

No. 07-6053

IN THE
Supreme Court of the United States

DWAYNE GILES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF OF PETITIONER

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QUESTION PRESENTED

In *Crawford v. Washington*, 541 U.S. 36, 62 (2004), this Court recognized that the forfeiture by wrongdoing rule “extinguishes confrontation claims on essentially equitable grounds.” The question presented by this case is: Does a criminal defendant “forfeit” his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?

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OPINIONS BELOW

The opinion of the California Supreme Court (J.A. 31-71) is published at 40 Cal.4th 833, 152 P.3d 433 (2007). The California Supreme Court's one-page order denying rehearing was filed on May 23, 2007. (J.A. 72.) The opinion of Division Six of the Second District Court of Appeal of the State of California was filed on October 25, 2004. The Court of Appeal's order modifying its opinion and denying rehearing was filed on November 22, 2004. The Court of Appeal's modified opinion (J.A. 11-30) is published at 123 Cal.App.4th 475, 19 Cal.Rptr.3d 843 (2004).

JURISDICTION

The California Supreme Court issued its decision in this case on March 5, 2007, and denied petitioner's timely petition for rehearing on May 23, 2007 (J.A. 31, 72). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial in California state court of murdering his former girlfriend Brenda Avie. At trial, the prosecution, over petitioner's objection, admitted out-of-court statements that Avie made to a police officer about an alleged prior assault by petitioner. While his appeal was pending, this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004). At the

request of the Court of Appeal, the parties filed briefs on *Crawford's* impact on petitioner's case. The California Court of Appeal and the California Supreme Court rejected petitioner's argument that the admission of Avie's testimonial hearsay violated the Confrontation Clause and affirmed his conviction.

1. Trial Proceedings

As largely recounted in the decisions below, the evidence of the killing consisted of the following. On the night of September 29, 2002, petitioner was socializing with his new girlfriend Tameta Munks, his friend Marie Banks, and his niece Veronica Smith in the garage behind his grandmother's house, where he was living. He received a telephone call from Brenda Avie, a former girlfriend, and then asked Munks to leave, which she did. Shortly thereafter, Avie arrived. Banks noted that Avie argued with petitioner and he tried to pacify her. J.A. 32-33; RT 919-20, 926-27.¹

Smith went inside the house. Avie left with Banks, intending to go to her father's house. On the way, she saw Munks. She told Banks that she was going back to the petitioner's home because she didn't intend to let "that bitch" visit petitioner. Avie returned to petitioner's home by herself. J.A. 33, 35; RT 922, 927, 931.

Smith heard Avie and petitioner talking outside but couldn't tell what they were saying. She then heard Avie yell "Granny," and heard a series of gunshots. Smith ran outside. Avie was lying on her

¹ "RT" refers to the Reporter's Transcript. "CT" refers to the Clerk's Transcript.

back in the driveway. Petitioner was standing nearby, holding a nine-millimeter handgun. Avie did not have a weapon. J.A. 33-34.

Avie had six gunshot wounds in her torso area, two of which were fatal. One wound was consistent with her holding up her hand when she was shot, one was consistent with her having turned to the side when she was shot, and one was consistent with her being shot while she was lying on the ground. J.A. 33-34.

Over petitioner's objection, the prosecution presented the testimony of a Los Angeles police officer who interviewed Brenda Avie on September 5, 2002, about an alleged assault by petitioner.² The officer testified that on that day, he and his partner went to an address in Los Angeles County. Petitioner answered the door, apparently agitated. Avie was sitting on the bed, crying. The officer interviewed Avie while his partner interviewed petitioner separately. Avie told the officer that she had been talking on the phone with a female friend when her boyfriend, petitioner, got angry with her and accused her of having an affair with her friend. Avie ended the phone call and argued with petitioner. He lifted her off the floor, put her down, and choked her. She broke free and fell to the floor. He climbed on top of

² The trial court admitted the evidence under California Evidence Code § 1109, which permits the admission of evidence of prior acts of domestic violence to prove the defendant has a propensity to commit acts of domestic violence; and California Evidence Code § 1370, which establishes a hearsay exception for certain out-of-court statements describing the infliction of physical injury on the declarant when the declarant is unavailable to testify at trial and the statements are trustworthy. J.A. 36; RT 1-2, 606-10.

her and punched her face and head. She broke free and crawled onto the bed. Then he opened the blade of a folding knife, held it about three feet from her, and said, "If I catch you fucking around I'll kill you." The officer did not see any physical marks on Avie, but felt a bump on her head. J.A. 35-36; RT 606-08.³

Petitioner testified and claimed self-defense. He had dated Avie for several years. He broke up with her in January 2002, but she continued to call and harass him. J.A. 34. Petitioner testified that Avie was volatile and had a history of violence, particularly when she was jealous. When she telephoned him on the night of the shooting, he told her that Munks was there; Avie then became upset and threatened to kill Munks. When Avie arrived and found Munks gone, she threatened to kill Munks when she saw her. Petitioner told Avie to leave, but she did not. Eventually, he told everyone to leave. J.A. 32, 34, 56; RT 635-36, 638-41, 643, 645, 650-53, 686-88, 693, 695.

After Avie and Banks left, petitioner stayed in the garage, putting his compact discs away. When Avie appeared in the driveway, she said, "I know that bitch going to come back here. I'm going to kill you and that bitch." He told Avie to leave, but she refused. When she started to run towards him, he

³ The testimonial hearsay about the prior assault also permitted the trial court to instruct the jury that if the jury found that he had committed a prior offense involving domestic violence, the jury may infer that he "had a disposition to commit another offense involving domestic violence," and to further infer that he was "likely to commit and did commit" the charged murder. CT 92.

grabbed his uncle's loaded gun, which was in the garage. He was very afraid that she had a weapon, although he did not see one because it was dark. As she charged directly at him, he aimed the gun at her, closed his eyes, and fired several shots. He did not intend to kill her. J.A. 34-35; RT 646-48.

On April 3, 2003, the jury convicted petitioner of first degree murder and found a firearm allegation true. J.A. 11, 36; CT 162. He was sentenced to prison for a term of fifty years to life. J.A. 11.

2. The Decision of the California Court of Appeal

Petitioner appealed. On March 8, 2004, while his appeal was pending in Division Six of California's Second Appellate District, this Court issued its decision in *Crawford v. Washington*, 541 U.S. 36. At the request of the Court of Appeal, both parties filed briefs regarding *Crawford's* impact on petitioner's case. J.A. 2.

On October 25, 2004, the Court of Appeal affirmed the judgment of conviction. J.A. 11, 30. The court rejected petitioner's argument that the admission of Avie's hearsay statements to the police officer violated his Sixth Amendment right of confrontation under *Crawford*. The court held that the rule of forfeiture by wrongdoing barred petitioner from raising a Confrontation Clause objection to the admission of Avie's out-of-court statements to the officer because petitioner caused her unavailability at trial by killing her. J.A. 27. He forfeited his confrontation right, the court held, even though there was no evidence that he killed Avie for the purpose of preventing her testimony at some future trial. J.A. 12, 20.

3. The Decision of the California Supreme Court

The California Supreme Court affirmed on March 5, 2007. J.A. 8, 66. The court adopted a formulation of the equitable forfeiture by wrongdoing rule that equated forfeiture with causation, but without requiring defendant to have specifically intended to prevent the witness's testimony. J.A. 32, 54-55. The state high court reasoned that "wrongfully causing one's own inability to cross-examine is what lies at the core of the forfeiture rule." J.A. 52.

