Crawford* accepted the equitable forfeiture doctrine, many courts altered their views and began to "focus on the equitable forfeiture rationale" as a means for admitting hearsay testimony without proof of witness tampering in homicide cases.<sup>165</sup>

The *Giles* court rejected the accused's claims that intent is an essential element and that the constitutional analysis "is, in essence, not based on broad forfeiture principles, but instead on waiver principles."<sup>166</sup> The court found support for its position in the *Crawford* "forfeiture" formulation as a principle that "'extinguishes confrontation claims on essentially equitable grounds,' not a

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156. *Id.* at 437.

157. *Id.*

158. *See id.*

159. *Id.* at 438.

160. *See* *People v. Giles (Giles II)*, 152 P.3d 433, 435 (Cal. 2008), *vacated*, *Giles v. California (Giles III)*, 128 S. Ct. 2678 (2008).

161. *Id.* at 438 n.3.

162. *See id.* at 443.

163. *Id.* at 439.

164. *Id.* (citing *United States v. Dhinsa*, 243 F.3d 635, 653-54 (2d Cir. 2001); *United States v. Emery*, 186 F.3d 921, 925-27 (8th Cir. 1999); *United States v. Houlihan*, 92 F.3d 1271, 1279-80 (1st Cir. 1996); *Steele v. Taylor*, 684 F.2d 1193, 1198-99, 1202 (6th Cir. 1982); *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982); *United States v. Balano*, 618 F.2d 624, 628-29 (10th Cir. 1979)).

165. *Id.* at 440.

166. *Id.* at 442.

waiver.”<sup>167</sup> The equitable basis for the doctrine “strongly suggests that the rule’s applicability does not hinge on the wrongdoer’s motive.”<sup>168</sup>

The California Supreme Court rejected the view that some federal courts articulated before *Crawford*, concluding that “it appears that the intent-to-silence element required by some cases evolved from the erroneous characterization of the forfeiture doctrine as the waiver by misconduct doctrine.”<sup>169</sup> The *Giles* court reasoned that the forfeiture principles “can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing.”<sup>170</sup> It explained that forfeiture of a constitutional right “is a logical extension of the equitable principle that no person should benefit from his own wrongful acts.”<sup>171</sup> Where the accused through his “intentional criminal act” renders a witness unavailable for trial, he would improperly “benefit[] from his crime if he [could] use the witness’s unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible.”<sup>172</sup>

This conclusion does not depend on “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.”<sup>173</sup> The California Supreme Court held that post-*Crawford* decisions, including that of the court of appeals in this case, “have correctly applied the forfeiture doctrine in a necessary, equitable manner.”<sup>174</sup> Equity allows courts to “further the truth-seeking functions of the adversary process when necessary, allowing fact finders access to relevant evidence that the defendant caused not to be available through live testimony.”<sup>175</sup>

Other jurisdictions have applied the same forfeiture analysis that the court expressed in *Giles*.<sup>176</sup> These courts have similarly eliminated intent where the accused’s voluntary and wrongful conduct resulted in the out-of-court declarant’s

167. *Id.* at 439 (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

168. *Id.*

169. *Id.* at 443.

170. *People v. Giles (Giles II)*, 152 P.3d 433, 443 (Cal. 2008), *vacated*, *Giles v. California (Giles III)*, 128 S. Ct. 2678 (2008).

171. *Id.*

172. *Id.*

173. *Id.* The Court of Appeals also noted that “a defendant can only be deemed to have forfeited his right of confrontation through an intentional criminal act.” *People v. Giles (Giles I)*, 123 Cal. App. 4th 475, 487 (Ct. App. 2004), *aff’d in part, superseded in part by Giles II*, 152 P.3d at 433. “[I]t is not enough to commit some act that incidentally produces that result.” For example, where a witness “was killed because [defendant] intentionally fired a gun at her; it is perfectly appropriate to conclude that in doing so, [defendant] forfeited his right to confront her in the event her hearsay statements were offered as evidence in some future criminal prosecution.” *Id.* Contrarily, if a witness “had instead been killed in an unintentional automobile collision while [defendant] was driving, he would have been the technical cause of her unavailability at any future trial, but his actions could not be construed as a forfeiture of his right to confront her as a witness.” *Id.*

174. *Giles II*, 152 P.3d at 444.

175. *Id.*

176. *Id.*

unavailability to the prosecution.<sup>177</sup> For example, in *State v. Sanchez*,<sup>178</sup> the accused shot and killed the victim.<sup>179</sup> Over his objection, the trial court admitted a note in which the victim wrote that the accused threatened to kill her if he ever caught her cheating on him.<sup>180</sup> The accused appealed his jury conviction of deliberate homicide, arguing that the trial court had violated his confrontation rights by admitting the note.<sup>181</sup> He asserted that the note was inadmissible because he was unable to cross-examine her about the contents of her note.<sup>182</sup>

The Montana Supreme Court agreed that the victim's note was testimonial,<sup>183</sup> but it determined that the accused lost his confrontation right under the doctrine of forfeiture by wrongdoing.<sup>184</sup> The court declined to adopt *Giles* in its entirety and qualified its holding as not "amount[ing] to a 'broad sweeping statement' as to the applicability of the forfeiture doctrine,"<sup>185</sup> reasoning that "[t]o the extent that a deliberate criminal act results in the victim's

177. Courts applying the Sixth Amendment equitable forfeiture doctrine have made clear that the doctrine can be applied where no formal charges have been filed against the would-be defendant and no adverse witnesses have been designated. All that is required is that there is a possibility that an individual could be called as a witness if formal charges were brought against the would-be defendant. See *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005) (explaining that the forfeiture doctrine "does not require that the declarant would otherwise be a witness at any particular trial"); *United States v. Dhinsa*, 243 F.3d 635 (2d Cir. 2001) (applying the forfeiture doctrine "where 'there was [no] ongoing proceeding in which the declarant was scheduled to testify' ... [because to do otherwise] 'would serve as a prod to the unscrupulous to accelerate the timetable and murder suspected snitches sooner rather than later'" (internal quotations omitted)); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (concluding that "the right of confrontation is forfeited with respect to any witness or potential witness whose absence a defendant wrongfully procures"); *United States v. Miller*, 116 F.3d 641, 668 (2d Cir. 1997) (stating that the forfeiture doctrine should not be limited to situations where there is "an ongoing proceeding in which the declarant was scheduled to testify"); *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996) (explaining that the forfeiture doctrine can be applied when it is "reasonably foreseeable that the investigation will culminate in the bringing of charges, the mere fact that the homicide occurs at an earlier step in the paven should not affect the operation of the waiver-by-misconduct doctrine"); *Steele v. Taylor*, 684 F.2d 1193, 1203 (6th Cir. 1982) (affirming application of the forfeiture doctrine to a signed statement given to FBI agents by a potential witness).

178. 177 P.3d 444 (Mont. 2008).

179. *Id.* at 447.

180. *Id.* The accused testified that he became suspicious that the victim, his then girlfriend, was cheating on him. *Id.* He confronted her and confirmed his suspicions. *Id.* In a later conversation, the victim also threatened to create problems for him with the police so that his children would be taken away from him. *Id.* According to the accused, he became enraged and shot the victim several times. *Id.*

181. *People v. Giles (Giles II)*, 152 P.3d 433, 451 (Cal. 2008), *vacated*, *Giles v. California (Giles III)*, 128 S. Ct. 2678 (2008).

182. *Sanchez*, 177 P.3d at 447.

183. *Id.* at 452-53. The Court observed that the note's substance was to explain the victim's untimely death or poisoning. *Id.* The note named the person she suspected would kill her and the method that he would use. *Id.* "In essence, Aleasha's note contained information that could establish or prove facts to answer questions regarding how, why, and by whom she had been harmed or killed." *Id.*

184. *Id.* at 456.

