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NO. 07-6053

IN THE

Supreme Court of the United States

DWAYNE GILES, *Petitioner,*

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a defendant who murders a witness may complain that the witness is unavailable for cross-examination.

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STATEMENT OF THE CASE

1. The State of California charged petitioner Giles with the first-degree murder of Brenda Avie. The prosecution produced witnesses who testified about the following events on the night of the crime and afterward:

a. Petitioner was "socializing" with others outside his grandmother's house on the evening of September 29, 2002. His niece was there, as was his girlfriend, Brenda Avie. After petitioner's niece had gone into the house for a while, she suddenly heard Ms. Avie exclaim "Granny!" and the sound of several gunshots. Petitioner's niece and his grandmother ran outside. Ms. Avie was lying on the ground and bleeding. Petitioner, a few feet away, was holding a nine-millimeter pistol. J.A. 32-33.

Petitioner's grandmother took the gun from him and called "911." At petitioner's request, his niece drove him away in her car. After several blocks, however, petitioner jumped from the car and ran away. J.A. 33.

The police arrived. They retrieved the gun from petitioner's grandmother. But they found no other weapon or purse near Ms. Avie. J.A. 34.

An autopsy revealed that Ms. Avie had been shot six times. Each of two separate gunshot wounds—perforations of her aorta and her liver—was serious enough alone to kill her. The location of one bullet wound indicated that she had been holding up her hand at the time of one gunshot. The location of another indicated that she had turned to her side. The location of a third indicated that she had been shot while lying on the ground. J.A. 33-34.

At the end of its case-in-chief, the prosecution called police officer Stephen Kotsinadelis to testify about a previous incident—a few weeks earlier, on September 5—in which the officer had taken a report from Ms. Avie describing domestic violence inflicted on her by petitioner. Petitioner objected that the evidence was inadmissible

under state law. But the trial judge allowed the testimony as admissible hearsay under California Evidence Code § 1370. J.A. 15, 35-36.

Officer Kotsinadelis testified that petitioner, appearing agitated, had answered at the door and allowed the officer and his partner to enter. Ms. Avie was sitting on the bed, crying. Officer Kotsinadelis interviewed her while his partner remained with petitioner in a different room. Ms. Avie said that she had been talking on the phone with a friend when petitioner became angry and accused them of having an affair. Then, she said, petitioner grabbed her by the shirt, lifted her off the floor, and began to choke her. She broke free and fell to the floor, but petitioner climbed on top of her and punched her in the face and head. Petitioner, she continued, opened a folding knife, held it about three feet from her, and said, "If I catch you fucking around, I'll kill you." Officer Kotsinadelis saw no marks on Ms. Avie; but he was able to feel a bump on her head. J.A. 35-36.

b. Petitioner relied on self-defense. He testified that, even though they had a relationship that included living together from 1998 to 2002, Ms. Avie once had attacked him with a knife, had confronted other women in his presence with a knife, and had told petitioner she once had shot a man during an argument. J.A. 34. Other defense witness testified that they had been subjected to violence, threats, and harassment by Ms. Avie. R.T. 698-704, 734-741.

According to petitioner, Ms. Avie had phoned him at his grandmother's house and told him she was coming over to kill his new girlfriend, Tameta Munks. After petitioner sent Ms. Munks away, Ms. Avie arrived and this time threatened to kill both of them. Petitioner retrieved a gun he knew to be loaded, and disengaged its safety button so it would be ready to fire. Ms. Avie followed petitioner, he

testified, as he retreated down the driveway; in the darkness, he could not tell if she had a weapon. Although claiming that he had lowered his head and closed his eyes, petitioner acknowledged in his testimony that he pointed the gun at Ms. Avie, fired it, and kept firing until it was empty. J.A. 34-35. To continue firing the gun petitioner used, one would have to squeeze the trigger anew after each shot. R.T. 338-343.

c. The jury found petitioner guilty as charged of first-degree murder by means of a firearm. The judge sentenced him to state prison for a term of fifty years to life. J.A. 11.

2. Petitioner appealed to the California Court of Appeal. J.A. 1. While the appeal was pending, this Court issued its decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), holding that the Confrontation Clause applied to a witness' "testimonial" statements, but also "accepting" that a defendant may be held to forfeit his confrontation right if his own wrongdoing made the witness unavailable to testify at the trial. After the parties filed briefs on *Crawford's* effect on the case, the Court of Appeal rejected petitioner's confrontation claim and affirmed his conviction. J.A. 2, 18-27, 30. The court held that petitioner had forfeited his confrontation claim by wrongdoing when he killed Ms. Avie, regardless of whether his intent was to keep her from testifying. J.A. 18-23.

3. Petitioner sought and obtained review in the California Supreme Court. J.A. 4-5. The California Supreme Court affirmed petitioner's conviction. J.A. 66. It first set out this issue: "Defendant acknowledges that the forfeiture by wrongdoing doctrine is an exception to the Confrontation Clause, but argues that it is inapplicable because the defendant did not kill the victim with the intent of preventing her testimony at a pending or potential trial." J.A. 39. The court reasoned that *Crawford* and *Reynolds*

v. *United States*, 98 U.S. 145 (1879), had treated the doctrine as a "forfeiture" rule based on the principles that no one should profit from his wrongdoing and that no one may complain about what he himself has caused. J.A. 52. Thus, "wrongfully causing one's own inability to cross-examine is what lies at the core of the forfeiture rule." *Id.* Conversely, the state court explained, petitioner's proffered "intent" argument was based on a flawed theory of "waiver" of rights rather than forfeiture. J.A. 53.

The California Supreme Court recognized that forfeiture principles extend beyond tampering cases to cases "in which an intent to silence element is missing." J.A. 54. This was such a case: as the state appellate court had explained, "a defendant whose intentional criminal act renders a witness unavailable benefits even if it was not his intent." *Id.* The state supreme court further explained that application of the rule in such cases, without requiring proof of a motive to tamper, protects the "integrity of court proceedings." J.A. 55. And it noted that petitioner himself had introduced evidence of Ms. Avie's out-of-court statements to portray her as violent, aggressive, and volatile. J.A. 56. Pointing out that petitioner "no longer disputes" the point, the state court further concluded that the doctrine applies in a case where the wrongdoing is the same as the offense for which the defendant is on trial. J.A. 59.

The California Supreme Court set out limitations on its holding. There must be a showing of "genuine" unavailability that was "caused" by the defendant's "intentional criminal act." J.A. 64. The State must prove the wrongdoing by a "preponderance of the evidence"; and that proof may not consist solely of the unavailable declarant's hearsay but instead must be corroborated by "independent evidence." J.A. 64. Further, the forfeiture bars only the defendant's objections based on the lack of

confrontation of the witness he prevented from appearing. The hearsay statement still must qualify as an exception to the state-law hearsay rule and other rules of evidence. J.A. 64.