California's broad equitable forfeiture rule requires a showing, by a preponderance of the evidence, that the witness is unavailable for trial and the defendant caused the witness's unavailability by an intentional criminal act. J.A. 62-63. In making this determination, the trial court may consider the proffered hearsay, but the hearsay must be supported by independent corroborative evidence. J.A. 63-64. If the elements are shown, the defendant forfeits his right to object under the Confrontation Clause to the admission of the witness's hearsay statements. However, the defendant may still object to the admission of the statements on hearsay and other statutory grounds. J.A. 64.

The California Supreme Court relied on *Reynolds v. United States*, 98 U.S. 145, 158 (1879), and *Crawford v. Washington*, 541 U.S. at 62, to justify its holding that causation alone is sufficient for forfeiture of Confrontation Clause rights, ruling that intent to silence is not an element of the forfeiture rule. J.A. 38-41. Although the court acknowledged that the facts of *Reynolds* involved a defendant's intentional tampering with a witness, it read

Reynolds as “describ[ing] the rule without reference to a defendant’s motivation.” J.A. 52. This Court, it noted, “did not suggest that the rule’s applicability hinged on Reynolds’s purpose or motivation in committing the wrongful act.” J.A. 41 (citations omitted). Moreover, *Crawford’s* characterization of the rule as a “forfeiture” rather than as a “waiver,” and as based on “essentially equitable grounds,” strongly suggested that the applicability of the rule does not depend on the defendant’s motive. J.A. 52. Invoking the equitable principle that “no person should benefit from his own wrongful acts,” the court concluded that “[a] defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness’s unavailability to exclude damaging hearsay statements that would otherwise be admissible.” J.A. 54-55. Accordingly, even though there was no evidence that petitioner killed Avie for the purpose of preventing her testimony at some future trial, the California Supreme Court reasoned that Avie’s statement was properly admitted; for otherwise petitioner would benefit from his wrongdoing. J.A. 20, 54-57.

SUMMARY OF ARGUMENT

The California Supreme Court below read this Court’s brief discussion of the “forfeiture by wrongdoing” doctrine in *Crawford v. Washington*, 541 U.S. 36, 62 (2004), as though it endorsed the creation of a broad “forfeiture by causation” exception to a defendant’s Sixth Amendment right to confront testimonial evidence presented against him. This purported exception dispensed with any showing of deliberate witness tampering. By adopting this

broad rule, the state court's ruling contravened the core teaching of *Crawford*—that subject to very limited exceptions, the Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay of absent witnesses. Thus, lower courts are not to create “open-ended,” newly-minted exceptions to the confrontation right. *Id.* at 54. However, the state court below violated that directive when it adopted a broad exception that departed from all prior understandings of the confrontation right.

The core requirement of the witness-tampering forfeiture rule at common law was a showing of the defendant's specific intent to prevent an expected witness from appearing at a forthcoming trial—that is, that the defendant had sought to undermine the integrity of the judicial process by acting through contrivance or otherwise to prevent the witness's testimony. Causation—that the defendant's conduct caused the witness's unavailability—was a necessary element, but it was never sufficient. As *Reynolds v. United States*, 98 U.S. 145 (1879), and the cases it relies upon make clear, the common law required *both* causation and specific intent to prevent the witness's testimony. For more than two centuries from the founding era through the Court's 2004 *Crawford* decision, the forfeiture exception applied only in cases where the defendant had procured the absence of the witness with the specific goal of keeping the witness away from the courtroom.

Indeed, the ruling below cannot be squared with the common law's recognition of a “dying declaration” exception, and its established application over the centuries. The dying declaration exception applied only to a victim's statement made *after* the infliction

of a fatal wound and only if the victim was aware of impending death at the time that the declaration was made. If such a statement could have been admitted on a mere showing that the defendant caused the witness's death, the more rigorous standards of the dying declaration exception would have been superfluous and would never have developed.

Notably, the common law's specific intent requirement is carried forward and preserved as the bedrock requirement of Federal Rule of Evidence 804(b)(6), which now "codifies the forfeiture doctrine." *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2280 (2006). The Rule allows the admission of "[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." Its text reflects the consistent practice of the federal courts to insist on specific intent to prevent the appearance of an expected trial witness as a predicate for finding that the defendant relinquished his rights under both the hearsay rule and the Confrontation Clause.

The California Supreme Court's broad forfeiture rule is not only inconsistent with the teachings of *Crawford* and the unbroken tradition of the common law, but is unprecedented in working a wholesale forfeiture of confrontation rights by defendants in nearly all homicide cases. Thus, it plainly contravenes the Sixth Amendment's inclusive guarantee of confrontation rights in "all criminal prosecutions" and our national commitment to preserving basic liberties even for those accused of the most serious crimes. If the California court's logic is accepted, "forfeiture by causation" may well

extend beyond homicide cases to include situations where prosecutors claim victims cannot testify because they have been “traumatized” by the defendant’s criminal conduct. The state court’s holding and its logical implications, we submit, threaten to unravel this Court’s effort in *Crawford* to reinvigorate confrontation rights.

ARGUMENT

I. THE CONFRONTATION CLAUSE BARS TESTIMONIAL HEARSAY OF DECEASED WITNESSES, SUBJECT TO A LIMITED NUMBER OF WELL-DEFINED EXCEPTIONS

Time and again, this Court has observed that a defendant’s Sixth Amendment right to confront his accusers “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.” *Crawford v. Washington*, 541 U.S. 36, 54 (2004); *see, e.g., Salinger v. United States*, 272 U.S. 542, 548 (1926); *United States v. Reid*, 53 U.S. 361, 364-65 (1851) (overruled on other grounds by *Rosen v. United States*, 245 U.S. 467, 470 (1918)). Under the common law of 1791, the rule governing testimony by deceased witnesses was clear-cut: absent a prior opportunity for cross-examination, a deceased’s statements were inadmissible. As incorporated into the Sixth Amendment, this rule recognized only two exceptions: when that testimony consisted of the “dying declaration of a party murdered,” 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 390 (London 1819), and “when it can be proved on oath, that the witness is detained and kept back from appearing by the means and

procurement of the prisoner.” GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 125 (6th ed. London 1801); *see also Crawford*, 541 U.S. at 56 n.6 (dying declarations), 62 (forfeiture by wrongdoing). Neither of these carefully drawn exceptions to the confrontation right is capable of supporting the California Supreme Court’s unprecedented holding that a criminal defendant “forfeits” his rights under the Confrontation Clause merely because his misconduct causes a witness to be unavailable to testify even though (as found by the courts below) the defendant had no specific intent to prevent the witness’s testimony.

A. As *Crawford* Teaches, the Common Law of 1791 Generally Barred Testimony by Deceased Witnesses

This case implicates the second of the “two inferences about the meaning of the Sixth Amendment” identified in *Crawford*—“that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and *the defendant had had a prior opportunity for cross-examination*,” 541 U.S. at 54 (emphasis added).

By its terms, this proposition bars the use of a deceased witness’s statements when there has been no prior opportunity for cross-examination. A deceased witness is “unavailable” in the most basic sense. His testimony is thus inadmissible, absent a prior opportunity for cross-examination.

The English authorities discussed at length in the *Crawford* decision confirm this is the proper understanding of the common law rule. In *King v.*

Paine, 87 Eng. Rep. 584 (1696), the King's Bench ruled that a deceased witness's sworn statements to the mayor of Bristol could not be introduced in a libel trial, for "[the defendant] had lost the benefit of a cross-examination." *Id.* at 585. As this Court noted, the *Paine* decision "settled the rule requiring prior opportunity for cross-examination as a matter of common law." *Crawford*, 541 U.S. at 46.