185. *Id.* at 456 n.3.

death ... the forfeiture by wrongdoing doctrine does not hinge on whether the defendant specifically intended to silence a witness.”<sup>186</sup> In the spirit of *Giles*, the Montana Supreme Court acknowledged that the forfeiture doctrine is based on “the maxim that no person should benefit from [his or her] own wrongdoing.”<sup>187</sup>

By its very nature, the out-of-court declarant’s murder always results in the unavailability of his or her adverse trial testimony.<sup>188</sup> For this reason, the accused who commits murder should not be allowed to exclude the victim-declarant’s out-of-court statements “regardless of whether the defendant specifically intended to silence the victim-declarant.”<sup>189</sup> To deny the admissibility of these statements would “undermine[] the judicial process and threaten[] the integrity of court proceedings.”<sup>190</sup> In applying the forfeiture doctrine in this case, the Montana Supreme Court held that “when a defendant admittedly and deliberately kills another person, thus procuring the person’s unavailability as a witness, the defendant forfeits the constitutional rights to confront the victim at trial.”<sup>191</sup>

Another case on point is *State v. Jensen*.<sup>192</sup> There, the accused was charged with first-degree intentional homicide for his wife’s death.<sup>193</sup> At a preliminary hearing, a witness testified that the victim gave him an envelope and told him to mail it to the police if anything were to happen to her because she was scared that her husband was trying to poison her.<sup>194</sup> A police detective testified that he received the envelope shortly after the victim was found dead, and that it contained a letter from her stating that she was afraid that her husband was trying to kill her and she would never commit suicide.<sup>195</sup> The defendant challenged the admissibility of the letter and the oral statements she allegedly made to the witness in light of *Crawford* and *Davis*.<sup>196</sup>

On appeal, the Wisconsin Supreme Court considered the trial court’s ruling that the victim’s letter and her other out-of-court statements were inadmissible.<sup>197</sup> In response to the State’s forfeiture-by-wrongdoing argument, the court noted that *Crawford* accepted the equitable doctrine of forfeiture in its discussion of *Reynolds* and early English precedent.<sup>198</sup> In fashioning a broad forfeiture-by-wrongdoing doctrine that does not include an intent requirement, the court

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186. *Id.* at 456.

187. *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)).

188. *State v. Sanchez*, 177 P.3d 444, 456 (Mont. 2008).

189. *Id.*

190. *Id.*

191. *Id.*

192. 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518.

193. *Id.* ¶ 3.

194. *Id.* ¶ 5.

195. *Id.* ¶ 7.

196. *Id.* ¶ 2.

197. *Id.* ¶ 30.

198. *Id.* ¶¶ 36-38.

recognized that the post-*Crawford* holding in *United States v. Garcia-Meza*<sup>199</sup> was very persuasive to its analysis.<sup>200</sup> The *Jensen* court relied on *Garcia-Meza*'s explanations: (1) while the FRE contain an element of intent, Sixth Amendment rights are not governed by "the vagaries of the Rules of Evidence," and (2) the U.S. "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."<sup>201</sup> The court concluded that forfeiture can be established by showing that the accused voluntarily committed the wrongful act that rendered the witness's live in-court testimony unavailable.<sup>202</sup> Unlike *Sanchez*, the Wisconsin Supreme Court did not limit its holding to homicides.<sup>203</sup>

Finally, in *State v. Meeks*,<sup>204</sup> the Kansas Supreme Court considered a situation in which the accused shot his victim after a fist fight.<sup>205</sup> Approximately ten minutes after the shooting, a police officer arrived on the scene and asked the victim who shot him.<sup>206</sup> The victim replied, "Meeks shot me."<sup>207</sup> One hour later, the victim died.<sup>208</sup> A jury convicted Meeks of first-degree premeditated murder, and he received a life sentence without eligibility of parole for twenty-five years.<sup>209</sup>

On appeal, the Kansas Supreme Court held that the accused forfeited his right to confrontation when he murdered the victim who served as a witness against him.<sup>210</sup> The court observed that the majority of cases analyzing the forfeiture doctrine focused on post-crime conduct that rendered the witness unavailable to testify at trial about the details of the underlying crime.<sup>211</sup> The court went on to reject any subject-matter limitations on the application of forfeiture where, as here, the accused was charged with murder, the very act that

199. 403 F.3d 364, 370-71 (6th Cir. 2005) (holding that for purposes of the doctrine of forfeiture by wrongdoing it was not necessary that *Garcia-Meza* murdered his wife with the intent of preventing her testimony).

200. *Jensen*, 2007 WI 26, ¶ 49.

201. *Id.* ¶ 50 (quoting *Garcia-Meza*, 403 F.3d at 370-71).

202. *State v. Jensen*, 2007 WI 26, ¶ 51, 299 Wis. 2d 267, ¶ 51, 727 N.W.2d 518, ¶ 51.

203. *Id.*

204. 88 P.3d 789 (Kan. 2004), *overruled in part on other grounds in State v. Davis*, 158 P.3d 317, 322 (Kan. 2006). Meeks came to a party and demanded that Green apologize for accidentally shutting Meeks's hand in the door earlier in the day. *Id.* at 791. When Green refused to apologize, Meeks challenged Green to a fight outside. *Id.* After fighting for about five minutes, Green stopped and walked toward the house. *Id.* Meeks pulled out a handgun and began to chase Green around one of the cars parked on the street. *Id.* At this point, all of the observers ran back into the house to hide. *Id.* Wright, one of the people inside the house, saw Green slip and fall. *Id.* Shortly thereafter, Wright heard two gunshots and he went outside, finding Green lying on the ground with Meeks standing in front of him, gun in hand. *Id.*

205. *Id.*

206. *Id.* at 792.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 793-94.

211. *Id.* at 794.

caused the witness's unavailability.<sup>212</sup> Indeed, the idea that the accused forfeits his or her right of confrontation in murdering the out-of-court declarant finds support in what Professor Richard Friedman calls the "reflexive" application of the forfeiture doctrine.<sup>213</sup> In applying forfeiture reflexively in homicide cases, courts do not require a finding that the accused intended the victim to be unable to testify at trial.<sup>214</sup>

The *Meeks* court accepted *Crawford's* formulation of forfeiture by wrongdoing as a rule that "extinguishes confrontation claims on essentially equitable grounds."<sup>215</sup> It recognized that *Crawford*, in turn, relied on the *Reynolds* Court's pronouncement that if the accused "voluntarily keeps witnesses away, he cannot insist on his privilege."<sup>216</sup> Here, the declarant's murder kept him from giving live testimony at trial.<sup>217</sup> Having wrongfully caused the victim's unavailability, the *Meeks* court held that the accused forfeited his right to confront the out-of-court declarant and, *a fortiori*, to any hearsay objection to the victim's out-of-court statements.<sup>218</sup>

212. *Id.*

213. Reflexive application of the forfeiture doctrine occurs when the accused is on trial for the out-of-court declarant's murder, and the primary reason why the victim cannot testify at trial is that the accused murdered her. See Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 506, 508 (1997). See also Brief of Law Professors Sherman J. Clark et al. as Amici Curiae Supporting Petitioners, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958, at \*24 n.16 (1997) (arguing that an "accused should be deemed to have forfeited the confrontation right, even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable"). The classic illustration of *chutzpa* is "the man who kills both his parents and then begs the sentencing court to have mercy on an orphan." Friedman, *supra*, at 506. Professor Friedman argues that at the defendant's murder trial, the only way to prevent the defendant from benefiting from his wrongful act of murdering his parents is to apply the forfeiture doctrine reflexively. See *id.* at 517. Professor Friedman also argued in his Amicus Brief to the U.S. Supreme Court in *Crawford* that:

If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable.

Brief for Law Professors Sherman J. Clark et al., *supra*, at \*24 n.16.

214. Any act of homicide can trigger reflexive application of the forfeiture doctrine under Professor Friedman's formulation. See Friedman, *supra* note 213, at 508. We would limit the forfeiture doctrine to instances where the accused causes the unavailability by his or her wrongful and voluntary acts. For example, an act of homicide in the nature of involuntary murder would not trigger the application of the forfeiture doctrine.

215. *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004) (citing *Crawford*, 541 U.S. at 62), *overruled in part on other grounds in State v. Davis*, 158 P.3d 317, 322 (Kan. 2006).

216. *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 158 (1879)). Accord *People v. Moore*, 117 P.3d 1, 5 (Co. Ct. App. 2004) (applying the equitable-forfeiture doctrine reflexively to hold that a defendant must not "benefit from his or her wrongful prevention of future testimony from a witness, regardless whether that witness is the victim in the case").

217. *Meeks*, 88 P.3d at 792-93.

218. *Id.* at 795. Accord *People v. Bauder*, 712 N.W.2d 506, 514 (Mich. Ct. App. 2005) (holding that the test for forfeiture is whether the out-of-court declarant is unavailable as a direct result of some wrongful voluntary act of the defendant regardless of intent).