SUMMARY OF ARGUMENT

I. When the defendant has murdered the witness, he may not still insist on his "right" to cross-examine her at his trial. It makes no difference whether his motive for killing her was to make her unavailable to testify against him in court.

a. It is not only irrepressible human intuition that leads to the conclusion that such serious misconduct by the defendant is inimical to his confrontation right. The ancient maxim that "no one may profit from his wrongdoing" provides the legal basis for the conclusion that a defendant who murders the witness forfeits his trial right to confront her about her out-of-court statement. And the principles that traditionally have animated the confrontation-forfeiture doctrine—equitable considerations of fairness, necessity, and the integrity of the truth-finding function of the criminal trial—operate with compelling force where the defendant has murdered the witness.

Murder is the ultimate act of "unclean hands." Of all forms of wrongdoing, moreover, homicide is the one that makes it most clear to the defendant that his victim will not be available for any future proceeding. Equally fundamental, it would damage the integrity of the criminal justice system to allow the killer to exclude his victim's testimony in his murder prosecution. The loss of the victim's evidence subverts the truth-finding mission of the courts. And excluding the victim's out-of-court testimony would prejudice even further the interests of the State—the party already deprived of the victim's live testimony by the defendant's wrongdoing. Such

wrongdoing causes the same damage in any given case, whether or not the defendant might have set out specifically to tamper with the proceeding.

b. Dating back to the era when the Confrontation Clause was adopted, equitable principles underlying the forfeiture doctrine were accepted, in English cases such as *Lord Morley's Case* in 1666, as the explanation for admitting the statements of witnesses whom the defendant wrongfully had kept away from his trial. Later, the same equitable considerations provided the acknowledged justification for the "dying declarations" rule. That rule allowed into evidence at the defendant's murder trial the un-sworn and un-cross-examined statements of the homicide victim—regardless of whether the defendant had struck the fatal blow for the purpose of tampering with a prospective witness. In those essential respects, the dying declaration bears a "striking resemblance" to the statements admitted in this case without cross-examination and regardless of any witness-tampering motive on the part of petitioner.

c. This Court has explicitly endorsed a forfeiture doctrine that permits rejection of a defendant's confrontation claim on equitable grounds when he seeks a windfall from his wrongdoing. It also has credited the validity of the dying-declarations rule—a rule that specially admits the victim's statements in the defendant's murder trial regardless of the motive for the murder. Further, this Court's precedents in a variety of other settings demonstrate that a defendant may be precluded from asserting a constitutional claim precisely because of conduct inimical to the right he asserts and regardless of his original motive or subjective understanding of his conduct's implications.

d. Even if the defendant's murder of the witness did not virtually exhaust the forfeiture calculus, it still would

serve no legitimate purpose to inject a "motive" inquiry into this a murder case. The defendant would reap the same benefit from his wrongdoing regardless of his motive. The impairment of the integrity of the trial would be accomplished regardless of the defendant's motive. The prejudice to the State would remain the same regardless of his motive too.

Petitioner's argument for a motive requirement seems in part to be an artificial one of simply cutting down the number of instances in which defendants will be prevented from suppressing evidence of their victims' statements. Wherever forfeiture is justified, however, it should be invoked. Petitioner's other professed concern, that the forfeiture doctrine might be misapplied in other cases, is not at issue in this defendant-murders-victim case. Besides, long-standing procedures remain in place to protect against invocation of the forfeiture rule where the witness is not truly unavailable and to protect against the admissibility of unreliable evidence even where the defendant has forfeited his confrontation right.

II. Unavailable, also, are any arguments that oath and a prior opportunity for cross-examination remain prerequisites even where the defendant forfeits his right to confrontation at trial. No such objections were raised in the certiorari petition. Validating any such objection would deprive the doctrine of any effect. Finally, then-existing statutory and hearsay rules of the Framing era, on which petitioner relies, do not limit the scope of the forfeiture doctrine.

Precisely because he intentionally killed his victim in this case, and made her unavailable to testify in his murder trial, petitioner forfeited his right to confront her. The California Supreme Court correctly admitted evidence of the victim's statement over his meritless confrontation objection.

ARGUMENT

I.

A DEFENDANT WHO MURDERS A WITNESS MAY NOT COMPLAIN THAT THE WITNESS IS UNAVAILABLE FOR CROSS-EXAMINATION

Introduction.

Petitioner sought to exclude from his murder trial evidence of statements Brenda Avie made to the police three weeks before petitioner killed her. Petitioner claimed that admitting the statements violated his Confrontation Clause right because Ms. Avie was dead and thus not available to be cross-examined about them. Relying on this Court's acceptance of the "forfeiture by wrongdoing" doctrine, the state supreme court ruled that petitioner had forfeited his confrontation claim when he killed the witness and caused her absence from the trial.

Petitioner contends that the forfeiture doctrine applies, if at all, only in cases where the defendant's wrongdoing was motivated by an intention to keep the witness from testifying. Here, it is acknowledged, that was not shown to be the case. But his contention must be rejected.

The traditional justifications for admitting an absent witness' statement without confrontation are most cogent where the defendant caused the witness' absence by intentionally killing her. Framing-era law and this Court's precedents therefore recognized the admissibility in the homicide trial of the murder victim's un-cross-examined statements, and did so where the murder would not have been motivated by any desire to "tamper" with a witness.

A. Equitable considerations of fairness, necessity, and the integrity of the trial provide the historical foundation for the forfeiture-by-wrongdoing doctrine and govern its application in this case.

Where the defendant seeks to exploit his victim's absence from the trial, the forfeiture-by-wrongdoing doctrine vindicates the ancient legal maxim that no one may take advantage of his wrongdoing. On the question of forfeiture of confrontation, the maxim requires the court to consider the demands of fundamental fairness, the necessities of the case, and the integrity of the truth-finding function of criminal trials. Here, those considerations combine to dictate that petitioner must not be allowed to rely on the absence of the woman he killed as a reason for excluding her out-of-court statements in his murder prosecution.

1. In *Crawford* v. *Washington,* 547 U.S. 813, and in *Davis* v. *Washington*, 547 U.S. 813 (2006), this Court addressed the issue of whether the defendant may invoke the Confrontation Clause to require a court to exclude evidence of an absent witness' out-of-court statements where the defendant himself had wrongfully caused the witness' absence from the trial. This Court reiterated in those cases that it "accepts" the doctrine of "forfeiture by wrongdoing" that "extinguishes confrontation claims on essentially equitable grounds." *Davis*, at 833; *Crawford*, at 62. See *Snyder* v. *Massachusetts,* 291 U.S. 97, 106 (1934) ("no doubt" that the right of confrontation may be lost by misconduct); see, e.g., *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970). "One who obtains the absence of a witness by wrongdoing forfeits the constitutional right of confrontation." *Davis*, at 833.

Crawford traced its acceptance of the doctrine back more than a hundred years, to *Reynolds* v. *United States*, 98 U.S. 145. *Reynolds*, in turn, traced the doctrine to

England and the seminal seventeenth-century decision in *Lord Morley's Case*, 6 How. St. Tr. 869 (H.L. 1666). *Reynolds* explained the operation and the theoretical justifications for the forfeiture-of-confrontation doctrine:

> [T]he 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 support the place of that which has kept away. The Constitution does not guarantee an accused person against the legitimate consequence of his 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 (emphasis added). *Reynolds* specifically identified the historic legal maxim that supports the doctrine:

> *The rule has its foundation in the maxim that no one should be permitted to take advantage of his own wrong*; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. 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 the principles of common honesty,* and, if properly administered, can harm no one.