Early nineteenth century cases confirm that the common law barred *ex parte* testimony of a witness who died before trial when not taken in the presence of the accused. *See Crawford*, 541 U.S. at 49-50. Thus, in *State v. Webb*, 2 N.C. 103 (Super. L. & Eq. 1794) (per curiam), the North Carolina high court held that the only depositions which could be read against an accused were those taken in his presence, for "it is a rule of common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.* at 104; *see also Crawford*, 541 U.S. at 49. In an analogous case, *State v. Campbell*, 30 S.C.L. 124 (App. L. 1844), South Carolina's highest law court excluded a deposition taken by a coroner "notwithstanding the death of the witness." *Id.* at 125. The court reasoned that "such depositions are *ex parte*, and therefore, utterly incompetent." *Id.* The Tennessee court in *Johnston v. State*, 10 Tenn. (2 Yer.) 58 (1821), held that a deceased witness's prior statements were admissible only because they were taken "in the presence of the prisoner and the magistrate before whom he has been brought on a charge of felony. . . ." *Id.* at 59. The court expressly noted that a deceased witness's statements would be barred absent such a prior opportunity for cross-

examination; were a deposition “not taken in [the defendant’s] presence, when he could have had the liberty to cross-examine,” it would be “rejected.” *Id.*

As two cases cited in *Crawford* illustrate, *see* 541 U.S. at 46, the common law rule barring testimonial hearsay by deceased witnesses applied even in murder trials where the statements at issue were made by the victim. The first, *King v. Dingler*, 168 Eng. Rep. 383 (1791), held that statements made by an assault victim to a magistrate were inadmissible, because the magistrate taking the statements did not follow the procedures established by the then-governing Marian statutes. In cases where the proper procedures were followed, the court observed, “the prisoner may have, as he is entitled to have, the benefit of cross-examination.” *Id.* at 384. Without such an opportunity, the court found the statements inadmissible, as “no judicial examination has been taken.” *Id.* As authority for this proposition, the court cited *King v. Woodcock*, 168 Eng. Rep. 352 (1789). In *Woodcock*, the victim gave a statement to a justice of the peace after she was attacked, but died prior to trial. Again, the court held that because “the prisoner . . . had no opportunity of contradicting” the statements in the deposition, the statements could not be admitted. *Id.* at 353.⁴

⁴ While both *Dingler* and *Woodcock* were decided under Marian statutes, that fact, if anything, strengthens the conclusion that the common law absolutely barred testimonial statements by deceased witnesses absent an opportunity for prior cross-examination. As this Court noted in *Crawford*, “to the extent Marian examinations were admissible, it was only because the statutes *derogated* from the common law.” *Crawford*, 541 U.S. at 54 n.5 (emphasis in original).

There is thus no question about how the common law of 1791 generally approached testimony by witnesses who died before trial. Whether the declarant was living or dead, the same rule applied: "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59.

B. The Dying Declaration and the Marian Statutes Exceptions to the General Hearsay Prohibition are Inconsistent with a Forfeiture-By-Causation Doctrine

As incorporated by the Sixth Amendment, the common law's general prohibition of testimony by deceased witnesses is subject to only a limited number of well-defined exceptions. This is because the accused's "right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54 (alteration in original) (citations omitted). "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* Apart from the limited exceptions recognized at common law, the Sixth Amendment demands an opportunity for prior cross-examination before the testimony may be admitted.

Neither of the common law exceptions, however, provides any support for the position advanced by the court below that a defendant "forfeits" his

Confrontation Clause right upon a mere showing that the underlying misconduct for which he is being tried caused the unavailability of a witness.

1. The Dying Declaration Exception Provides No Support for a Broad Forfeiture Doctrine

The common law dying declaration exception provides no support for the position advanced below. As noted in *Crawford*, 541 U.S. at 56 n.6, the dying declaration exception was “sui generis” and was the *only* exception to the ban against the admission of hearsay evidence against a criminal defendant that was recognized during the framing era. *See also* CHITTY, *supra*, at 390 (describing the “dying declaration of a party murdered” as “one great and important exception” to the otherwise blanket prohibition against hearsay evidence of a criminal defendant’s guilt). Notably, the dying declaration exception applied only to a victim’s statement made *after* the infliction of a fatal wound and only if the victim was aware of impending death at the time that the declaration was made.

The dying declaration doctrine was first recognized in 1722 in *King v. Reason*, 16 How. St. Tr. 1 (K.B. 1722). Specifically, this exception to the otherwise strict ban against criminal hearsay allowed “the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it was committed,” provided that “the deceased at the time of making such declarations was conscious of his danger.” *Id.* at 24-25. Thus, the exception was created because there could be instances in which the victim’s dying statements would be the only source of such vital information as the identity of the

assailant. However, because it was an exception to the principles of evidence, it was restricted to instances in which the victim was aware of impending death, on the presumption that that circumstance was equivalent to the solemnity of testimony under oath.

The strict limits on the dying declaration exception were settled features of framing-era doctrine. *See, e.g., Dingler*, 168 Eng. Rep. at 384 (noting that the prosecuting counsel conceded that a victim's statement, taken when the victim was unaware that her wound would be fatal, could not be admitted as a dying declaration); *see also State v. Moody*, 3 N.C. 50, 1798 WL 93, at *1 (Super. L. & Eq. 1798) (declining to admit murder victim's statement as dying declaration because it was given six or seven weeks prior to his death, rather than by "one so near his end that no hope of life remains" so that "the solemnity of the occasion [would be] a good security for his speaking the truth, as much so as if he were under the obligation of an oath").

Additionally, at common law, the dying declaration exception was limited to statements by the decedent "as to the fact [that is, the crime] itself."⁵ *Reason*, 16 How. St. Tr. 24-25. Thus, the exception permitted only statements about the immediate circumstances of the infliction of the fatal injury and the identity of the assailant. *See also* 5 JOHN HENRY WIGMORE,

⁵ Framing-era authorities often used "fact" as a synonym for the charged crime. *See, e.g.,* 4 WILLIAM BLACKSTONE, COMMENTARIES 301 (1769) (noting the requirement that the date and township "in which the fact was committed" be included in an indictment).

EVIDENCE AT TRIALS AT COMMON LAW § 1431-3
(James H. Chadbourn rev. ed. 1974).

Of course, the very existence of the dying declaration exception is flatly inconsistent with the California court's broad forfeiture-by-causation rule. Had there been any such rule in 1791 or thereafter allowing the automatic admission of any hearsay account of statements made by an alleged homicide victim, the dying declaration exception would have been totally superfluous and never developed. Thus, the dying declaration exception in itself proves the novelty and extremity of the lower court's ruling in this case.

2. Exceptions Under the Marian Statutes Provide No Support for a Broad Forfeiture Doctrine

The rule that a properly taken and sworn Marian examination was admissible at trial if the witness who had given it was dead, too ill to travel, or kept away by the defendant similarly provides no support for the forfeiture-by-causation theory advanced below. *See generally* 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 605 (Thomas Leach ed., 1787) (stating rule). As noted in *Crawford*, the Marian procedures were widely understood to be in derogation of the common law, 541 U.S. at 54 n.5, and by the mid-nineteenth century, English courts routinely required a prior opportunity for cross-examination even when a witness's statement was taken pursuant to the statutes. "When Parliament amended the statutes in 1848 to make the requirement explicit . . . the change merely 'introduced in terms' what was already afforded the defendant 'by the equitable construction

of the law.” *Id.* at 47 (quoting *Queen v. Beestom*, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C.J.)).

Even if decisions under the Marian statutes were somehow pertinent to the question of how the right of confrontation was understood at common law, they would provide no support for the California court’s broad forfeiture doctrine. The principle that a deceased’s witness’s testimony could be admitted applied only to formally sworn statements given by witnesses after the commission of a crime.