Following *Crawford*, several federal courts of appeals also embraced a forfeiture analysis that does not include an intent element. In *United States v. Garcia-Meza*,<sup>219</sup> the defendant was convicted of his wife's first-degree murder.<sup>220</sup> On appeal to the United States Court of Appeals for the Sixth Circuit, he argued that the trial court violated his confrontation rights by allowing hearsay evidence of what his wife told investigating officers after an earlier assault.<sup>221</sup> He contended that for the prosecution to prevail on its forfeiture claim, it had to prove that he killed or otherwise prevented his wife from testifying with the intent to prevent her testimony.<sup>222</sup>

The court, however, found that "[t]here 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."<sup>223</sup> It distinguished between a constitutional and evidentiary analysis, recognizing that "[alt]hough the Federal Rules of Evidence [804(b)(6)] may contain [an intent] requirement, the right secured by the Sixth Amendment does not depend on ... 'the vagaries of the Rules of Evidence.'"<sup>224</sup> The court reasoned that the *Crawford* affirmation of the forfeiture doctrine's equitable foundation "strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive."<sup>225</sup> It concluded that the accused forfeits his confrontation rights "regardless of whether he intended to prevent the witness from testifying against him or not."<sup>226</sup>

Just four months later, in *United States v. Mayhew*,<sup>227</sup> the United States District Court for the Southern District of Ohio cited *Garcia-Meza* in a ruling on a defendant's motion in limine to exclude an inculpatory audiotape recording.<sup>228</sup> The defendant kidnapped and fatally wounded his daughter.<sup>229</sup> On the way to the

219. 403 F.3d 364 (6th Cir. 2005).

220. *Id.* at 365-66. The defendant and his wife, Kathleen, began physically fighting after she danced with a male friend at a party. *Id.* at 366. After the fight ended, she went with some family members to a friend's house to avoid going home that evening. *Id.* The defendant broke into the house, and when his wife refused to come with him, he plunged a steak knife into her chest. *Id.* at 367. The prosecution was allowed to use the testimony of investigating police officers who responded to a domestic violence dispute between the defendant and his wife several months prior to the murder. *Id.* at 367-68.

221. *Id.* at 369.

222. *Id.* at 370.

223. *Id.*

224. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36 (2004) (internal citations omitted)).

225. *Id.*

226. *Id.*

227. 380 F. Supp. 2d 961 (S.D. Ohio 2005).

228. *Id.* at 963.

229. *Id.* The defendant broke into the home of his ex-girlfriend and her fiancé, shot and killed them both, and kidnapped his and his ex-girlfriend's daughter. *Id.* When the defendant, still with his daughter, was pulled over for a minor traffic offense, he shot the officer as the officer was approaching the car. *Id.* After a thirty-minute car chase, the defendant was stopped by a roadblock and tire spikes. *Id.* When the police ordered him to exit the car, the defendant shot his daughter

hospital, his daughter said that the defendant killed her mother (his ex-girlfriend) and her mother's fiancé, and that he kidnapped her.<sup>230</sup> An officer recorded this conversation on an audiotape.<sup>231</sup>

Despite finding that the statements were testimonial,<sup>232</sup> the court admitted them because the accused forfeited his confrontation rights by his own wrongdoing.<sup>233</sup> Citing *Garcia-Meza*, the court agreed that where the defendant, through his voluntary wrongful act, rendered unavailable a witness against him, "the motive behind his wrongdoing was irrelevant."<sup>234</sup> The forfeiture doctrine's equitable considerations "demand that a defendant forfeits his Confrontation Clause rights if the court determines ... that the declarant is unable to testify because the defendant intentionally murdered her."<sup>235</sup> All that matters is that the defendant rendered the unavailability of live trial testimony through his or her own voluntary wrongful conduct, regardless of the underlying motivation.<sup>236</sup>

### B. *People v. Stechly: Intent Is Required*

There are some courts that have gone the other way and mistakenly injected an intent element into the constitutional forfeiture analysis. One example is the Illinois Supreme Court in *People v. Stechly*.<sup>237</sup> In that case, the defendant appealed his convictions of predatory criminal sexual assault, criminal assault, and aggravated criminal sexual abuse of a five-year-old child.<sup>238</sup> He argued that the trial court erred in admitting the child-victim's out-of-court statements in violation of his constitutional right to confront her.<sup>239</sup> The trial court admitted the child's out-of-court statements after holding a pre-trial hearing.<sup>240</sup> During the hearing, the prosecution presented evidence that, after sexually abusing the child-

twice and then shot himself once in the chest. *Id.* The daughter was taken to a nearby hospital and died shortly thereafter. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 965 (citing *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)).

233. *Id.* at 965-66 (accepting, after an extensive discussion, a reflexive application of the forfeiture doctrine).

234. *Id.*

235. *Id.* at 968. In the authors' opinion, by adopting a reflexive approach to the forfeiture doctrine, the court stopped short of imputing intent to commit the underlying crime to intent to render the declarant unavailable.

236. *Id.*

237. 870 N.E.2d 333 (2007).

238. *Id.* at 344.

239. *Id.* at 344-45.

240. Prior to trial, on motion of the State, the court held an availability hearing to determine whether the child-victim, M.M., was available to testify at trial. *Id.* at 340. Before the hearing, M.M. was interviewed by a clinical child psychologist. *Id.* In the interview, M.M. indicated that she did not want to talk about the abuse and expressed an unwillingness to testify at trial. *Id.* The psychologist testified that her professional opinion was that it would not be in M.M.'s best interests to force her to testify because she would likely suffer psychological trauma. *Id.* After hearing this testimony, the trial court concluded that M.M. was unavailable to testify and admitted her hearsay statements into evidence. *Id.* at 341. The defendant was found guilty on all counts. *Id.* at 344.



victim, the defendant told her that he would “hurt” her if she told her mother about the incident.<sup>241</sup>

On appeal to the Illinois Supreme Court, the defendant argued that admitting the victim’s hearsay statements violated his rights under the Confrontation Clause.<sup>242</sup> The State answered that under the equitable doctrine of forfeiture by wrongdoing, he should not be allowed to raise his constitutional claim because his own actions rendered the victim unavailable for trial.<sup>243</sup> Writing for the plurality, Justice Freeman relied on *Davis v. Washington*<sup>244</sup> to hold that intent to render unavailable is an essential element in the application of the forfeiture rule.<sup>245</sup> Specifically, he pointed to language in *Davis* that the equitable doctrine of forfeiture applies when the accused “‘seek[s] to undermine the judicial process ... or destroy the integrity of the criminal trial system.’”<sup>246</sup> He concluded that assault by itself is not enough<sup>247</sup> because “[i]t is, after all, impossible to deter those who do not act intentionally.”<sup>248</sup>

The *Stechly* plurality linked the constitutional equitable doctrine of forfeiture to FRE 804(b)(6), forfeiture by wrongdoing, which does require intent.<sup>249</sup> While recognizing that FRE 804(b)(6) does not have the authority of a constitutional rule,<sup>250</sup> the court acknowledged that some courts have found that intent is not a required element in a constitutional analysis.<sup>251</sup> Nonetheless, the plurality concluded that these cases were limited to situations where the accused actually murdered the victim.<sup>252</sup> In instances other than murder, the court held proof of intent to render a witness unavailable is a necessary element.<sup>253</sup> The prosecution argued that the accused demonstrated his intent to procure the child-victim’s unavailability when he told her that he would hurt her if she told anyone of the incident, but the court ultimately was not willing to make such a factual

241. *Id.* at 339. Joan, the child-victim’s mother, testified that her daughter’s babysitter came to her work and informed her that her daughter, M.M., needed to go to the hospital but did not tell her why. *Id.* On the way to the hospital, Joan asked her daughter what was wrong. *Id.* M.M. recounted an incident of sexual abuse by “Bob.” *Id.* Joan understood that M.M. was referring to Joan’s boyfriend. *Id.* Joan testified that the defendant babysat M.M. prior to Christmas 1998, but when Joan returned, M.M. was “acting peculiar.” *Id.* Joan suspected that the defendant or M.M.’s father had sexually abused the child. *Id.* She had confronted the defendant, who denied doing anything to the child. *Id.* On arrival at the hospital, a specialist for the hospital’s child abuse team interviewed M.M. regarding the incident. *Id.* In the interview, M.M. told her of sexual abuse by Bob and that Bob told her he “would be mad” if she told her mother of the incident. *Id.*

242. *Id.* at 344-45.

243. *Id.* at 348.

244. 547 U.S. 813 (2006).

245. *People v. Stechly*, 870 N.E.2d 333, 350 (Ill. 2007).

246. *Id.* (quoting *Davis*, 547 U.S. at 833).

247. *Id.*

248. *Id.* at 349.

249. *Id.* at 350.

250. *Id.* at 351.

251. *Id.*

252. *Id.* at 352.