Id., at 159 (emphasis added).

The forfeiture doctrine recognized in *Crawford* and *Reynolds* thus may be explained in two overlapping ways. First, the Constitution does not "guarantee an accused

protection against the legitimate consequences" of his misconduct. 98 U.S. at 159. Second—and more powerfully—it would be intolerable if the defendant were allowed to profit in court from his wrongdoing.

The equitable maxim that no man may profit from his own wrong was long a part of common law. H. BROOM, A SELECTION OF LEGAL MAXIMS 202, 204 (3d ed. 1852); 1 HALE, PLEAS OF THE CROWN 482 (1726). It carried over to America too: it is "[d]eeply rooted in our jurisprudence." *Glus* v. *Brooklyn E. District Terminal*, 359 U.S. 231, 232-233 (1959). See *McDaniel* v. *State,* 16 Miss. 401 (1847) ("It would be a perversion of [the Confrontation Clause's] meaning to exclude the [dying declaration], when the prisoner himself has been the guilty instrument of preventing the production of the witness, by causing his death."); see also *State* v. *Houser*, 26 Mo. 431 (1858) (exclusion of dying declarations would be "abhorrent" to a "sense of justice.")

3. The forfeiture doctrine and its underlying principles serve other important policies consistent with the Sixth Amendment. As recognized by this Court, and by the California Supreme Court, courts need not "acquiesce" when the defendant acts in "ways that destroy the integrity of the criminal-trial system." *Davis*, 547 U.S. at 833. The forfeiture doctrine allows the court to protect the integrity of the trial. *Giles*, J.A. 57; see *id*.

The aspiration of fully developing all relevant facts is fundamental to the criminal justice system. *United States* v. *Nixon*, 418 U.S. 603, 709 (1974). The forfeiture-by-wrongdoing doctrine promotes the truth-seeking function of the trial by preventing the defendant from suppressing important, and often crucial, testimony of a witness when the defendant's own misconduct has made confrontation impossible. Here, for example, Brenda Avie's statement to the police provided significant circumstantial evidence on

the question of whether the charged homicide, as to which no eyewitnesses were available to the State, had been committed unlawfully and with premeditated intent to kill. See, *e.g., United States* v. *Garcia-Meza*, 403 F.3d 364, 365-366 (6th Cir. 2005). Where the defendant's misconduct frustrates cross-examination, the Confrontation Clause does not require courts to ignore "the necessities of the case," *Mattox* v. *United States*, 156 U.S. 237, 243 (1895), by excluding the victim's statements and permitting the defendant to present a one-sided account of events.

Consonant with its underlying equitable principles, the doctrine further protects the integrity of court proceedings by avoiding the prejudice the State would suffer if the defendant's wrongdoing were allowed to entirely deprive it of the witness' testimony. It also mitigates the prejudice the defendant causes when he wrongly deprives the State of the witness' testimony live and in court. As this Court has observed in the context of a confrontation claim, "[J]ustice, though due the accused, is due to the accuser too." *Snyder* v. *Massachusetts*, 291 U.S. at 122.

B. The doctrine's equitable principles, and their application to witness-killing cases throughout history and in this Court, dictate that the victim's statements are admissible over the defendant's confrontation objection if he murdered her.

These equitable justifications for the confrontation-forfeiture doctrine—fairness, necessity, integrity of the proceedings—no doubt permit the court to consider multiple factors. In terms of the basic conundrum—how to determine whether the consequences of the defendant's misconduct support the conclusion that he has forfeited his confrontation right—the most logical equitable considerations are the seriousness of the defendant's wrongdoing, the apparent predictability of the victim's

absence, and the seriousness of the charged crime. Other considerations might include the defendant's motive and the nature of the victim's evidence. The balance of such factors in an ambiguous case might be a delicate one.

But where the defendant intentionally kills the witness, the answer becomes clear. Murder falls in the worst class of wrongdoing and "unclean hands." The resultant unavailability of the witness for testifying in any future case will be obvious to all, including the defendant in committing the homicide. The murder prosecution itself is in the first rank among the most serious ones the State brings. The notion of allowing the killer to silence the victim on account of her absence in such cases is worse than unpalatable. It is intolerable.

Anglo-American legal history demonstrates that, in such cases and for those reasons, the justifications for applying the forfeiture doctrine become most powerful in the case where the defendant intentionally kills the witness. As this Court discerned in *Reynolds*, perhaps the earliest expression of the rationale for admitting unsworn and un-cross-examined statements where the defendant killed the witness extends back to the opinion in *Lord Morley's Case* in 1666. 98 U.S. at 159. A further manifestation of the rationale is the historic dying-declarations rule, one treated with clear approval in this Court's precedents. Consisting of the murder victim's unsworn statements and used against the defendant at his murder trial despite a want of confrontation and outside any conceivable witness-tampering context, dying-declarations bear a "striking resemblance," see *Davis*, 547 U.S. at 830; *Crawford*, 541 U.S. at 52, to the statements admitted against petitioner in this case.

1. The defendant's motive to "tamper" is insignificant in applying the forfeiture-by-wrongdoing doctrine to admit the murder victim's testimony against her killer.

a. The equity-based legal principle that no one may profit from his wrongdoing fits the facts of this case without regard to whether petitioner had a specific witness-tampering purpose when he killed Brenda Avie. To sustain petitioner's confrontation objection to evidence of Ms. Avie's statements would be to allow petitioner to benefit, by exclusion of the evidence, from the wrongdoing that caused her absence from the trial and that provided petitioner with the very grounds for his objection. He would be receiving that benefit as an exploitation of his own misconduct, whatever his state of mind at the time of the homicide. Indeed, this Court has applied the maxim without regard to whether a killer originally intended the benefit he later claims on account of his own act of homicide. See, *e.g., Mutual Life Ins. Co.* v. *Armstrong*, 117 U.S. 591, 600 (1886).

This Court in *Davis*, commenting that domestic-violence cases are especially susceptible to the commission of wrongdoing that keeps the victim from testifying, recognized that "[w]hen this occurs, the Confrontation Clause gives the defendant a *windfall*." 547 U.S. at 833 (emphasis added). The forfeiture doctrine prevents the defendant from cashing that particular check: "[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right of confrontation." *Id.*

As *Reynolds* indicated, the confrontation-forfeiture issue may be conceived in slightly different terms as a question of fundamental incompatibility between the defendant's misconduct and his claim of right. *Reynolds*, 98 U.S. at 159; see R. Friedman, *Confrontation and the Definition of Chutzpah*, 31 ISRAEL L. REV. 506. Whether

petitioner's conduct is viewed as an intolerable attempt to profit from wrongdoing, or as an untenable effort to have it both ways by seeking the very kind of legal protection his own actions have made impossible, extinguishment of petitioner's right follows inevitably. Killing Ms. Avie and making her unavailable for trial was absolutely inimical to petitioner's claim for cross-examination. See *United States* v. *White*, 116 F.3d 903, 910 (D.C. Cir. 1997); *Steele* v. *Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) ("A defendant cannot prefer the law's preference [for live testimony rather than out-of-court statements] and profit from it . . . while repudiating that preference by creating the condition that prevents it").

b. The same conclusion holds true in light of the forfeiture doctrine's concerns about judicial integrity, including fairness to the State as the opposing litigant. Regardless of the defendant's specific motive, the damage inflicted on the trial's truth-seeking function by the loss of the evidence in any particular case, and its one-sided replacement, remains the same. Regardless of the motive, the harm to the State also remains the same so long as the substance of the statement remains excluded on account of the witness' death.

c. Petitioner's suggestion that he would not "benefit" from excluding his victim's testimony on account of her absence (Pet. Br. 47) is simply not true. He reasons that "benefit follows design." But "benefit" follows more directly from the proximate conduct that makes it happen. Suppressing the victim's testimonial statements obviously would be a benefit to petitioner, else he would not be seeking it. That benefit follows from the inevitable and necessary consequences of his own act of murder.