Framing-era law did not treat the absence of a witness resulting from the defendant’s intentional witness tampering any differently than the other recognized forms of witness unavailability such as death and illness. Thus, unlike current deliberate witness tampering doctrine, framing-era law permitted the admission of an unavailable witness’s Marian examination only if the defendant had an opportunity to cross-examine when it was taken. In *King v. Woodcock*, 168 Eng. Rep. 352, cited in *Crawford*, 541 U.S. at 54 n.5, a murder victim had given a statement to a justice of the peace after she was attacked, but had died prior to trial. The court ruled that the statement was inadmissible as a Marian examination because it had been taken “extrajudicially”—that is, not at the time of the arrest of defendant and in circumstances in which the defendant had an opportunity for cross-examination. As a result, the court ruled that the victim’s statement could be admitted only if it qualified as a dying declaration (that is, only if the victim had been aware of impending death). *Woodcock* plainly demonstrates that there was no doctrine that a

murder victim's statement could be admitted simply because the defendant was alleged to have killed the victim. Rather, the absence-procured-by-defendant doctrine was restricted to properly taken Marian examinations.

The same conclusion is demonstrated even more powerfully by *Dingler*, 168 Eng. Rep. 383, cited in *Crawford*, 541 U.S. at 54 n.5. In *Dingler*—a case in which the prosecutor conceded that the post-attack statement of the deceased victim could not constitute a dying declaration because the victim had not been aware of impending death—the court nevertheless ruled that the victim's post-attack statement to a justice of the peace was also inadmissible as a Marian examination because it had not been taken in the presence of the defendant at the time of his arrest. *Dingler*, 168 Eng. Rep. at 383-84. The rule that only a properly taken Marian deposition could be admitted is also demonstrated by *State v. Moody*. There, the court rejected the deceased victim's statement as a dying declaration and also rejected it as a Marian deposition, notwithstanding the fact that the statement had been taken in defendant's presence, because it had not been properly sworn when taken. 3 N.C. at 50-51, 1798 WL 93, at *1-2. *Moody* therefore demonstrates that the fact that defendant allegedly caused the victim's death did not suffice to admit the victim's statement.

Thus, although the admission of Marian depositions under the forfeiture doctrine restricted a defendant's confrontation right insofar as he was precluded from the usual right to confront and cross-examine the witness in the presence of the trial jury itself, the defendant was *never* wholly deprived of the

right to cross-examine the witness under the framing-era absence-procured-by-defendant rule. The framing-era intentional witness tampering doctrine impinged on a defendant's confrontation right, but did not extinguish it.

In sum, both English and early nineteenth-century authorities demonstrate the overarching common law rule that a deceased witness's testimony could not be admitted absent a prior opportunity for the defendant to cross-examine the witness. As we discuss next, the remaining principal exception—the doctrine of procurement or contrivance that originated in *Lord Morley's Case*—plainly required that the defendant act with a specific intent to prevent the witness from testifying.

II. THE COMMON LAW RECOGNIZED A NARROW EXCEPTION TO THE GENERAL HEARSAY PROHIBITION WHERE THE DEFENDANT BY PROCUREMENT OR CONTRIVANCE KEPT THE WITNESS AWAY TO PREVENT HIS TESTIMONY

A. The Procurement Exception, as Articulated in *Reynolds*, Contained a Specific Intent Requirement and Applied Only to Statements Previously Made Under Oath

In *Crawford*, this Court, relying on *Reynolds v. United States*, 98 U.S. 145, stated that “the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.” *Crawford*, 541 U.S. at 62. *Reynolds* and the decisions it relied upon established that the forfeiture doctrine applies only when the defendant has acted with specific intent to prevent the witness's

testimony at trial, by “procuring” the witness’s absence or otherwise “contriving” to keep the witness away.

The defendant in *Reynolds* was tried for bigamy. 98 U.S. at 146. The prosecution attempted to call his second wife to testify against him, but was prevented from doing so by the defendant’s refusal to reveal her location to a process server. In response, the trial court admitted testimony that the wife had given in a previous trial on the same issue. *Id.* at 159-60. On appeal to this Court, Reynolds argued that the use of this previously sworn testimony violated the Confrontation Clause.

The Court resolved Reynolds’ constitutional claim by adopting the witness tampering rule of *Lord Morley’s Case*, 6 How. St. Tr. 769 (H.L. 1666). The Court began its analysis by describing the general rule applicable at common law:

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 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.

98 U.S. at 158.

The Court emphasized that it was not adopting any new principle: “We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on principles of common honesty, and, if properly administered can harm no one.” *Id.* at 159. In so holding, the Court cited *Lord Morley’s Case*, 6 How. St. Tr. 769; *Harrison’s Case*, 12 St. Tr. 833 (1692); *Drayton v. Wells*, 1 Nott & McC. 409, 1819 WL 692 (1819); *Queen v. Scaife*, 117 Eng. Rep. 1271 (1851); and *Williams v. State*, 19 Ga. 403, 1856 WL 1804 (1856), as precedent for the procurement exception.

The Court noted the defendant chose to remain silent when he was given an opportunity at trial to disclose the witness’s location or to deny under oath that he had kept her away. 98 U.S. at 160. The Court viewed Reynolds’ silence as a tactical decision that he would be better off by preventing her from testifying than by confronting her on the stand: “Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own.” *Id.* Consequently, the Court held that the witness’s testimony on the same issue at a prior trial, where the defendant had “full opportunity for cross-examination,” *id.*, was properly admitted. Thus, the defendant forfeited his right to confrontation not

because of his criminal wrongdoing generally but because he had procured the absence of the witness to prevent her testimony at the retrial.

1. **The Common Law Precedent Relied on in *Reynolds* Defined Procurement to Require a Showing that the Defendant Specifically Intended to Prevent the Witness From Testifying at Trial**

The forfeiture rule was initially articulated in *Lord Morley's Case*. Prior to Lord Morley's trial for murder, the judges of England agreed that if any witness who had been examined by the coroner did not appear at trial, the written examination of that witness was admissible if the witness was dead, unable to travel, or "detained by means or procurement of the prisoner." 6 How. St. Tr. at 770-71. When the Crown sought permission to read the coroner's examination of Thomas Snell, an absent witness, the Lord Chief Justice "delivered the opinion, That if the court upon any evidence were satisfied, the witness was withdrawn by the procurement of the prisoner, the deposition ought to be read, otherwise not." *Id.* at 776-77. Although Snell's master then testified that Snell had run away after stating that "Lord Morley's trial was to be shortly but he would not be there," the court held that this evidence was not sufficient to satisfy the rule and Snell's examination was not read. *Id.* at 777.

Consistent with *Lord Morley's Case*, the other cases relied upon in *Reynolds* restricted the absence-by-procurement rule to instances in which a defendant deliberately kept away from trial a witness

who had previously given sworn testimony. For example, in *Harrison's Case*, 12 St. Tr. 833, the English court admitted an absent witness's previous testimony at a coroner's inquest. Prosecuting counsel argued that his examination should be read, because "Mr. Harrison's agents or friends have, since the last sessions, made or conveyed [the witness] away," and presented evidence that a man had tried to bribe the witness to be "kind" to Harrison, *id.* at 851, that the witness had been "inticed away by three soldiers," and that efforts to locate him had failed. *Id.* at 851-52. Satisfied that the defendant "made [the absent witness] keep away," that is, that the defendant had procured the witness's absence, the court allowed the coroner's examination to be read into evidence. *Id.* at 852.⁶

The principle requiring a defendant who acts with specific intent to procure the absence of a witness

⁶ Four years later, the admissibility of a witness deposition also arose in the attainder proceeding in Parliament in *Fenwick's Case*, 13 How. St. Tr. 537 (H.C. 1696). Sir John Fenwick was charged with high treason, and a key prosecution witness, Goodman, did not appear at trial. The prosecution argued that Goodman's examination should be read because Fenwick had procured Goodman's absence by bribes made by Lady Fenwick and others. *Id.* at 579, 583, 588-91, 594. The Speaker of the House described the issue as an "offer to prove that this very person hath been tampered with to take off his testimony." *Id.* at 590. Although the peers ultimately voted to admit the examination while acting in their legislative capacity, the arguments of counsel demonstrate that the common law doctrine, per *Lord Morley's Case*, was still that a coroner's examination was admissible only if the defendant had deliberately interfered to prevent the appearance of a person who previously had formally given a sworn examination.

was similarly applied in *Drayton v. Wells*, 1 Nott & McC. 409, 1819 WL 692. There, the South Carolina court considered the admission of a statement by a witness who had forgotten what he had previously testified to. The court stated:

The books enumerate four cases only, in which, the testimony of a witness who has been examined in a former trial, between the same parties, and where the point in issue was the same, may be given in evidence, on a second trial, from the mouths of other witnesses, who heard him give evidence: 1st. Where the witness was dead; 2nd. Where he was insane; 3rd. Where he was beyond seas; and 4th. Where the Court was satisfied that the witness had been kept away by the contrivance of the opposite party.