253. *Id.* at 353.

determination on its own.<sup>254</sup> As a result, the court remanded the inquiry to the trial court to determine whether the defendant forfeited his confrontation objection by his own wrongdoing.<sup>255</sup>

Chief Justice Thomas dissented, arguing that in light of the overwhelming evidence supporting the defendant's convictions, it was unnecessary to address the issue of forfeiture by wrongdoing.<sup>256</sup> Assuming *arguendo* that the forfeiture question needed to be addressed, he disagreed with the way the plurality applied the doctrine.<sup>257</sup> Thomas asserted that the inquiry should not focus on the accused's intent.<sup>258</sup> Instead, he argued that the accused should not profit from his own wrongdoing, regardless of motive or intent.<sup>259</sup> The true purpose behind the common-law doctrine of forfeiture, he explained, is broader than the rationale of deterring intentional acts,<sup>260</sup> and it "should not be confused with the federal statutory hearsay exception, which does have the limited purpose of addressing witness intimidation."<sup>261</sup> Thomas declared that in contrast to FRE 804(b)(6), "the common law doctrine of forfeiture by wrongdoing has a broader grasp" and operates under equitable principles, as the U.S. Supreme Court recognized in *Crawford*.<sup>262</sup> He explained that there is no distinction between the out-of-court declarant-victim's murder or assault for the application of forfeiture.<sup>263</sup> There only needs to be a "direct causal connection between the [accused's] wrongdoing ... and the [declarant's] unavailability."<sup>264</sup>

In *State v. Romero*,<sup>265</sup> the New Mexico Supreme Court applied a forfeiture analysis similar to the Illinois Supreme Court, and it too was met with a strong dissent.<sup>266</sup> The defendant in that case was convicted of domestic violence and his estranged wife's second-degree murder.<sup>267</sup> On appeal to the New Mexico Supreme Court, he argued that the trial court erred in admitting testimonial hearsay evidence in violation of his right to confront adverse witnesses against him.<sup>268</sup> The court analyzed the hearsay statements in light of *Crawford* and *Davis*, determined that the statements were testimonial, and concluded that they were improperly admitted.<sup>269</sup> The prosecution argued that even if the statements did qualify as testimonial, the accused should nonetheless be precluded from

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254. *Id.*

255. *People v. Stechly*, 870 N.E.2d 333, 353 (Ill. 2007).

256. *Id.* at 382 (Thomas, C.J., dissenting).

257. *Id.*

258. *Id.*

259. *Id.* at 383.

260. *See id.* Chief Justice Thomas responded to the plurality, stating that it is "after all, impossible to deter those who do not act intentionally." *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 382.

264. *Id.* at 389.

265. 156 P.3d 694 (N.M. 2007).

266. *Id.* at 702.

267. *Id.* at 696.

268. *Id.* at 697.

269. *Id.* at 697-99.

raising a confrontation clause claim because he forfeited the right by wrongdoing.<sup>270</sup> The court resolved in the accused's favor, finding that intent to prevent live testimony is an essential element of the forfeiture doctrine.<sup>271</sup>

The New Mexico Supreme Court observed that "some courts have considered distinct" the elements of the Federal Rules of Evidence and the requirements of the U.S. Constitution,<sup>272</sup> noting that some commentators even suggest that the forfeiture rule applies "whenever a defendant's wrongdoing caused a witness's unavailability," regardless of a specific intent to render the witness unavailable.<sup>273</sup> Nonetheless, the court held that, despite the strong rationale and public policy against allowing an accused to profit from his or her own wrongdoing, "emphasis must be not only on wrongdoing but on intentional wrongdoing, from which an inference of waiver might be appropriate or in which an equitable conclusion of forfeiture is justified."<sup>274</sup> It concluded that a rule that requires proof that the accused intended to prevent a witness from testifying should not be abandoned "in cases where it helps provide a strong basis for finding waiver or forfeiture."<sup>275</sup>

In his dissent, Justice Bosson contended that the majority applied the forfeiture doctrine too narrowly.<sup>276</sup> He argued that the accused forfeited the right to confront his wife when he killed her.<sup>277</sup> Justice Bosson reasoned that regardless of whether the accused procured the absence "with the specific intent to prevent his wife from testifying, or whether he caused that absence simply in a drunken rage, the effect is the same."<sup>278</sup> The witness is unavailable to testify.<sup>279</sup> It "seems a perversion of the Constitution and the Confrontation Clause to allow any defendant to profit so from his own misdeeds."<sup>280</sup> Referring to *Giles and Jensen*, Justice Bosson complained that the majority was overly limiting when it required "an intent not just to kill the witness, but to silence her as well"<sup>281</sup> without accounting for the "sweeping changes to the Confrontation Clause analysis" brought about by the *Crawford* decision.<sup>282</sup>

We recognize that the constitutional right of confrontation must be protected, but this right is not absolute. Forfeiture by wrongdoing terminates the right because the accused should not be allowed to benefit from his or her own voluntary and wrongful conduct. Consequently, a voluntary wrongful act that prevents a witness's live in-court testimony, regardless of motive or purpose,

270. *Id.* at 701.

271. *Id.* at 703.

272. *Id.* at 701.

273. *Id.* (citing Joshua Deahl, *Expanding Forfeiture without Sacrificing Confrontation after Crawford*, 104 MICH. L. REV. 559, 602 (2005)).

274. *Id.* at 702.

275. *State v. Romero*, 156 P.3d 694, 702 (N.M. 2007).

276. *Id.* at 703 (Bosson, J., dissenting).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 704.

282. *Id.* at 703.

should result in a loss of the right so as to allow the use of relevant out-of-court statements in evidence. To hold otherwise would give a windfall to the accused. The California Supreme Court in *Giles* and other courts have identified and formulated the correct standard for Sixth Amendment forfeiture analysis. Unlike the doctrine of waiver, as articulated by *Johnson v. Zerbst*, where an accused may knowingly and intelligently forego a constitutional right,<sup>283</sup> the equitable doctrine of forfeiture by wrongdoing does not include an intent element. The *Giles* line of cases properly utilizes the forfeiture doctrine as a tool to deliver judicial punishment to the accused when the prosecution proves that he or she caused the unavailability of the live in-court testimony of the out-of-court declarant by his or her voluntary and wrongful act.

#### V. *GILES V. CALIFORNIA*: A MISGUIDED DEPARTURE

On June 25, 2008, the U.S. Supreme Court decided *Giles v. California*,<sup>284</sup> addressing the question “whether a defendant forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable ... at trial.”<sup>285</sup> Justice Scalia, speaking for the plurality, and in a surprising departure from his previous articulation of forfeiture in *Crawford* and *Davis*, held that a forfeiture exception without an intent element did not exist at the nation’s founding.<sup>286</sup> To support his new view of the Sixth Amendment’s historical underpinnings, Justice Scalia painstakingly looked to the language in a number of common-law cases, treatises, and dictionaries.<sup>287</sup>

While Chief Justice Roberts and Justices Thomas, Alito, Souter, and Ginsburg<sup>288</sup> generally concurred with his historical analysis, the plurality was divided on how to apply the exception to the facts of this particular case.<sup>289</sup> For instance, Justices Thomas and Alito questioned whether the statements implicated the Confrontation Clause at all.<sup>290</sup> They contended that the victim’s statements to the police were not testimonial, and therefore, whether *Giles* had intended to make her unavailable for trial was actually a moot point.<sup>291</sup> Justices

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283. 304 U.S. 458, 464 (1938).

284. *Giles v. California* (*Giles III*), 128 S. Ct. 2678 (2008).

285. *Id.* at 2681.

286. *Id.* at 2693.

287. *Id.* at 2683-85.

288. *Id.* at 2680.

289. *See id.* at 2693-94.

290. *Id.* Justice Thomas’s concurring opinion argued that the statements in question did not implicate the Confrontation Clause because they were nontestimonial. *Id.* at 2693. In his opinion, the statements were “indistinguishable from the statements made during police questioning in response to the report of domestic violence” addressed in *Davis*. *Id.* In both cases there was no “formalized dialogue” to suggest that the statements were intended to be used in court at a later time. *Id.* Justice Alito also filed a concurring opinion agreeing with the plurality’s analysis of the forfeiture doctrine but questioned whether the statements fell within the scope of the Confrontation Clause. *Id.* at 2694.

291. *Id.* at 2693-94.