Application of the forfeiture doctrine does not punish the defendant for his wrongdoing; the penal sanction takes care of that if need be. The forfeiture doctrine,

extinguishing confrontation claims, instead counters the wrongdoing's effects at trial. The killer, in objecting at trial, means to affect the proceedings and seeks an advantage on account of the ensuing absence of his victim. That purpose arises inevitably in all forfeiture cases; it is just a matter of time. Still, the defendant's trial objection is the wrongful act that causes the forfeiture. The wrongful act that renders the objection unmeritorious is the homicide. It is the seriousness of the crime and the evident predictability of the victim's absence at trial that drives the forfeiture ruling in this case, not the defendant's specific purpose at any particular point in time.

The forfeiture context is unlike the situation where the court honors a meritorious constitutional objection by suppressing a coerced confession or excluding the fruits of an unconstitutional search. See *Davis*, at 833. In obtaining neither ruling does the defendant ultimately improve his legal position on account of his wrongdoing.

d. If wrongdoing may override confrontation—and *Crawford* and *Davis* assure that it can—it must be seen to do so in cases where the defendant intentionally kills the witness. It is not an accident that petitioner is hard-pressed to cite a modern forfeiture case in which the murderer of the witness was held on appeal to retain his confrontation rights with respect to excluding her statements from his trial. Even courts that generally limit forfeiture to cases where the wrongdoing was motivated by witness tampering have also recognized that the rule well might be different in a case where the defendant's wrongdoing is that of killing the witness. See, e.g., *People* v. *Stechly*, 870 N.E.2d 333, 352-353 (Ill. 2007); *People* v. *Moreno*, 160 P.3d 242, 246 (Colo. 2007).

2. *Framing-era legal principles exemplified in* **Lord Morley's Case** *and the dying-declaration rule show historical equitable bases for admitting the witness' un-confronted statements where the defendant killed her, regardless whether the motive for the murder was to tamper with a proceeding.*

As a basic matter of logic and equity, the defendant's murder of the witness presents the strongest case for admitting the victim's out-of-court statements against him. The same judgment has been made by history. *Lord Morley's Case* in ancient law presents one example of equitable considerations in action where the defendant detains or kills a witness. The dying declarations rule, traditionally allowing evidence of the homicide victim's statements against the accused killer without cross-examination even where the homicide occurred outside any "witness tampering" context, provides another example compelling in its own right.

a. Lord Morley's Case.

i. *Lord Morley's Case*, 6 St. Tr. 770 (1666), is recognized as a progenitor of the forfeiture-by-wrongdoing confrontation doctrine. See *Reynolds*, 98 U.S. at 158. Under the rule that developed from *Lord Morley's Case*, evidence of the witness' out-of-court and un-confronted coroner's examination was admissible in the defendant's murder case where the witness' absence was caused by the "means or procurement" of the prisoner. See *Harrison's Case*, 12 St. Tr. 833 (1692), and *Fenwick's Case*, 13 How. St. Tr. 538 (1696). In that era, the defendant would not likely have been present at such coroner's examinations to confront the witnesses. PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64 (1802); see *Rex* v. *Eriswell*, 100 Eng.Rep. 815, 824 (1790).

Framing-era and post-Framing-era authorities gave distinct equitable justifications for the admissibility rule triggered in homicide cases where the witness was dead or the defendant kept the witness away. Gilbert's treatise explained that, "in these cases," the examinations amounted to the "utmost evidence" because the witness was dead; and that "so much more are such examinations to be read at trial when the witness is detained and kept back from appearing by the means and procurement of the prisoner," because the defendant "shall *never be permitted* to shelter himself by such evil practices on the witness, that being to give him advantage of his own wrong." GILBERT, THE LAW OF EVIDENCE 99-100 (1754) (emphasis added); PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 40-41 (1802). Referring to Taylor's treatise on evidence, similarly, the court in *Regina* v. *Scaife*, 117 Eng. Rep. 1271 (1851), identified support for the rule in the principle that "justice . . . will not permit a party to take advantage of his own wrong." *Id.* at 242; see also 2 HAWKINS, PLEAS OF THE CROWN (1716) (citing coroner's status). As this Court indicated in *Crawford,* 541 U.S. at 47, n.2, it cannot confidently be said that English law at the time the Sixth Amendment was proposed and adopted in 1789-1791 had curtailed the continuing admissibility of coroner's examinations such as those at issue in *Lord Morley's Case* and *Harrison's Case*. See T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 491-492 (2d ed. 1828); PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 41 (1802).

ii. Petitioner examines nineteenth century dictionary definitions and treatises in a vain effort to prove that the word "procure," which was used in *Lord Morley's Case* in describing the kind of absence-producing wrongdoing that triggered forfeiture, connotes a specific motive to tamper. (Pet. Br. 26 et seq.)

A basic flaw in petitioner's method is that it ignores the fact that *Lord Morley's Case* spoke not only of "procurement" but also of whether the witness was "detained by the *means*" of the prisoner. 6 How. St. Tr. at 770-771 (emphasis added). Petitioner in his brief understandably does not contend that a simple reference to "means" specially connotes "specific intent" and "deliberate design." The Oxford English Dictionary (Compact ed. 1971) defines "means" variously in terms of "proximate cause," "instrumentality," connoting an event "owing to" or "in consequence of" something. When the defendant's murder of a witness causes her absence at trial, she indeed has been made absent "by means . . . of the prisoner." Another flaw is that even petitioner's cited definition of "procure" includes "to cause"; "to bring about"; and "to cause to come on." None of these denotes a specific-intent design rather than bare physical causation. Petitioner's effort is strained and tendentious. Regardless, the important point is, instead, that the common law recognized the principles that underlie the forfeiture doctrine identified by this Court in *Reynolds* and *Crawford*.