Id. at *2. Based on this reasoning, the court refused to admit the previous trial testimony. *Id.* at *3.

Another case cited in *Reynolds* that makes clear the importance of the defendant's intent to procure a witness's absence is *Queen v. Scaife*, 117 Eng. Rep. 1271. There, the court allowed an absent witness's earlier testimony, which was taken in front of a magistrate, to be admitted only against the defendant who had procured the witness's absence. The prosecutor had proved that a witness was kept away by the defendant Smith but there was no evidence that the other defendants, Scaife and Rooke, were involved in procuring the witness's absence. Allowing the deposition to be admitted against Smith only, Chief Justice Lord Campbell stated: "The prisoner Smith had resorted to a contrivance to keep the witness out of the way; and therefore the

deposition was admissible evidence against him: but it was not so against the other two prisoners. . . .” *Id.* at 1273.

In the last case cited by *Reynolds*, the Georgia court refused to admit an absent witness’s prior testimony taken before a magistrate. *Williams v. State*, 19 Ga. 403, 1856 WL 1804. Citing *Lord Morley’s Case* for the proposition that a defendant can forfeit his confrontation rights if he procures the witness’s absence, the court held that the state had presented insufficient evidence to support a finding “that prisoner had induced Thomas to absent himself from Court.” 1856 WL 1804, at *1.

Each of the decisions cited in *Reynolds* shares two important features. First, the central inquiry in each is whether the defendant specifically intended to prevent the testimony of an absent witness. Without proof of such specific intent, the prior testimony was excluded from trial. Second, each case considered whether to admit testimony given under oath at a coroner’s inquest, former trial or deposition taken before a magistrate.

2. Contemporaneous Definitions of the Terms “Procure” and “Contrive” Confirm the Specific Intent Requirement

The specific intent requirement is further reflected in the language used in the applicable cases, which makes clear the particular meaning these words held in English and early American common law. The term “procure,” which figures prominently in *Lord Morley’s Case*, 6 How. St. Tr. at 771, 777, and *Reynolds*, 98 U.S. at 158, and is also preserved in Federal Rule of Evidence 804(b)(6), clearly connotes a

deliberate intent to carry out a specific design. The leading dictionary of the early republic defines the term as follows:

1. To get; to gain; to obtain; as by request, loan, effort, labor or purchase.
2. To persuade; to prevail on.
3. To cause; to bring about; to effect; to contrive and effect.
4. To cause to come on; to bring on.
5. To draw to; to attract; to gain.⁷

1 NOAH WEBSTER, REVISED UNABRIDGED DICTIONARY (1828), *cited in Crawford*, 541 U.S. at 51. Notably, only one of these definitions (def. 3) arguably supports the lower court's forfeiture-by-causation theory, and then only if the first half of that definition is artificially read in isolation. *Cf. Jones v. United States*, 527 U.S. 373, 389 (1999) ("language must be read in context and a phrase gathers meaning from the words around it") (internal quotation marks omitted). As Webster's definition of "cause" ("That which produces an effect") (def. 2) further suggests, "cause" and "procure" are distinct.

The Oxford English Dictionary ("OED") likewise defines "procure" as "To contrive or devise with care (an action or proceeding); to endeavour to cause or bring about (mostly something evil) to or for a person." OED 559 (2d ed. 1989) (def. 2) (original

⁷ See also 1 CHARLES RICHARDSON, A NEW DICTIONARY OF THE ENGLISH LANGUAGE 1514 (London 1837) (defining "procure" as "to take *care* for; to take *care* or heed, (sc.) that any thing be done; to urge or endeavor, to manage or contrive that it be done; to acquire to obtain").

emphasis omitted) (citing uses from 1330-1608). Newer definitions of “procure” which appear in the OED confirm that the term assumes an intent to carry out a specific plan. *See, e.g., id.*, def. 4 (“To bring about by care or pains; also (more vaguely) to bring about cause, effect, produce”) (citing uses from 1340-1861); *id.*, def. 5 (“To obtain by care or effort; to gain, win, get possession of, acquire.”) (citing uses from 1297-1874).

The term “contrive,” used in two cases that *Reynolds* cited,⁸ is included within the previously quoted definitions of “procure,” and appears in at least one contemporaneous treatise to describe the standard for forfeiture of Confrontation Clause rights.⁹ Like “procure,” “contrive” clearly connotes a deliberate intention to carry out a specific design or plan. Thus, Webster’s defines the term as “To invent; to devise; to plan.” WEBSTER’S, *supra*, def. 1. The OED is even more illuminating, defining the term as “To invent, devise, excogitate with ingenuity and cleverness any plan or purpose” and “[especially]

⁸ *See Queen v. Scaife*, 117 Eng. Rep. at 1273 (“The prisoner Smith has *resorted to a contrivance to keep the witness out of the way*, and therefore the deposition was admissible evidence against him.”) (emphasis added); *Drayton v. Wells*, 1 Nott. & McC. 409, 1819 WL 692, at *2 (holding that “where the Court was satisfied that *the witness had been kept away by the contrivance of the opposite party*,” the “testimony of a witness who has been examined in a former trial, between the same parties, and where the point in issue was the same, may be given in evidence, on a second trial, from the mouths of other witnesses, who heard him give evidence.”) (emphasis added).

⁹ *See* SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAWS OF EVIDENCE 154 (1st ed. 1814).

used of the planning or plotting of evil devices, treason, treachery, murder, etc.” OED 851 (def. 1) (citing uses from 1325-1864).

Thus, as understood at the founding, both “procure” and “contrive” assume an intent to use a particular means to bring about, endeavor toward, prevail, or obtain a particular result with a plan or purpose. The terms do not mean merely “to cause,” but instead contemplate an endeavor or scheme to cause something particular to occur.

3. Contemporaneous Treatises Reflect the Procurement Exception’s Emphasis on Specific Intent

Three contemporary treatises cited in *Reynolds* confirm the Court’s recognition that specific intent is a necessary condition of the absence-procured-by-defendant rule. The Court relied on these authorities for the principle “that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence.” 98 U.S. at 158-59 (citing 1 GREENLEAF, EVIDENCE, § 163; 1 TAYLOR, EVIDENCE, § 446; 1 WHARTON, EVIDENCE, § 178). This limitation—that a witness be “kept away by the adverse party”—makes clear that the absence-by-procurement doctrine turned on the defendant’s specific intent.