Souter and Ginsburg joined in a partial concurrence that accepted Justice Scalia's historical framework of the forfeiture doctrine but declined to unite with the portion of the opinion that dissected the dissent's arguments.<sup>292</sup> Finally, Justice Breyer, joined by Justices Stevens and Kennedy, dissented.<sup>293</sup> They disagreed with the *Crawford* formulation altogether and argued that the Court should craft a case-by-case exception to the Confrontation Clause.<sup>294</sup>

The plurality opinion opened with a statement that the Sixth Amendment's Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."<sup>295</sup> According to Justice Scalia, the common law allowed the admissibility of two forms of unfronted testimonial statements: (1) declarations made by a speaker "who was both on the brink of death and aware that he was dying"<sup>296</sup> and (2) "statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant."<sup>297</sup> He identified the second exception as the common-law doctrine of forfeiture by wrongdoing.<sup>298</sup> He quickly concluded that the out-of-court statement in question was not a dying declaration<sup>299</sup> and moved to the main question presented: whether the statements were admissible under the doctrine of forfeiture by wrongdoing.<sup>300</sup>

Justice Scalia's analysis of the forfeiture doctrine's origin began by examining the very same seventeenth-century common-law cases that we discussed above.<sup>301</sup> He pored over *Lord Morley's Case*, *Harrison's Case*, and *Queen v. Scaife* to determine what sort of events triggered the forfeiture exception's application.<sup>302</sup> He noted that these cases applied the forfeiture exception where the witness was "kept back" or "detained" by "means or procurement" of the accused.<sup>303</sup> According to his reading, English judges used these terms to limit the scope of the forfeiture exception to situations where the "defendant engaged in conduct *designed* to prevent the witness from testifying."<sup>304</sup>

He noted that there are two dictionary definitions for the key term "procure."<sup>305</sup> One, from two nineteenth-century dictionaries, is "to obtain, gain,

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292. *Id.* at 2694-95.

293. *Id.* at 2695.

294. *Giles v. California (Giles III)*, 128 S. Ct. 2678, 2707 (2008).

295. *Id.* at 2682 (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

296. *Id.*

297. *Id.* at 2683.

298. *Id.* at 2683, 2687-88.

299. *Id.* at 2683.

300. *Id.* at 2682.

301. *Id.* at 2683-84, 2687, 2689-90.

302. *Id.* at 2683.

303. *Id.*

304. *Giles v. California (Giles III)*, 128 S. Ct. 2678, 2683 (2008).

305. *Id.*

cause, bring on”<sup>306</sup> or “to obtain, gain ... to seek or find.”<sup>307</sup> He acknowledged that this definition does not support the inclusion of an intent element.<sup>308</sup> It does not characterize “procure” as requiring specific intent to achieve a particular result and would allow the forfeiture exception to apply whenever the defendant’s voluntary wrongful act caused the witness’s absence.<sup>309</sup> A more limiting definition of “procure,” taken from a nineteenth-century American dictionary and a twentieth-century edition of the *Oxford English Dictionary*, and ultimately adopted by Justice Scalia, is “to *contrive* and effect” or “[t]o *contrive* or devise with care (an action or proceeding).”<sup>310</sup>

Justice Scalia also cited *A Practical Treatise on the Criminal Law*, by J. Chitty, and *A Treatise on the Law of Evidence*, by S. Phillipps, both published in the nineteenth century, to support his conclusion that the second definition “limit[ing] the causality to one that was designed to bring about the result ‘procured’”<sup>311</sup> was controlling at the founding.<sup>312</sup> These treatises, which were compiled more than 100 years after the common-law decisions in *Lord Morley’s Case*, *Harrison’s Case*, and *Regina v. Scaife*, replaced the common-law triggering term “procure” with “contrive” in their own discussions of the forfeiture doctrine.<sup>313</sup> By revising the “procure” language grounded in the common-law cases, these authors injected an intent element into the forfeiture analysis that did not previously exist. Combining the noted dictionary definitions with the treatise writers’ distorted analysis, Justice Scalia reached an improper conclusion when he limited the forfeiture doctrine’s application to those situations where “the defendant [has] schemed to bring about the absence from trial that he ‘contrived.’”<sup>314</sup> This ill-chosen definition of “procure” explains why Justice Scalia incorrectly deduced that the element of specific intent is constitutionally required.

306. See, e.g., NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE: ABRIDGED FROM THE AMERICAN DICTIONARY FOR THE USE OF PRIMARY SCHOOLS AND THE COUNTING HOUSE 337 (1833) (defining “procure” as “to obtain, gain, cause, bring on”).

307. JOHN CHARLES TARVER, THE ROYAL PHRASEOLOGICAL ENGLISH-FRENCH, FRENCH-ENGLISH DICTIONARY 578 (1845) (defining “procure” as “to obtain, gain”; “to seek or find”; “to draw upon us”); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 571 (1828).

308. *Giles III*, 128 S. Ct. at 2683.

309. *Id.*

310. *Id.* (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining “procure” as “to *contrive* and effect” (emphasis added)); 12 OXFORD ENGLISH DICTIONARY 559 (2d ed. 1989) (def. I(3)) (defining “procure” as “[t]o *contrive* or devise with care (an action or proceeding); to endeavour to cause or bring about (mostly something evil) *to* or *for* a person”)).

311. *Giles III*, 128 S. Ct. at 2683-84 (citing 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 81 (1816) (“kept away by the means and contrivance of the prisoner”); S. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 165 (1814) (“kept out of the way by the means and contrivance of the prisoner”).

312. *Id.*

313. *Id.* at 2684 n.1.

314. *Giles v. California (Giles III)*, 128 S. Ct. 2678, 2684 (2008).

Justice Scalia's reliance on a number of eighteenth- and nineteenth-century cases, including *King v. Woodcock*<sup>315</sup> and *King v. Dingler*,<sup>316</sup> is also misguided. These cases uniformly fail to show that the accused acted with a motive to prevent the out-of-court declarant from testifying.<sup>317</sup> He found it telling that the prosecutors in those cases did not attempt to argue the admissibility of the out-of-court statements on the basis of a forfeiture rule.<sup>318</sup> The thrust of his reasoning hinges merely on the absence of such claims to conclude that the prosecutors did not pursue the forfeiture exception because the defendants did not intend to make the witnesses unavailable.<sup>319</sup> It is true that in each case the prosecution went to great lengths to convince the court that the out-of-court statements were admissible, even though uncontroverted, under the dying-declaration exception by marshalling witnesses to testify that the declarant made the statement under a reasonable belief of impending death.<sup>320</sup> Nevertheless, to conclude that these arguments were proffered as a substitute for a forfeiture claim because the prosecutors could not satisfy the element of intent is plainly wrong. The nonexistence of a forfeiture claim can be explained as a matter of trial strategy.

For example, the defendant in *King v. Woodcock* was on trial for murdering his wife.<sup>321</sup> Shortly after the victim was severely beaten, but forty-eight hours before she died, a magistrate took her sworn statement, which related to the cause of her injuries.<sup>322</sup> The court recognized that there were only two types of statements admissible at law even if uncontroverted in court: dying declarations and examinations of witnesses in the accused's presence under the Marian bail and committal statutes.<sup>323</sup> The wife's statement could not be admitted under the Marian statutes because the defendant was not present when she made her statement.<sup>324</sup> The judge instructed the jury to consider the statement only if it found that it met the dying-declaration requirements.<sup>325</sup> The court made no mention in its opinion that the prosecution attempted to argue admissibility under

315. *King v. Woodcock*, (1798) 168 Eng. Rep. 352 (K.B.).

316. *King v. Dingler*, (1791) 168 Eng. Rep. 383 (K.B.). *Accord* *United States v. Woods*, 28 F. Cas. 762 (C.C.D.C. 1834) (No. 16,760); *Smith v. State*, 28 Tenn. (9 Hum.) 9 (1848); *Lewis v. State*, 17 Miss. (9 S. & M.) 115 (1847); *Nelson v. State*, 26 Tenn. (7 Hum.) 542 (1847); *Montgomery v. State*, 11 Ohio 424 (1842); *Welbourn's Case*, 1 East 358 (P.C. 1792); *Thomas John's Case*, 1 East 357 (P.C. 1790).

317. *Giles III*, 128 S. Ct. at 2684.

318. *Id.* at 2685.

319. *Id.*

320. *Id.* at 2686 (citing *King v. Commonwealth*, 4 Va. (2 Munf.) 78, 80-81 (1817); *Gibson v. Commonwealth*, 4 Va. (2 Munf.) 111, 116-17 (1817); *Anthony v. State*, 19 Tenn. (Meigs) 265, 278-79 (1838)).

321. *Giles III*, 128 S. Ct. at 2684 (citing *Woodcock*, 168 Eng. Rep. at 352).