Petitioner says that Rule 804(b)(6) of the Federal Rules of Evidence carries on the alleged tradition of inferring that to "procure" inherently involves a deliberate intention to carry out a plan. (Pet. Br. 26.) But the language of the rule suggests the opposite. It speaks of whether the defendant in his wrongdoing "intended to, and did, procure" the witness' unavailability. If it were so clear that "procure" clearly denotes specific intent, the added "intended to" language would not have been needed.

iii. *Lord Morley's Case* gave rise to a rule allowing into evidence un-confronted statements of a witness in a murder prosecution where the defendant's wrongdoing had caused the witness' absence. The principles that dictated

that rule pertain to the case at bar, which also involves the same conundrum of a defendant seeking to suppress on lack-of-confrontation grounds the statements of a victim killed or wrongfully kept away by the defendant himself.

b. Dying declarations.

i. The DNA of the forfeiture-by-wrongdoing doctrine can also be found in another ancestor: the dying-declaration rule that developed as part of criminal law at the time the Sixth Amendment was ratified. E.g., *Rex* v. *Woodcock*, 168 Eng. Rep. 352 (1789); *Rex* v. *Reason*, 16 How. St. Tr. 1, 24-38 (1721). The dying-declaration rule operated to admit in a murder prosecution—subject to certain criteria that did not pertain to compliance with any cross-examination process—a witness' out-of-court and un-cross-examined statements against the defendant who killed her. See *Crawford*, 541 U.S. at 56, n.6; S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 186 (1842). And, obviously, the fatal blow that would prompt a victim's dying declaration could be struck for myriad other reasons than the unlikely one of "witness tampering." In these essential ways, dying declarations bear a "striking resemblance" to the statements at issue in this case. That resemblance supports the conclusion that the admission of the challenged statements in this case comported with the Sixth Amendment. See *Davis*, 547 U.S. at 830.

ii. Further, the equitable justifications for admitting dying-declarations without confrontation would coincide with the justifications for dispensing with confrontation under this Court's forfeiture doctrine in virtually any case where the defendant seeks to exclude the statements of a witness he intentionally killed. The equity-based rationale that supported the admissibility of dying declarations at common law was that of necessity. "Evidence of this sort is admissible in this case on the fullest necessity; for it

often happens that there is no third person present to be an eyewitness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of." 1 E. EAST, A TREATISE OF THE PLEAS OF THE CROWN 353 (1803); accord, *State* v. *Ferguson*, 20 S.C.L. (2 Hill) 619, 624 (S.C. App. 1835); cf. *Omychund* v. *Barker*, 26 Eng. Rep. 15, 31 (1744). To exclude the dying declaration would be "abhorrent to . . . justice." *State* v. *Houser*, 26 Mo. 431 (1858); see also *State* v. *Thomas*, 64 N.C. 74 (1870) (rule justified by maxim that "no man shall take advantage of his own wrong.").

As recognized in early American cases, the seriousness of the crime of murder also played a significant role. See *Wilson* v. *Boerem*, 15 Johns Cas. 286, 291 (N.Y. Sup. Ct. 1818); see also *Jackson* v. *Kniffen*, 2 Johns Cas. 31, 35 (N.Y. Sup. Ct. 1806) (rule limited to "great crimes" where "public justice may otherwise . . . be defeated.") "[T]he exception stands on the ground of the public necessity of preserving the lives of the community by bringing manslayers to justice." *McDaniel* v. *State,* 16 Miss. 401 ("It is only permitted in cases of homicide, and the exception stands upon the ground of the public necessity of preserving the lives of the community, by bringing man-slayers to justice."); *Houser*, 26 Mo. 431; S. GREENLEAF, TREATISE ON EVIDENCE 187.

iii. Of special pertinence to petitioner's case, the dying-declarations rule applied peculiarly to allow admission of the victim's statements against the wrongdoing defendant in the criminal homicide case. See 2 WM. HAWKINS, PLEAS OF THE CROWN 619 (Leach ed. 1788.) That limitation corroborates the inference that a motivating concern for the rule was the fact that it was the defendant in particular who had killed the witness. See *McDaniel* v. *State,* 16 Miss. 401 ("It would be a perversion of [the Confrontation Clause's] meaning to exclude the proof, when the prisoner

himself has been the guilty instrument of preventing the production of the witness, by causing his death."). Given these justifications, the dying-declarations rule may be classified as a species of a forfeiture-by-wrongdoing doctrine.

iv. Petitioner and amicus NACDL contend that dying-declarations historically were admitted only because they were especially reliable and not because the defendant was thought to have forfeited his confrontation rights by killing the witness. (Pet. Br. 15; NACDL Br. 16.) But their "reliability" answer begs the question. As this Court explained in *Crawford*, there was "no general reliability exception to the common-law rule" of confrontation. 541 U.S. at 61. The common-law principle, as enshrined in the Confrontation Clause, was a procedural one commanding "not that evidence be reliable, but that it be assessed in a particular way: by testing in the crucible of cross-examination." *Id.*

Instead, as just explained, the admissibility of dying-declarations without confrontation depended on other reasons—the necessity for the evidence, the fact that the defendant had "gotten rid of" the witness, and the importance of murder prosecutions. Early American treatises, indeed, noted that flaws in the asserted "reliability" rationale left the reasoned basis for the exception "to stand only upon the ground of" the equitable concerns of fairness and necessity. See GREENLEAF, TREATISE ON EVIDENCE 187 [§ 156]; J. TAYLOR, A TREATISE ON THE LAW OF EVIDENCE, vol. 1, 472 [§ 501] (1848). If reliability were the touchstone for the admission of dying declarations, the courts would not have limited the rule to criminal cases at all. Instead, early American courts identified the absence of necessity as the reason for declining to apply the rule to civil cases despite the reliability of the evidence. See *Wilson*, 15 Johns Cas. at

291; *Jackson*, 2 Johns Cas. 31.

In basing admissibility of the victim's statements against her killer on those equitable considerations, the dying-declarations rule illuminates the same historical judgment about confrontation that is at issue in petitioner's case. It was then—as it is now—intolerable and unjust to allow the defendant to exploit his killing of the witness by citing her absence as the reason for excluding her statements at the murder trial. Cf. *Lord Audley's Case*, 123 Eng. Rep. 1140 (1631) (overriding marital privilege where wife is victim of husband's serious crime).

Petitioner and NACDL point out that Brenda Avie's statement went beyond the scope of a dying declaration in that the latter were statements made in apprehension of death and describing the culprit's infliction of the fatal wound. (Pet. Br. 15; NACDL Br. 22.) But the cited differences are merely hearsay matters. See GREENLEAF, TREATISE ON EVIDENCE 186. They are not confrontation matters, for they have nothing to do with adherence to a cross-examination procedure. As this Court in *Crawford* made clear, the cross-examination-process mandate of the Sixth Amendment is separate from mere hearsay concerns. 541 U.S. at 60-62. The dying declarations rule reflects that dichotomy. It retained some hearsay limitations, without relaxing them entirely. See EAST, PLEAS OF THE CROWN 353-354. But it fully dispensed with confrontation. Regardless of any variations in their hearsay dimensions, dying declarations bear "striking similarities" to Brenda Avie's statements in this case insofar as they both reflect the same equitable judgment overriding the confrontation rights of the killer.