Each of these treatises indicates that the procurement exception applies only when the defendant has intentionally procured the absence of the witness or kept the witness away to prevent his testimony. Thus, Greenleaf explains the absent witness exception as follows:

In the fifth class of exceptions to the rule rejecting hearsay evidence may be included the testimony of deceased witnesses, given in a former action, between the same parties It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick, and unable to testify, or has been summoned, *but appears to have been kept away by the adverse party.*

1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 198 (13th ed. 1876) (emphasis added).¹⁰

Other leading treatises published before the *Reynolds* decision confirm that at common law the procurement exception applied only when the defendant had kept the witness away for the purpose

¹⁰ See also JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE 465 (6th ed. 1872) ("The proposition that, *if a witness be kept out of the way by the adversary*, his former statements on oath will be admissible, rests, partly, on the authority of several decisions both in the civil and criminal courts; partly, on the analogies furnished by one or two statutes; but chiefly, on the broad principle of justice, which will not permit a party to take advantage of his own wrong. In case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them, the court held that his deposition *might be read in evidence as against the man who had kept him out of the way*, but should not be received against the other two men." (citations omitted) (emphasis added)). See also FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES 170 (8th ed. 1880) ("In criminal cases the testimony of a former witness, *corruptly or otherwise unlawfully kept from court by the party against whom he is called*, it has been held, may be in like manner reproduced, the defendant in the former trial having had the opportunity of cross-examining the witness.") (emphasis added).

of preventing his testimony at trial. See GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 125 (6th ed. 1801) (stating that previous testimony is admitted when “when it can be proved on oath, that the witness is detained and kept back from appearing by *the means and procurement of the prisoner.*”) (emphasis added); SAMUEL MARCH PHILLIPPS, *A TREATISE ON THE LAWS OF EVIDENCE* 154 (1st ed. 1814) (witness’s former testimony may be read despite hearsay objection “if it can be proved, that he has been kept away by the *contrivance* of the other party.”) (emphasis added); EDMUND POWELL, *THE PRACTICE OF THE LAW OF EVIDENCE* 166 (1st ed. 1858) (procurement exception applies when the witness “had been kept out of the way by the prisoner, or by some one on the prisoner’s behalf, *in order to prevent him from giving evidence against him*”) (emphasis added).

Each of the treatises confirms the common law requirement that the defendant have acted to keep the witness away through contrivance or procurement to prevent the witness’s testimony. By contrast, not one even suggests that a defendant would forfeit his confrontation rights if he killed a witness without the intention of preventing his testimony. The treatises recognize a further additional limitation on the procurement exception—the hearsay statement must have been originally made by the absent witness under oath “either orally in court, or in written depositions taken out of court.”

1 GREENLEAF, *supra*, at 198.

B. This Court's Post-*Reynolds* Decisions Further Confirm the Specific Intent Requirement

This Court's decisions applying *Reynolds* and its progeny also provide no support for the broad forfeiture rule adopted by the court below. In the 125-year period between *Reynolds* and *Crawford*, *Reynolds* has been applied in only three cases: *Eureka Lake & Yuba Canal Co. v. Superior Court of Yuba Co.*, 116 U.S. 410 (1886), *Motes v. United States*, 178 U.S. 458 (1900), and *Diaz v. United States*, 223 U.S. 442 (1912). *Motes*, in turn, was applied in *Douglas v. Alabama*, 380 U.S. 415 (1965). The central issue in each of these cases was whether the defendant abused his constitutional right to confrontation in order to manipulate or thwart the judicial system.

Eureka Lake upheld service of process on a corporation by nontraditional means when the corporate agent intentionally avoided the process server. Relying on *Reynolds*, the Court held that the corporation forfeited its usual right to service of an order to show cause upon an officer or agent because the officers or agents kept themselves out of the way "for the express purpose of avoiding service." 116 U.S. at 418.

In *Motes*, a witness for the prosecution, Taylor, who was in state custody, absconded immediately before he was called to testify at trial. When Taylor could not be located, the trial court admitted a statement by Taylor taken at a preliminary examination where the defendants had no opportunity for cross-examination. 178 U.S. at 467-71. Relying on *Reynolds*, this Court held that the

admission of Taylor's statement violated the defendants' confrontation rights because "there was not the slightest ground in the evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement or with the assent of either of the accused." *Id.* at 471-74.

In *Diaz*, the defendant introduced into evidence hearsay statements of witnesses who were absent from trial. 223 U.S. at 449-50. Relying on *Reynolds*, this Court held that because the defendant, "by his voluntary act," introduced the evidence and "thereby sought to obtain an advantage from it," he waived his right to confrontation. *Id.* at 452-53.

Finally, in *Douglas v. Alabama*, 380 U.S. 415, the prosecution sought to introduce an accomplice's pre-trial confession that implicated the defendant, because the accomplice had invoked his Fifth Amendment privilege against self-incrimination and refused to testify. *Id.* at 417-18. This Court held that the defendant's inability to cross-examine the accomplice about the alleged confession "plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.* at 419. Under these circumstances, the Court explained, the testimony could come in without violating the Confrontation Clause only if the accomplice's refusal to testify was "procured by the petitioner"—that is, only if the defendant had engaged in conduct that undermined the integrity of the judicial system. *Id.* at 420.

These cases confirm that *Reynolds*' specific intent holding was no anomaly, but a well-established feature of this Court's nineteenth and twentieth century Confrontation Clause jurisprudence. Perhaps

more importantly, these cases demonstrate the novelty of the lower court's forfeiture-by-causation doctrine—a doctrine untethered to the specific intent requirement that this Court has adhered to since *Reynolds*.

III. THE MODERN FORMULATION OF THE PROCUREMENT EXCEPTION AS A WAIVER OR FORFEITURE BY MISCONDUCT DOCTRINE CONTAINS A SPECIFIC INTENT REQUIREMENT

Federal and state courts have consistently applied the forfeiture rule only in cases where there was witness tampering and required proof that the defendant specifically intended to prevent the witness's testimony.

In December 1976, *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), became the first modern federal circuit decision to apply the procurement or contrivance exception. Although the court referred to the exception as a "waiver" doctrine, the change in terminology did not change the underlying standard; the waiver/forfeiture rule was applied in *Carlson* to deal with witness tampering by the defendant. For some thirty years—until some courts like the California Supreme Court interpreted *Crawford* to deny confrontation rights to defendants whose misconduct caused the unavailability of a witness but without any specific intent to tamper with the witness—federal and state courts applied the forfeiture rule only in cases where there was witness tampering and required proof that the defendant specifically intended to prevent the witness's testimony.

Starting in 1976, federal courts began to expand the concept of a prior statement by a “witness” to include statements made when the defendant had no opportunity for cross-examination. In *Carlson*, a person who had testified before the grand jury did not appear at trial because defendant intimidated him. The court noted that it could not identify any previous federal or state cases involving admission of prior grand jury testimony under the intentional witness tampering rule, *id.* at 1358, but upheld the admission of the witness’ grand jury testimony because it exhibited indicia of reliability insofar as it had been under oath and subject to the sanction of perjury and because “the law [should not] permit an accused to subvert a criminal prosecution by causing witnesses not to testify who have, at the pretrial stage, disclosed information which is inculpatory as to the accused.” *Id.* at 1359.¹¹ Thus, *Carlson* still limited what it termed the “waiver” doctrine to a defendant’s deliberate tampering with a person who was a “witness” at least in the sense of having previously given sworn testimony about the crime.