322. *Id.*

323. *Id.* at 2684-85. As historical background, Marian statutes provided procedure similar to the present-day sworn deposition. To qualify as admissible, the statement must have been given under oath in the accused's presence so as to give the accused an opportunity to cross-examine the declarant. For more information, see Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493 (2007).

324. *Giles v. California (Giles III)*, 128 S. Ct. 2678, 2685 (2008).

325. *Id.* (citing *Woodcock*, 168 Eng. Rep. at 354).

the forfeiture exception. It is not logical to conclude that the non-inclusion of a forfeiture claim can be explained by the prosecution's inability to fulfill the intent element.

The six other cases cited by the plurality all addressed the admissibility of out-of-court statements on the basis of a dying-declaration exception alone,<sup>326</sup> without making reference to their admissibility on the basis of the forfeiture exception.<sup>327</sup> Justice Scalia noted that “[c]ourts in all these cases did not even consider admitting the statements on the ground that the defendant’s crime was to blame for the witness’s absence—even when the evidence establishing that was overwhelming.”<sup>328</sup> Justice Scalia suggested that if common law recognized the exception as articulated by the prosecution in this case, the prosecution in the older common-law cases would have at least argued that the exception allowed the court to admit unopposed testimonial out-of-court statements.<sup>329</sup>

Professor Richard Friedman provides a reasonable alternative explanation for these omissions.<sup>330</sup> He states that the dying-declaration exception is a manifestation of the forfeiture doctrine that should be limited “by the principle that the state cannot invoke forfeiture doctrine if it has not taken advantage of reasonable opportunities to preserve the confrontation right in whole or in part.”<sup>331</sup> He explains that, in each of these cases, the state could have “reasonably arrange[d] for testimony by the victim subject to confrontation” prior to his or her death and that the failure to do so justified the statements’ exclusion.<sup>332</sup> He in turn argues that the facts in *Giles* differ from these cases because the victim’s testimonial statements in *Giles* were made weeks before the charged crime’s commission, and there was no “settled practice of exclusion” of out-of-court statements in this situation.<sup>333</sup> Professor Friedman correctly concludes that allowing the use of such statements is entirely in line with the historical development of the common law.<sup>334</sup>

Justice Scalia also rejected the State’s formulation of the forfeiture doctrine in *Giles* because the doctrine had not been established in American jurisprudence at the time of the nation’s founding.<sup>335</sup> He opined that the forfeiture exception proposed by the prosecution was not applied until 1985 in *United States v. Rouco*.<sup>336</sup> In *Rouco*, the defendant was convicted of second-degree murder for killing a special agent of the U.S. Bureau of Alcohol, Tobacco and Firearms

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326. *Id.* (citing *Lewis v. State*, 17 Miss. (9 S. & M.) 115, 120 (1847) (refusing to admit an out-of-court statement on the grounds that there was no evidence that the statement was made by a declarant who “was sensible that he was on the verge of dissolution”)).

327. *Id.*

328. *Id.*

329. *Id.*

330. Posting of Richard D. Friedman to The Confrontation Blog, <http://confrontationright.blogspot.com/2008/06/reflections-on-giles-part-1-history.html> (June 27, 2008, 01:39 EST).

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Giles v. California (Giles III)*, 128 S. Ct. 2678, 2687 (2007).

336. *Id.*



(ATF).<sup>337</sup> During a sting operation targeting cocaine, the defendant fatally shot an undercover ATF agent who had attempted to arrest him.<sup>338</sup> The agent had named the defendant as the cocaine's source during a debriefing session before the fatal shooting.<sup>339</sup> The trial court allowed the testimony of the agent's supervisor under the residual-hearsay exception.<sup>340</sup> On appeal, the defendant claimed that allowing the agent's supervisor to present the out-of-court statement concerning the cocaine's source violated the accused's Sixth Amendment confrontation right.<sup>341</sup>

The *Rouco* court rejected this claim, finding that the defendant waived his right to confront and cross-examine the special agent when he killed him.<sup>342</sup> Reasoning that the Sixth Amendment "does not stand as a shield to protect the accused from his own misconduct or chicanery,"<sup>343</sup> the *Rouco* court concluded that any contrary result would "make a mockery of the system of justice that the right was designed to protect."<sup>344</sup> Contrary to Justice Scalia's interpretation, this case forcefully demonstrates that intent to procure a potential witness's unavailability is not an element of the confrontation clause framework.<sup>345</sup> Additionally, *Rouco* was not the first American court to address the forfeiture exception as the prosecutors articulated in *Giles*.<sup>346</sup>

The *Giles* plurality noted correctly that the U.S. Supreme Court first applied a forfeiture exception in *Reynolds*.<sup>347</sup> The *Reynolds* Court held that where a witness's absence results from the defendant's own "wrongful procurement,"<sup>348</sup> he "is in no condition to assert that his constitutional rights have been violated" when the evidence is offered by other means.<sup>349</sup> The Court reasoned that the "Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts ... [and this is an] outgrowth of a maxim based on the principles of common honesty."<sup>350</sup>

In *Giles*, Justice Scalia interpreted the *Reynolds* language narrowly as allowing the admissibility of prior unconfrosted out-of-court statements only in circumstances "where the defendant had engaged in wrongful conduct designed to prevent a witness's testimony."<sup>351</sup> According to Justice Scalia, the *Reynolds* Court required that there be some indication that the defendant acted with intent

337. *United States v. Rouco*, 765 F.2d 983, 985, 987 (11th Cir. 1985).

338. *Id.* at 985-86.

339. *Id.* at 994.

340. *Id.*

341. *Id.* at 995.

342. *Id.*

343. *Id.* (citing *United States v. Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976)).

344. *Id.* (citing *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. Unit B 1982)).

345. *See id.*

346. *See Reynolds v. United States*, 98 U.S. 145, 158 (1879).

347. *Giles v. California (Giles III)*, 128 S. Ct. 2678, 2687 (2007) (citing *Reynolds*, 98 U.S. at 158).

348. *Reynolds*, 98 U.S. at 158.

349. *Id.*

350. *Id.* at 158-59.

351. *Giles III*, 128 S. Ct. at 2687.

to cause the witness's unavailability and the *Reynolds* Court's conclusion was in line with the common-law rule.<sup>352</sup> Justice Scalia misinterpreted *Reynolds* because a fair reading of the opinion demonstrates that the Court focused exclusively on the accused's voluntary wrongful conduct and not his motivation.<sup>353</sup>

Justice Scalia also used the FRE to support his understanding of the constitutional doctrine of forfeiture.<sup>354</sup> He observed that the Supreme Court previously described FRE 804(b)(6) as a rule of evidence that "codifie[d] the forfeiture doctrine."<sup>355</sup> Pointing to various treatises, he observed that all the commentators concluded that the intent requirement in FRE 804(b)(6) limits the exception's scope to situations where "the defendant has in mind the particular purpose of making the witness unavailable."<sup>356</sup> With this in mind, he concluded that FRE 804(b)(6) was intended to mirror the forfeiture doctrine as applied by common-law English judges in *Lord Morley's Case*, *Harrison's Case*, and *Scaife*.<sup>357</sup>

Justice Scalia did not accept the prosecution's formulation of the forfeiture exception.<sup>358</sup> He contended that if the prosecution's characterization of the exception is historically correct, "one would have expected it to be routinely invoked in murder prosecutions like the one here, in which the victim's prior statements inculpated the defendant," which was not the case.<sup>359</sup> He read the common law differently, finding that an intent to render a witness unavailable at trial is the most natural reading of the language used at common law.<sup>360</sup> Justice Scalia also pointed out the absence of any common-law cases to the contrary and the common law's uniform exclusion of all unconfrosted inculpatory testimony by murder victims, except for the dying-declaration exception.<sup>361</sup>

The fallacy of Justice Scalia's position lies in an incorrect assumption that the common-law judges limited the definition of "procure" with an element of intent.<sup>362</sup> He read intent into a term that was not understood as such at common law. The words "procure" and "procurement," as the courts used in *Lord Morley's Case*, *Harrison's Case*, and *Scaife*, were carefully crafted to demonstrate that the standard for the admissibility of unconfrosted out-of-court

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352. *Id.*

353. See *supra* Part III.A for more discussion.

354. *Giles III*, 128 S. Ct. at 158 (citing FED. R. EVID. 804(b)(6)).

355. *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 833 (2006)).

356. *Id.* at 2687-88 (2008) (citing CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE 176 (6th ed. 2006); 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:134, at 235 (3d ed. 2007); 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 804.03[7][b], at 804-32 (Joseph M. McLaughlin ed., 2d ed. 2008)).