The hearsay–confrontation distinction explains away petitioner's and NACDL's argument that equitable principles could not have worked to extinguish confrontation concerns in common law without rendering

the dying-declarations rule "superfluous." (Pet. Br. 17; NACDL Br. 16-25.) The dying-declarations rule dispensed with confrontation, but it did not automatically admit the victim's statements just because confrontation had been accounted for. So it is not surprising that NACDL can cite pre-Framing and Framing-era cases where the prosecutor failed to secure admission of a victim's statement under a dying-declaration theory but then never offered the statement under the theory that the defendant had forfeited his confrontation rights. (NACDL Br. 17-22.) Where a homicide victim's statement failed under the dying-declaration rule's hearsay standards anyway, any confrontation-forfeiture argument would have been moot.

The same hearsay-confrontation distinction, in fact, played an important role in petitioner's own case under California law. In the state appeal, the California Supreme Court held that petitioner had forfeited his federal constitutional confrontation right by wrongdoing. But, on account of other State policies promoted in its Evidence Code, petitioner was held *not* to have forfeited his right to insist that the challenged evidence nevertheless meet the reliability criteria embodied in the Evidence Code section 1370 hearsay exception for statements such as those Brenda Avie made to the police when petitioner beat her up a few weeks before murdering her. *Giles*, J.A. 54.

v. Petitioner cites *Rex* v. *Woodcock*, 168 Eng. Rep. 352, and *Rex* v. *Dingler*, 168 Eng. Rep. 383 (1791), for the proposition that, at the time of the Framing, "the absence-procured-by-defendant doctrine was restricted to properly taken Marian examinations." He argues that any "forfeiture doctrine" therefore would have admitted only statements that otherwise complied with the confrontation opportunity that he says characterized the Marian examinations of the time. (Pet. Br. 18-19.) The *Woodcock* court's actual Marian-examination ruling, however, seems

to have been based on the absence of an effective judicial oath or the absence of an opportunity for what the court called "contradiction." See argument II, *post*. More important, *Woodcock* recognized that the victim's statements indeed were admissible against the defendant in his murder trial as dying declarations. So in a real sense the forfeiture doctrine and the fundamental common-law principles that undergirded it were at work in *Woodcock* even outside any witness-tampering context.

Dingler is basically the same and no more helpful to petitioner. The court's cryptic ruling on the *ultra vires* Marian examination at issue in that case simply cited to *Woodcock*. The inadmissibility of the examination for failure to meet hearsay-based objections as a dying-declaration, as explained above, does not mean that the defendant had retained any confrontation claim after killing the victim. The State observes, also, that *Woodcock* and *Dingler* did not involve coroner's examinations; as indicated in *Lord Morley's Case*, coroner's examinations were treated differently from justice-of-the-peace examinations at common law.

vi. As with the statements challenged in petitioner's case, dying declarations are those of the homicide victim; they are admitted against the accused killer in the homicide prosecution; and they have not been subjected to cross-examination or oath. Most particularly, the defendant's wrongdoing leading to a dying declaration generally would not be motivated by witness tampering. The statements in petitioner's case in these essential ways thus bear a "striking resemblance," *Davis*, 547 U.S. at 830; *Crawford*, 541 U.S. at 52, to the statements deemed admissible in the dying-declarations cases. The historic equitable principles that traditionally governed confrontation-forfeiture cases remained applicable to solve the forfeiture question posed by the case at bar.

3. *This Court has signaled approval of admitting the murder victim's statements in the defendant's murder trial regardless whether the defendant's wrongdoing had been motivated by a witness-tampering purpose.*

In accepting the principle that the forfeiture by wrongdoing doctrine extinguishes confrontation claims, this Court traced the justification for doctrine back to *Lord Morley's Case. Crawford*, 541 U.S. at 62; *Reynolds*, 98 U.S. at 158-159. In addition, this Court has treated dying declarations, essentially similar to those at issue here, as valid despite the demands of the Confrontation Clause. See *Crawford*, 541 U.S. at 56 n. 6; *Pointer* v. *Texas*, 380 U.S. 694, 697 (1965). This Court has explained the admissibility of dying declarations in terms of equitable considerations such as those identified above. See *Kirby v. United States,* 174 U.S. 47, 61 (1899) (admission justified by the "necessities of the cause"); *Carver* v. *United States*, 164 U.S. 694, 697 (1897) (admission justified by "necessities of the case, and to prevent an entire failure of justice"); *Mattox* v. *Unit*ed *States*, 156 U.S. at 244 (same).

As argued above, *Lord Morley's Case* and the dying-declarations rule combine to cover statements bearing a striking similarity to those in this case. There is thus a compelling logical and historical basis, confirmed by this Court's own Confrontation Clause precedents, for treating the situation in this case—where the defendant has murdered the witness—as a most compelling example of forfeiture of confrontation by wrongdoing without regard to the motivation of the wrongdoer.

C. This Court has never identified a witness-tampering motive as a required element for a showing of forfeiture—and most assuredly has never endorsed such a rule where the defendant murdered the witness.

Petitioner argues that the facts underlying some of this Court's forfeiture precedents showed intentional tampering with a witness and that some later developments in federal law treat the defendant's witness-tampering motivation as a prerequisite to admission of his victim's hearsay. Petitioner's arguments fail to come to grips with the effect on the forfeiture calculus wrought by the defendant's murder of the witness, and fail to observe the distinction this Court has drawn between hearsay concerns and confrontation-clause concerns.

1. The fact patterns in some of this Court's forfeiture cases do not limit the scope of the Court's clear acceptance of the forfeiture doctrine—especially for cases where the defendant murdered the witness.

a. Petitioner's claims that the fact pattern in *Reynolds* and in this Court's later cases in that line portray witness-tampering defendants; so he concludes that the forfeiture-by-wrongdoing doctrine therefore must be limited to that context. (Pet. Br. 32-34.) But petitioner's view is myopic. He does not see the broader no-profit-from-wrongdoing principle confirmed in *Reynolds*. And, in fixing on the fact patterns of cases where witnesses had merely been detained by the defendant, petitioner loses sight of the central feature of his murder case: he intentionally killed the witness. In the same way, he ignores this Court's acceptance of the admissibility under the Constitution of dying declarations—statements very much like those at issue in this case as a matter of fact and very much like

them in terms of the absence of confrontation and a "witness tampering" setting.

Neither *Reynolds* nor any of this Court's cases in the *Reynolds* line ever limited the doctrine to tampering cases. Indeed, *Reynolds* specifically addressed the mental-state question in a way that tends only to contradict petitioner's argument for a "motive" requirement. *Reynolds* described the forfeiting act as a "voluntary" one. 98 U.S. at 158. Petitioner offers no justification for simply disregarding *Reynolds'* specific description of the mental state that supported application of the doctrine.

Petitioner interprets the *Reynolds* Court's comment on the defendant's silence at the foundational hearing in that case as a finding that he had made "a tactical decision that he would be better off preventing her from testifying than by confronting her on the stand." (Pet. Br. 22.) But the cited comment did not lay down any rule requiring proof of such a motivation for wrongdoing. The Court's comment pertained to a separate point: whether the government's showing should be viewed as persuasive in light of the defendant's studied silence on the foundational question of whether he had anything to do with the witness' absence in the first place. The *Reynolds* Court explained, "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 on the weakness of the case made against him than to develop the strength of his own." 98 U.S. at 160.

b. This Court has applied the *Reynolds* forfeiture doctrine to new and different factual contexts, beyond rendering a witness unavailable and seeking to take advantage of it, that also implicated its fundamental equitable rationale. These applications illustrate that, as in the common law, the basic equitable no-profit-from-wrongdoing principles applied even more broadly to

different fact patterns. In *Eureka Lake & Yuba Canal Co.*, 116 U.S. 410, 418 (1886), this Court ruled that, where a corporation's agents avoided service of a court order, "*it cannot justly complain* if service on its attorney is made equivalent to that which its agents *by their wrongful acts have made impossible*."