Following *Carlson*, courts applied the deliberate witness-tampering rule to cases in which the defendant deliberately prevented the appearance of a person who simply had provided information informally in an ongoing investigation of a crime and

¹¹ It should be noted that this curtailment of the earlier confrontation right in *Carlson* occurred during the period in which the confrontation right was effectively subsumed under a reliability-focused hearsay inquiry such as that articulated in *Ohio v. Roberts*, 448 U.S. 56 (1980). Of course, this Court repudiated the *Roberts* formulation as an inadequate construction of the confrontation right in *Crawford*.

who was anticipated to appear as a witness in a reasonably foreseeable future trial of that crime. For example, in *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996), a drug racketeering and murder case, the court permitted the admission into evidence of unsworn recorded statements which a member of the drug gang had made to police prior to his own murder by the gang. The statements incriminated the defendants in previous murders and on-going drug distribution crimes. The informant's statements were admitted because evidence showed defendants had "successfully conspired to execute [the witness] for the express purpose of preventing his cooperation with the authorities." *Id.* at 1278 (emphasis added). Although the court recognized that "the reported cases" relating to the "waiver by misconduct" exception to the confrontation right "all appear to involve actual witnesses" who had previously given formal testimony, the court concluded that:

the waiver-by-misconduct doctrine should ... apply with equal force if a defendant intentionally silences a potential witness ... in order to prevent him from assisting an ongoing criminal investigation ... as long as it is reasonably foreseeable that the investigation will culminate in the bringing of charges ... [because] it is *the intent to silence* that provides notice [that defendants were waiving their trial right of confrontation when they deliberately tampered with the potential witness].

Id. at 1279-80 (emphasis added).

Effective December 1, 1997, this Court promulgated Federal Rule of Evidence 804(b)(6). 171

F.R.D. 708 (Apr. 11, 1997). The Rule “codifies the forfeiture doctrine.” *Davis*, 126 S. Ct. at 2280. Entitled “[f]orfeiture by wrongdoing,” the Rule expressly incorporates the specific intent requirement:

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.

(Emphasis added).

As the text makes clear, “forfeiture by wrongdoing” requires both (1) causation (that the defendant in fact procured the unavailability of the witness) and (2) specific intent (that the defendant specifically “intended to” render the witness unavailable).

Not only the text of Rule 804(b)(6) but also the decisions the rulemakers relied on in considering the Rule provide that the defendant’s specific intent to prevent the witness’s testimony is required before “forfeiture by wrongdoing” may be found. The Advisory Committee’s notes list a number of decisions illustrating the working of the forfeiture doctrine. 117 F.R.D. at 719. Two of the decisions involved a murder of the witness in question; both required an explicit finding that the defendant murdered the witness for the specific purpose of preventing the witness’s testimony.

In *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982), the defendant had been convicted of both

RICO violations and conspiracy to violate the civil rights of a principal government witness by murdering the witness. Although the trial court based its admission of the decedent witness's testimony on Rule 804(b)(5), the panel found that "other grounds support the admission of the [witness's] statements" and that defendant's "waiver of his right to confrontation in these circumstances also constituted a waiver of any hearsay objection." *Id.* at 629-30. Relying on the trial court's finding that the defendant "killed [the witness's] because [the witness] intended to testify against him," *id.* at 624, the court upheld admission of the witness's out-of-court testimony; "a defendant who causes a witness to be unavailable for trial *for the purpose of preventing that witness from testifying* . . . waives his right to confrontation under the *Zerbst* standard." *Id.* at 630 (emphasis added).¹² The *Thevis* panel made clear that a waiver or forfeiture of Confrontation Clause rights requires a finding of both causation *and* specific intent to silence the witness: "Whether a waiver existed in this case requires analyzing two separate questions: whether a defendant's murder of a witness *for the purpose of preventing his testifying at trial* constitutes a valid waiver, and what standard of proof the government must bear in proving that waiver." *Id.* (emphasis supplied).

¹² In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), this Court stated that to constitute a valid waiver of a constitutional right there must be "an intentional relinquishment or abandonment of a know right or privilege" by the accused.

The Advisory Committee notes cite to a second murder case, *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982). In that case, the defendant, convicted of various drug charges, appealed the admission into evidence of hearsay testimony from a murdered witness. The Second Circuit panel remanded to the district court for an evidentiary hearing on defendant's involvement in the murder of the witness. On remand, the trial court framed the question as whether defendant had "effectively waived his rights under the confrontation clause of the sixth amendment through complicity in the murder of the principal witness against him." *United States v. Mastrangelo*, 561 F. Supp. 1114, 1115 (E.D.N.Y. 1983). The court identified the defendant's prior statement that the witness would never take the stand as "evidence of [defendant's] *intent* to prevent [witness] from testifying, or, at least, of his knowledge that others would prevent [witness] from testifying" and included that finding as a factor in deciding to apply the doctrine. *Id.* at 1120. The decisions in *Thevis* and *Mastrangelo*, both expressly relied upon by the rulemakers, demonstrate that the "waiver by misconduct" doctrine required a showing of specific intent on the defendant's part to prevent the witness's testimony as a condition for allowing out-of-court testimony from a murdered witness.

The drafters of Rule 804(b)(6) were plainly concerned with witness tampering. The Advisory Committee note state that the Committee "recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself,'" and cites cases in which defendants or their agents acted to prevent

testimony. 163 F.R.D. at 157 (citing *Mastrangelo*, 693 F.2d at 273 (murder); *United States v. Aguiar*, 975 F.2d 45 (2d Cir. 1992) (threats); *United States v. Potamitis*, 739 F.2d 784, 788-89 (2d Cir. 1984) (same); *United States v. Balano*, 618 F.2d 624, 629-30 (10th Cir. 1979) (same); *Carlson*, 547 F.2d at 1352-53 (same); and *Steele v. Taylor*, 684 F.2d 1193, 1198-99 (6th Cir. 1982) (influence)).¹³

The history of the Rule shows that the initial draft also contained the specific intent element but was entitled “waiver by misconduct,” the nomenclature used by most federal courts. During the drafting process, the Committee substituted the word “forfeiture” for “waiver” because it believed that “forfeiture” better described the rationale of the rule. It also substituted “wrongdoing” for “misconduct” to make the rule consistent with Federal Rule of Evidence 804(a). The change in the title did not change the scope of the rule. The intent-to-silence element remained in the rule despite the Committee’s preference for the language of “forfeiture” in the title of the rule.¹⁴

¹³ The Committee rejected a proposal that the Rule refer expressly to witness tampering because it believed that the text made clear that the rule applied only when the object was to procure the witness’s absence. Advisory Committee on Evidence Rules, Minutes of the Meeting of April 22, 1996.

¹⁴ The Advisory Committee’s minutes are sparse, but they clearly indicate that the change in title was not intended to change the rule:

A number of objections were voiced about the text of the proposal: 1. that “forfeiture” rather than “waiver” more appropriately captures the rationale underlying the rule. . . .

IV. THE CALIFORNIA SUPREME COURT'S
ATTEMPT TO CREATE A BROAD EQUITABLE
FORFEITURE DOCTRINE IS INCONSISTENT
WITH *CRAWFORD'S* UNDERSTANDING OF
THE CONFRONTATION RIGHT

Noting the post-*Crawford* response of some courts to “focus on the equitable forfeiture rationale [so as to] eliminate the need for evidence of witness tampering and broaden the scope of the rule to all homicide cases,” J.A. 46, the California high court in this case embraced an application of the forfeiture rationale creating a categorical exclusion from Sixth Amendment confrontation rights for all witness-homicide cases. This sweeping application of the doctrine cannot be squared with this Court’s Sixth Amendment jurisprudence.

As this Court’s decision in *Crawford* makes clear, the Sixth Amendment right of confrontation reflects a particular vision of what a criminal trial should look like. Rejecting “the civil-law mode of criminal procedure, and particularly its use of *ex parte*

3. that the rule should be written so that it will apply only when the defendant’s intent is to tamper with a witness. . . .

The Committee agreed that “forfeiture” is a more appropriate term than “waiver” and voted to make that change in the rule and accompanying note. . . .

The Committee thought it unnecessary to rewrite the rule to refer specifically to witness tampering because the proposed test states that the rule applies only in instances in which the party’s objective was to “procure the unavailability of the declarant as a witness.” Advisory Committee on Evidence Rules, Minutes of the Meeting of April 22, 1996.

examinations as evidence against the accused,” the Framers chose to follow the practice of early American and common law courts, which demanded that witnesses testify in-court, under oath, in the presence of the jury, and subject to cross-examination by the accused. *Crawford*, 541 U.S. at 50; *see id.* at 43 (“The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.”).