357. *Giles v. California (Giles III)*, 128 S. Ct. 2678, 2687 (2007).

358. *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

359. *Id.*

360. *Id.* at 2687-88.

361. *Id.* at 2688.

362. *Id.* at 2683.

statements under a forfeiture exception was premised exclusively on the accused's voluntary wrongful act that actually caused the witness's absence.<sup>363</sup>

Contrary to the plurality's reading of the common law, courts did not require that the accused intended, was motivated by, or contrived a means to render the witness unavailable for live in-court testimony.<sup>364</sup> If that were the common-law judges' view, they could have used, and likely would have used, precise language to convey design or contrivance rather than leaving their position open to future interpretation. Common-law cases clearly demonstrate that all that was required for the forfeiture exception was a causal connection between the accused's voluntary wrongful act and the witness's unavailability.<sup>365</sup> If the unavailability-causing conduct was voluntary, then the witness had been rendered unavailable "by means or procurement" of the defendant.<sup>366</sup> This interpretation preserves the defendant's confrontation right where the prosecution is unable to show a causal link between the accused's act and the witness's absence. This formulation is also consistent with equity principles that courts will not reward the accused's wrongful conduct with the exclusion of evidence.

The historical record of American cases does not support Justice Scalia's position either. In 1856, in *Williams v. State*, the Georgia Supreme Court focused on the accused's voluntary wrongful conduct that created the witness's unavailability at trial.<sup>367</sup> The court did not consider the defendant's intent to render the witness unavailable in applying the forfeiture exception.<sup>368</sup>

The U.S. Supreme Court's forfeiture analysis in *Reynolds* also did not refer to intent.<sup>369</sup> It focused exclusively on the voluntary nature of the defendant's conduct.<sup>370</sup> In *Reynolds*, Chief Justice Waite traced the forfeiture doctrine's history to *Lord Morley's Case*, *Harrison's Case*, and *Scaife*.<sup>371</sup> He also recognized the doctrine's basis in the equitable common law "maxim that no one shall be permitted to take advantage of his own wrong."<sup>372</sup> Despite access to the same nineteenth-century treatises that Justice Scalia relied on in his opinion in *Giles*—those replacing procurement with contrivance—the *Reynolds* Court applied the exception as formulated by the common-law judges.<sup>373</sup> *Reynolds* used "wrongful procurement," and not contrivance or design, to explain the defendant's forfeiture of confrontation rights.<sup>374</sup> It explained that "if a witness is

363. See *supra* Part II for more discussion.

364. Timothy M. Moore, *Forfeiture by Wrongdoing: A Survey and an Argument for Its Place in Florida*, 9 FLA. COASTAL L. REV. 525, 576 (2008).

365. *Id.*

366. See *King v. Morley (Lord Morley's Case)*, (1666) 6 Eng. Rep. 769, 770-71 (K.B.); *Harrison's Case*, (1692) 12 State Trials 833, 853 (Eng.); *Regina v. Scaife*, (1851) 117 Eng. Rep. 1271, 1276 (Q.B.).

367. 19 Ga. 402, 403 (1856).

368. *Id.*

369. See *Reynolds v. United States*, 98 U.S. 145, 159 (1878).

370. *Id.*

371. *Id.* at 158.

372. *Id.* at 159.

373. *Id.*

374. *Id.* at 158.

absent by [the defendant's] own wrongful procurement, [the defendant] cannot complain if competent evidence is admitted to supply the place of that which he has kept away."<sup>375</sup>

Nowhere did the *Reynolds* Court condition the admissibility of out-of-court statements on a showing of intent or design.<sup>376</sup> It merely required a nexus between the accused's act and the witness's unavailability.<sup>377</sup> Chief Justice Waite best expressed this position when he stated that "if there has not been, in legal contemplation, a wrong committed, the way has not been open for the introduction of the testimony."<sup>378</sup> Voluntary wrongful conduct, and not intent or design, cuts off constitutional protections to a defendant where absence of live in-court testimony is a "legitimate consequence[ ] of his own wrongful acts."<sup>379</sup>

Professor Richard Friedman noted in his respected blog that the *Giles* decision appears on the surface to be a "major victory for defendants."<sup>380</sup> He suggested, however, that "[t]he *Giles* test—however it develops—may turn out to be rather easily satisfied."<sup>381</sup> We agree with Professor Friedman that, in practice, trial courts will fulfill the *Giles* test by focusing on the defendant's conduct and then infer intent, particularly in cases of domestic violence.<sup>382</sup>

First, Professor Friedman posits that most courts are "inclined to admit statements made by a witness who was precluded from testifying in court by the defendant's own wrongful conduct" and as a result, courts will likely ease the hurdles necessary to fulfill the *Giles* test for intent by always finding intent.<sup>383</sup> Second, he argues that the *Giles* decision will further narrow the types of statements defined as testimonial to ease the admissibility process.<sup>384</sup> As the *Giles* test only applies to testimonial statements, courts will "give an unduly construction to the term 'testimonial'" to secure the admissibility of virtually any statement.<sup>385</sup> Third, Professor Friedman suggests that the holding in *Giles* will prompt courts to expand the dying-declaration exception that generally has limited evidentiary use.<sup>386</sup> He suggests that courts will find that certain out-of-court statements qualify as dying declarations in cases where victims do not actually believe themselves to be on the verge of death.<sup>387</sup> We find Professor Friedman's reasoning on this point compelling and agree that eventually courts will apply *Giles* in line with the forfeiture position that the prosecution advanced in *Giles*.

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375. *Id.*

376. See *supra* Part III.A for more discussion.

377. *Reynolds*, 98 U.S. at 159.

378. *Id.*

379. *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

380. Posting of Richard D. Friedman to The Confrontation Blog, <http://confrontationright.blogspot.com/2008/06/reflection-on-giles-part-2-is-giles-bad.html> (June 29, 2008, 18:43 EST).

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

VI. THE FORFEITURE RULE IN FRE 804(B)(6) SHOULD NOT BE CONFUSED  
WITH THE SIXTH AMENDMENT FORFEITURE DOCTRINE

Prior to the 1997 codification of the evidentiary forfeiture rule in FRE 804(b)(6), some federal courts used the residual hearsay exception to admit out-of-court statements of an unavailable witness if the proponent made a sufficient showing that the accused procured the witness's unavailability.<sup>388</sup> For example, the Second Circuit, in *United States v. Mastrangelo*,<sup>389</sup> applied the former residual hearsay exception, FRE 804(b)(5), to admit prior grand jury testimony after finding that the evidence "was surrounded with sufficient 'particularized guarantees of trustworthiness.'"<sup>390</sup> While recognizing that the grand jury statements were hearsay, Judge Winter explained that to not admit the grand jury testimony "would mock the very system of justice the confrontation clause was designed to protect."<sup>391</sup>

Professors Stephen Saltzburg and David Schlueter first brought the idea to codify the forfeiture-by-wrongdoing doctrine to the Advisory Committee on Federal Rules of Evidence in 1992.<sup>392</sup> They intended to resolve a federal circuit split on the nature of the burden of proof to establish that wrongful conduct had occurred.<sup>393</sup> Commentary to the new rule explained that the appropriate burden of proof is a preponderance of the evidence.<sup>394</sup> The Supreme Court approved the proposed rule on April 11, 1997, and it became effective on December 1, 1997 as FRE 804(b)(6).<sup>395</sup> The forfeiture rule provides:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: ...

(6) Forfeiture by wrongdoing. A statement 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.<sup>396</sup>

The Advisory Committee Notes to the 1997 Amendment expressly limit the rule's application to "actions taken *after* the event to prevent a witness from testifying."<sup>397</sup> The Advisory Committee Notes suggest that the rule was

388. Flanagan, *supra* note 81, at 1209-10.

389. 693 F.2d 269 (2d Cir. 1982).

390. *Id.* at 272 (quoting *United States v. Mastrangelo*, 533 F. Supp. 389, 390 (E.D.N.Y. 1982)).

391. *Id.* at 273.

392. 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, 903 (2001).

393. FED. R. EVID. 804 Advisory Committee's Notes to the 1997 Amendment, *reprinted in* 3 MICHAEL GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 585 (5th ed. 2001).