In *Diaz* v. *United States*, 223 U.S. 442, 452-453 (1912), the Court applied the *Reynolds* doctrine to overrule a confrontation objection lodged by a defendant who placed the un-confronted testimony into the trial record in the first place. Because the defendant by his "voluntary act" placed the testimony into the record "and thereby sought to take advantage from it," he waived his confrontation right "and cannot now complain of its consideration." *Id.* The *Diaz* situation is reminiscent of petitioner's in that, regardless of the defendant's original awareness of the consequences of his actions, his conduct was incompatible with his objection. Further, in applying the doctrine to contexts beyond that of rendering a witness unavailable, this Court continued to articulate the *Reynolds* equitable rationale–rather than any rule requiring an initial motive to exploit one's wrongdoing—in explaining its decisions.

The State's argument—that forfeiture applies where the defendant murders the witness without regard to any tampering motive—does not rely solely or primarily on the fact that this Court's precedents have never announced any such limitation. At bottom, the doctrine expresses the fairness and necessity concerns promoted by the equitable maxim identified in *Reynolds* as the rationale for its decision. As illustrated in similar common-law contexts, the balance of the factors that bear on the question —importantly, the seriousness of the wrongdoing and the obviousness of its potential to render the victim unavailable in the future—almost inevitably will tilt in favor of forfeiture where the defendant has murdered the witness.

2. This Court's precedents, in confrontation cases and in other areas, refute petitioner's claim that the "wrongdoing" inquiry is a "waiver" question requiring proof of a particular state of mind by the defendant.

a. Citing *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), and *United States* v. *Houlihan*, 92 F.3d 1271, 1279-1280 (1st Cir. 1996), petitioner unrealistically recommends that the Court should inquire, not whether the defendant committed serious wrongdoing inimical to assertion of a confrontation right, but whether his act of wrongdoing put him on notice that he was "waiving" his opportunity for confrontation. (Pet. Br. 36-38.) Petitioner suggests that proof of a witness-tampering motive is required because it would serve to provide the defendant with "notice" that his confrontation right was at stake. (*Id.*)

But that interpretation of murder does not comport with reality. Killing somebody is radically different from being haled into a criminal court or from being confronted with government agents investigating a crime. Even if the fundamental moral difference could be put to the side, it would remain true that procedural rights do not operate in the criminal act of homicide itself. Murder, that is, is not a bargaining of legal claims. Further, it would ill-behoove the judiciary to involve itself in appearing to denigrate the victim by reviewing her murder merely instrumentally in order to "validate" it for confrontation-claim purposes. As the California Supreme Court discerned in the opinion below, J.A. 53, "the intent-to-silence element required by some cases evolved from the erroneous mischaracterization of the forfeiture doctrine as the waiver by misconduct doctrine."

b. Even if viewed in terms of "waiver" or "notice," killing the victim makes it obvious to the defendant that his victim in fact will be unavailable for any purpose,

necessarily including any court proceedings, in the future. If the defendant's "knowledge" or recognition of confrontation implications were deemed necessary to application of the forfeiture doctrine, the act of intentional murder certainly would subsume it in that sense. Indeed, a murderer like petitioner would have had an even more specific appreciation of the confrontation implications. When he premeditated and decided that he would shoot to kill Ms. Avie, he must have known that some sort of legal proceeding would be in the offing, and that he was putting her out of the way—even if that were not his motivation.

The marginal difference between purpose and knowledge remains insignificant in this context. Murder suffices for forfeiture even on a "waiver" theory.

c. This Court's description of the doctrine as one of "forfeiture," *Crawford*, 541 U.S. at 62, is helpful in conceiving why the admissibility of the witness' statement depends instead on equitable factors such as the nature of the misconduct and when it becomes intolerable to allow the defendant to seek protection from its "legitimate consequences" or to seek to "benefit" from it at trial. For, in *United States* v. *Olano*, 507 U.S. 725 (1993), this Court earlier had explained the distinctive nature of "forfeiture" of constitutional rights, as contrasted with the knowing relinquishment of such rights that characterizes "waiver," *Olano* explained that a defendant, without meaning to "waive" his claims and thus affect the course of judicial proceedings, nevertheless may be held to forgo even his constitutional rights in light of his conduct. *Id.* at 733.

This Court's precedents contain many examples where a defendant becomes foreclosed from making a valid constitutional objection, without a "waiver" or a putatively knowing decision to forgo it, on account of conduct deeply incompatible with the assertion of the right. It is unnecessary to categorize them as "forfeitures," or even as

instances of "wrongdoing"; they serve in any event as analogies tending to validate application of the *Crawford-Reynolds* doctrine in petitioner's case.

In the Sixth Amendment confrontation context itself, this Court in *Illinois* v. *Allen*, 397 U.S. at 343, held that the defendant's obstreperous in-court behavior properly cost him his right to remain present at his trial. In *Taylor* v. *United States*, 414 U.S. 17 (1973) (per curiam), the defendant's voluntary conduct in absenting himself from trial similarly foreclosed his confrontation claim.

The conceptual difference between "waiver" and forfeiture by conduct incompatible with the exercise of a right is illustrated in other cases involving constitutional claims. In *United States* v. *Scott*, 437 U.S. 83 (1978), this Court confirmed that the defendant may not raise a double-jeopardy objection to a retrial after he had obtained dismissal of the proceedings in the trial court. With special significance for the case at bar, the *Scott* Court explained, "We do not thereby adopt the doctrine of waiver of double jeopardy . . . . Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *Id.*, at 99. Similarly, this Court in *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958), held that a defendant who chooses to testify cannot then invoke the privilege against self-incrimination to refuse to submit to cross-examination on matters raised by her testimony.

In *United States* v. *Loud Hawk*, 474 U.S. 302, 316-317 (1986), this Court refused to consider, in calculating the delay cited by defendants in their speedy-trial claim, time attributable to the defendant's own frivolous or otherwise insufficiently meritorious interlocutory appeals. Under *Faretta* v. *California*, 422 U.S. 806, 833, n.46 (1975), a defendant who chooses to represent himself at trial may

not later claim a violation of his right to "effective" counsel. In *United States* v. *Robinson*, 485 U.S. 25, 34 (1988), the Court allowed prosecutorial comment on defendant's failure to testify, notwithstanding the general proscription on prosecutorial comment on the subject in *Griffin* v. *California*, as a "fair response to a claim made by defendant or his counsel." Also, a defendant who asserts a claim of ineffective counsel cannot then assert his attorney-client privilege or right to confidentiality about relevant conversations he had with the lawyer. *Bittaker* v. *Woodford*, 331 F.3d. 715, 716, 718-719 (9th Cir. 2003)(en banc) (explaining result as application of the "fairness principle").