Crawford also teaches that courts may not undermine the Founders’ vision of how criminal trials are to be conducted through creative judicial policymaking. *See, e.g., id.* at 54 (“The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”); *id.* at 67 (“The Framers ... were loath to leave too much discretion in judicial hands.”). Thus, the Court observed that while the “ultimate goal” of the Confrontation Clause “is to ensure reliability of evidence,” the right of confrontation is ultimately “a procedural rather than a substantive guarantee.” *Id.* at 61. “It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.*

The expansive new forfeiture doctrine adopted by the California Supreme Court is completely at odds with this understanding of the Confrontation Clause. In at least two ways, the lower court’s ruling ensures that forfeiture—not confrontation—will be the norm in criminal trials where the forfeiture-by-causation doctrine is applied.

First, California's forfeiture doctrine excludes an entire class of criminal defendants—i.e., homicide defendants (and perhaps others who allegedly physically or psychologically caused the victim's unavailability)—from the protections of the Confrontation Clause. As petitioner's case well illustrates, any time a defendant is charged with murder, any and all of the alleged victim's prior statements will be admissible against the defendant, both in the murder case and in any other prosecution to which the statements might relate.

This result is plainly inconsistent with the text of the Sixth Amendment, which provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him" in "*all* criminal prosecutions." Amdt. 6 (emphasis added). There is no principled basis for exempting homicide suspects from the protection of the Confrontation Clause. Indeed, as *Crawford* recognized, it is in trials for the gravest offenses that the right of confrontation is most urgently needed. *Crawford*, 541 U.S. at 44 (noting "[t]he most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries.").

Second, the logic of California's forfeiture rule could be applied to any traumatic crime, even if the alleged victim is physically able to appear and testify. Already, prosecutors and other commentators have suggested that the defendant should forfeit his right to confrontation whenever a witness refuses to testify due to the trauma of an alleged criminal act. See, e.g., Adam M. Krischer, "*Though Justice May be Blind, It Is Not Stupid*," *Applying Common Sense To Crawford In Domestic Violence Cases*, 38

PROSECUTOR 14, 15-16 (Nov.-Dec. 2004) (arguing that perpetrators of domestic violence automatically forfeited their right to confront their victims); Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 469-70 (2006) (arguing that the existence of a battering relationship is sufficient to excuse the appearance of an otherwise available alleged victim and to conclude that the defendant caused the witness's absence). Under this logic, when there is plausible evidence that the defendant is responsible for the traumatising crime, the alleged victim's testimonial hearsay would be admitted, even if the victim has independent, personal, or self-serving reasons for not appearing, such as concerns about privacy, possible self-incrimination, prior inconsistent statements, or the desirability of preserving pre-existing relationships.

The expansive rule of forfeiture by wrongdoing also undermines the prosecution's incentive to locate and present the witness to the fullest extent feasible whenever previous testimonial hearsay statements are available. Of course, cross-examination of an officer repeating hearsay is not an effective substitute for cross-examination of the declarant, because the officer who merely heard the hearsay statement cannot modify or recant it.

Moreover, the California court fundamentally misconstrued the scope of its equitable power to limit a defendant's constitutional rights. Equity does not mean that courts can take whatever measures they happen to think is fair based on the defendant's alleged misconduct. In the context of constitutional

criminal procedure rights, forfeiture of those rights requires conduct that intentionally undermines the judicial process or threatens to “destroy the integrity of the criminal-trial system.” *Davis v. Washington*, 126 S. Ct. at 2280; *see, e.g., Illinois v. Allen*, 397 U.S. 337, 343 (1970) (defendant forfeits his right to be present at trial when, “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”); *Taylor v. United States*, 414 U.S. 17 (1973) (defendant forfeits his right to be present at trial by voluntarily absenting himself from trial); *Walder v. United States*, 347 U.S. 62, 65 (1954) (defendant forfeits his right to exclude physical evidence obtained in violation of the Fourth Amendment when he resorts to offering “perjurious testimony in reliance on the Government’s disability to challenge his credibility”); *Taylor v. Illinois*, 484 U.S. 400 (1988) (defendant forfeits his right to present a witness when he willfully refrains from providing discovery on a timely basis in order to obtain a tactical advantage at trial); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (defendant forfeits his right to suppress a voluntary confession taken in violation of *Miranda* when he exploits the suppression ruling by taking the stand and testifying inconsistently with the confession).

Reynolds makes clear that this same conception of equity—one protecting against intentional attempts to thwart, disrupt, or manipulate criminal proceedings—governs forfeiture doctrine in the

context of the right to confrontation. A defendant who procures or contrives to arrange for an adverse witness's absence, specifically intending to subvert the truth-seeking process, is rightly prevented by equitable principles from taking advantage of that wrong by asserting his confrontation rights. But confrontation rights cannot be subject to forfeiture simply because of the defendant's wrongdoing for which he is being tried; forfeiture is appropriate only if he has actually engaged in specific conduct to manipulate the trial process.

When the witness is "absent by [defendant's] procurement," evidence of that person's prior hearsay statements may come in because the defendant "is in no condition to assert that his constitutional rights have been violated." *Reynolds*, 98 U.S. at 158. It is this particular wrongful conduct, which derogates from the accuracy of the trial process, that the *Reynolds* court was referring to when it invoked the principle of equity: "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong" *Id.* at 159. "[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." *Davis*, 126 S. Ct. at 2280 (emphasis in original.)

The very concern expressed in *Reynolds* for protecting the integrity of the trial process requires a narrow conception of the forfeiture doctrine, for "denial or significant diminution [of Confrontation

Clause rights] calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined.” *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (citation omitted). Confrontation rights can be forfeited not as an additional penalty for alleged wrongdoing but only where the defendant has specifically interfered with an effective trial process.

When a defendant invokes his confrontation right with respect to a potential witness whom he killed for purely personal reasons, he does not benefit from the wrongful killing of that witness in the same way as a defendant who has caused the absence of a witness for the purpose of preventing testimony at trial. In the witness-tampering context, benefit follows design: the defendant seeks to benefit from the acts he has taken to arrange for the witness’s unavailability. Under the California court’s broad forfeiture doctrine, however, there is no requirement of any design at all to benefit in an anticipated trial from the killing of a victim. Of course, there is a causal connection between the defendant’s killing of the witness and the witness’s absence at trial, but factual causation is not sufficient because forfeiture requires a specific intent to interfere with the trial process itself.

The California court is fundamentally mistaken in treating *Crawford’s* formulation of the confrontation right as a “benefit.” J.A. 54-55. The Confrontation Clause provides the “bedrock procedural guarantee” that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” *Crawford*, 541 U.S. at 42 (quoting Amdt. 6). A defendant’s right to confront and cross-examine the witnesses against him is not a “benefit”

that accrues to a defendant as a result of his crime, it is a central procedural safeguard whose "very mission [is] to advance the accuracy of the truth-determining process in criminal trials." *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (citing *Dutton v. Evans*, 400 U.S. 74, 89 (1970)) (internal quotation marks omitted). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

Except where the defendant engages in conduct specifically designed to undermine the integrity of the trial process, the defendant's confrontation rights should be unimpaired. In this context, the California Supreme Court's concern about a defendant benefiting from wrongdoing is entirely misplaced. The defendant "benefits" only in the sense that the system does not take away his core rights as the accused. The state must prove its case without relying on testimonial hearsay statements that are not capable of being tested in the "crucible of cross-examination." *Crawford*, 541 U.S. at 61. That central teaching of *Crawford* should be a source of pride in our constitutional order, not a reason for expanding the forfeiture rule in a wholly unprecedented manner.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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