394. *Id.*

395. *Id.*

396. FED. R. EVID. 804(b)(6).

397. FED. R. EVID. 804 Advisory Committee's Notes to the 1997 Amendment, *reprinted in* 3 GRAHAM, *supra* note 393, at 585.

originally created as a means to prevent witness tampering.<sup>398</sup> In fact, the Advisory Committee chose not to refer to witness tampering in the rule because it believed that the rule's language and intent requirement very clearly indicated that the hearsay exception would apply only when the accused acted after his or her original crime to procure the unavailability of an adverse witness at trial.<sup>399</sup> It has also been suggested that the rule's drafters never questioned that intent to render a witness unavailable was an element of the rule.<sup>400</sup> The rule includes an intent requirement and provides that forfeiture will result from conduct of the accused who engaged in "wrongdoing that was *intended* to, and did, procure the unavailability."<sup>401</sup>

Courts regularly apply the rule as its proponents intended.<sup>402</sup> In *United States v. Gray*, the defendant appealed her mail-and-wire fraud conviction, arguing that the trial court violated her confrontation rights by admitting several out-of-court statements that the deceased made to his family members during the three months before his murder.<sup>403</sup> The prosecution claimed that she was responsible for his murder.<sup>404</sup> The court rejected her claim and determined that FRE 804(b)(6) "applies *whenever* the defendant's wrongdoing was intended to, and did, render the declarant unavailable as a witness against the defendant."<sup>405</sup> The court noted that there are no limits "on the subject matter of statements that can be admitted under [FRE 804(b)(6)],"<sup>406</sup> and therefore the rule accomplishes its purpose "'to deter criminals from intimidating or 'taking care of' potential witnesses against them."<sup>407</sup>

398. Flanagan, *supra* note 81, at 1213. See also *United States v. Thompson*, 286 F.3d 950, 962 (7th Cir. 2002) (holding that the forfeiture doctrine is an equitable principle and "the primary reasoning behind the rule is obvious—to deter criminals from intimidating or 'taking care of' potential witnesses against them").

399. FED. R. EVID. 804(b)(6) Advisory Committee's Note (Apr. 22, 1996).

400. Flanagan, *supra* note 81, at 1213.

401. FED. R. EVID. 804(b)(6) (emphasis added).

402. *E.g.*, *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005).

403. *Id.* at 240. "A grand jury indicted [defendant] Josephine Gray on five counts of mail fraud and three counts of wire fraud...." *Id.* at 230. Gray told her new friend, Wilson, that she killed her former husband to escape his abuse. *Id.* at 231. Shortly after his death, Gray claimed benefits from her late husband's life insurance policy. *Id.* During her marriage to her late husband, the defendant had an affair with another man, Robert Gray. *Id.* After her late husband's death, the couple used the insurance proceeds to purchase a home; however, Robert Gray left the home because he was afraid that the defendant was trying to kill him to collect on his life insurance policy, which named the defendant as the beneficiary. *Id.* Shortly thereafter, Robert Gray was found dead, shot once in the chest and once in the neck. *Id.* at 231-32. Gray told Wilson that she also had to kill Goode, her cousin and boyfriend, because he helped her with Robert Gray's murder and wanted a part of the insurance money that Gray received from his insurance policy in return for his silence. *Id.* at 232. At the close of the evidence at trial, a jury found Gray guilty on all counts and sentenced her to forty years in prison. *Id.* at 230.

404. *Id.* at 233 ("The indictment alleged that Gray 'intentionally caused the death[]' of ... Robert Gray ....").

405. *Id.* at 241.

406. *Id.* (citing 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, § 507.1, at 268 (2d ed. Supp. 2004)).

407. *Id.* at 242 (quoting *United States v. Thompson*, 286 F.3d 950, 962 (7th Cir. 2002)).

The court recognized that the rule's language "requires that the wrongdoing was *intended* to render the declarant unavailable as a witness"<sup>408</sup> and held that "a defendant need only intend 'in part' to procure the declarant's unavailability."<sup>409</sup> "[I]t is sufficient in this regard to show that the [defendant] was motivated in part by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor's sole motivation."<sup>410</sup>

We argue that the intent element in FRE 804(b)(6) creates a distinct evidentiary condition for admissibility. This condition should not be confused with the equitable common-law notion of forfeiture, which underlies the constitutional forfeiture doctrine. The intent element in FRE 804(b)(6) is directed at witness tampering that results from the accused's post-crime intentional conduct. Unlike the Sixth Amendment forfeiture rule, FRE 804(b)(6) would not apply where there is insufficient evidence to show, at least in part, an intent to procure a witness's unavailability. This is supported by Professor Saltzburg's commentary to the 1997 amendment explaining that before the rule can apply "it must be shown that the party against whom the evidence is offered acted with intent to procure the unavailability of the declarant as a witness."<sup>411</sup> He reasons that where a "defendant kills a declarant simply because he didn't like him, or because he was burned in a drug deal by him, then the defendant has not forfeited his right to object to the declarant's hearsay statement [under the rule]."<sup>412</sup>

In the equitable common-law forfeiture analysis, the basis for the constitutional principle, intent is not a relevant consideration.<sup>413</sup> A court will find that the accused forfeits his Sixth Amendment confrontation right whenever it is sufficiently shown that the unavailability of live in-court testimony is the direct result of his or her voluntary and wrongful act.<sup>414</sup>

Indeed, Justice Scalia clarified in *Crawford* that "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."<sup>415</sup> For this reason, the determination of "whether defendant has forfeited his constitutional right of confrontation is an issue separate from whether a particular rule of evidence has been satisfied."<sup>416</sup> While FRE 804(b)(6) contains an intent requirement, the Sixth Amendment forfeiture doctrine is derived independently from the common law, which does not contain an element of intent.<sup>417</sup> The constitutional forfeiture doctrine is not a means of

408. *Id.*

409. *Id.*

410. *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1991).

411. Fed. R. EVID. 804, Commentary of Stephen A. Saltzburg et al.

412. *Id.*

413. See John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 888-93 (1996).

414. See Timothy M. Moore, *Forfeiture by Wrongdoing: A Survey and an Argument for Its Place in Florida*, 9 FLA. COASTAL L. REV. 525, 532-34 (2008).

415. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

416. *State v. Bauder*, 712 N.W.2d 506, 514 (Mich. Ct. App. 2005).

417. *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (citing *Crawford*, 541 U.S. at 61).

circumventing the hearsay rule or allowing statements in evidence that would normally not be admissible.<sup>418</sup> The constitutional doctrine has a broader purpose and represents sound public policy to penalize the accused if his or her voluntary and wrongful actions subvert the legal system. The loss of the right of confrontation prevents the accused from gaining an unfair advantage in the adversarial contest through his or her voluntary and wrongful act. Ultimately, the rule promotes the truth-finding process.

## VI. CONCLUSION

Justice Scalia's plurality opinion in *Giles* is inconsistent with the original common-law cases that created and developed the forfeiture exception. Common-law judges based their forfeiture rule on an equitable maxim that focused exclusively on the accused's voluntary wrongful act rather than on intent or motivation. Since the U.S. Supreme Court adopted the forfeiture rule in *Reynolds*, American case law elevated the common-law forfeiture principle into a constitutional doctrine that remained faithful to its equitable foundation and public policy concern "that no person should benefit from his own wrongful acts."<sup>419</sup> As we have demonstrated throughout this article, equitable forfeiture "does not hinge on the wrongdoer's motive."<sup>420</sup> From this perspective, forfeiture is nothing more than judicially imposed punishment for the accused's voluntary and wrongful conduct in rendering the unavailability of the out-of-court declarant's live in-court testimony, especially in circumstances where the "intent-to-silence element is missing."<sup>421</sup>

The courts that agreed with the California Supreme Court in *Giles* are correct to separate the constitutional forfeiture doctrine from FRE 804(b)(6)'s evidentiary approach.<sup>422</sup> Justice Scalia's plurality opinion in *Giles* incorrectly injected an element of intent to the constitutional analysis in derogation of the equitable principles that underlie the constitutional forfeiture rule.<sup>423</sup> Since the U.S. Supreme Court previously labeled the rule as one of "forfeiture" and not "waiver" in both *Crawford* and *Davis*,<sup>424</sup> *Giles* was incorrectly decided when the plurality added an intent element.

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418. *Crawford*, 541 U.S. at 62.

419. *People v. Giles (Giles II)*, 152 P.3d 433, 443 (2007), *vacated*, *Giles v. California (Giles III)*, 128 S. Ct. 2678 (2008).

420. *Id.* at 442.

421. *Id.* at 443.

422. *Id.* at 442 (citing *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1991), and noting that despite a holding that intent, as least in part, was required, none of the cases held that intent was required under the Sixth Amendment equitable forfeiture framework).

423. *Id.* at 443.

424. *Id.* at 444.