In *Harris* v. *New York*, 401 U.S. 222, 225-226 (1971), this Court held that a defendant, having testified inconsistently with a prior statement excluded under *Miranda* v. *Arizona* from the prosecution's case-in-chief, could no longer avail himself of the *Miranda* v. *Arizona* rule to exclude the statement from the government's rebuttal case. Nothing in *Harris* suggests any need for proof of the defendant's specific purpose or motivation in testifying. Petitioner says that *Harris* is different, because there the defendant "exploited" the *Miranda* rule by taking the stand and offering a new account of events. But, as the California Supreme Court pointed out, J.A. 56, petitioner capitalized on his wrongdoing when he introduced a one-sided version of statements allegedly made by Ms. Avie as support for his defense at trial. Having done that, he is in an especially poor position to complain about his inability to cross-examine her about other statements on account of his wrongdoing in rendering her unavailable at trial.

This Court's habeas corpus jurisprudence also makes clear that state-court defendants ordinarily may forfeit their federal constitutional rights even by inadvertent

failure to raise them in compliance with state procedural rules. *Murray* v. *Carrier*, 477 U.S. 478, 487-488 (1986). Similarly, a defendant might forfeit his right to produce evidence of consent in a rape prosecution by failing to provide statutory notice of his evidence long before trial. See *Michigan* v. *Lucas*, 500 U.S. 145, 153-154 (1991).

The State of Illinois' amici curiae brief in this case cites persuasive examples illustrating the similar operation in other contexts of the maxim that no one may be allowed to profit from wrongdoing. Those precedents, as with the ones cited above, confirm that the defendant's intent or purpose at the time of the wrongdoing is not the focus of the equitable principles that govern this case.

3. The Federal Rules of Evidence provision on forfeiture of hearsay objections does not affect the constitutional question of when a defendant has forfeited his confrontation rights.

Petitioner cites the Federal Rule of Evidence 804(b)(6), and federal cases leading up to its adoption, as requiring proof of intent to tamper as a requirement for forfeiture by wrongdoing in federal courts. (Pet. Br. 36-40.) But Rule 804(b)(6), and the cited federal case law, concerns extra-constitutional "evidence law" rules of hearsay. The "vagaries of the rules of evidence" cannot determine the scope of the a defendant's confrontation claims. See *Crawford*, 541 U.S. at 61. As follows from *Crawford* and its overruling of *Ohio* v. *Roberts*, hearsay policies are not the same as confrontation principles.

In this case, petitioner's wrongdoing operated to forfeit his confrontation rights; but, under California law, that forfeiture did not disable petitioner's from relying on state hearsay rules or other state evidence-code provisions. Those are extra-confrontation rules. Rule 804(b)(6) happens to be an extra-constitutional kind of rule that

trumps a defendant's hearsay objections, as a matter of legislative or judicial purpose, when its conditions are met. But the Rule does not determine the scope of the Constitution or limit the extent of the States' rein under it.

It is true that this Court in *Davis* remarked that Rule 804(b)(6) "codifies" the forfeiture doctrine. 547 U.S. at 833. That does not mean, however, that the Court held the Rule to be identical to the historical forfeiture doctrine that extinguishes confrontation claims. For, at the same time, in language different from that of the Rule, *Davis* reiterated that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Id.*

As ably explained in Illinois' amici curiae brief, the drafters of the Rule 804(b)(6) proposed it in light of federal appellate cases in the last thirty years that had adopted a hearsay forfeiture rule in dealing with the problem of witness killings in organized-crime prosecutions. So the Rule never purported to be a distillation of common-law or Framing-era confrontation principles. At most, the Rule presented a "codified" forfeiture doctrine for hearsay in federal cases, in the sense that it was formally promulgated by legislative or quasi-legislative action.

D. Engrafting a motive-to-tamper requirement on the doctrine would produce untoward results, whereas the forfeiture doctrine as applied to this case would not subvert any remaining Sixth Amendment interest of the defendant.

Petitioner ignores harmful results that would follow from adoption of an artificial motive-to-tamper limitation on the kind of wrongdoing that might justify overriding the defendant's interest in confrontation. And he greatly exaggerates when he claims that various ill effects will

follow if the doctrine is not restricted to motive-to-tamper wrongdoing.

1. Petitioner's proffered rule would produce untoward results.

a. Petitioner's proposed witness-tampering limitation on the doctrine is not worth the resulting risk that an increased number of motive-to-tamper murders will avoid forfeiture undeservedly. In many cases—maybe most cases—the evidence that establishes that the defendant's motive was to prevent testimony consists of information known to the victim in particular. The defendant might have revealed his reason to the witness earlier before killing her: he might have complained to the witness about her status in the days leading up to the killing; and he earlier might have threatened to kill her if she persisted in cooperating in the case. These examples may be typical, for example, in domestic-violence cases that represent a serious problem and that, as this Court has observed, are notoriously susceptible to coercion and intimidation of witnesses. *Davis*, 547 U.S. at 833; see also *Georgia* v. *Randolph*, 547 U.S. 103, 127 (Roberts, C.J., dissenting), 145 (Scalia, J., dissenting) (2006). Unless the defendant were to foolishly announce his motive to other witnesses, the murder well might do away with both the witness and her crucial testimony about the "tampering" purpose of the killing.

Although one might broadly portray the question posed in this case as one of specific "intent," it is more precisely one of motive or purpose. See *United States* v. *Simpson*, 950 F.2d 1519, 1524-1525 (10th Cir. 1991). Traditionally, in criminal law, the State need not prove the "motive" even to establish the defendant's guilt of a crime. 1 WHARTON'S CRIMINAL EVIDENCE 383-384 (14th ed. 1985). And, certainly, it is more difficult to prove motive than intent.

Intent is most often deductible from the physical components of the crime. In the age of computer websites such as "whosarat.com," identifying alleged government witnesses, the question may become even more difficult. Here, petitioner obviously intended to kill Miss Avie from the fact that he shot her six times in the torso at close range while she was unarmed, including once while she lay on the ground. But his actual motive remains his secret to this day.

As in this murder case, the subjective witness-tampering motive of an abuser in intimidating a domestic partner or child may be very difficult to prove, even though his serious and intentional criminal conduct predictably would cause the victim's unavailability to testify. The illogical imposition of the "motive" rule advocated by petitioner would unnecessarily diminish the effectiveness of any otherwise sound forfeiture doctrine in murder cases, such as this one, and perhaps beyond. See *Georgia* v. *Randolph*, 547 U.S. at 117-118 (detailing serious nature and prevalence of domestic violence, including estimates of 2,000,000 injuries and 1,300 deaths in the United States each year); RENNISON, BUREAU OF JUSTICE STATISTIC CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993-2001, 1(2003) (1,247 women and 440 men killed by an intimate partner in 2000); T. Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 749 (2005) (noting high percentage of victim recantation in domestic violence cases).

2. *Applying the forfeiture doctrine as in this case would enhance the fairness of criminal trials.*

a. Petitioner complains that, unless a specific-purpose requirement is engrafted on the doctrine, too many cases will result in forfeitures. (Pet. Br. 43.) But it is not true that validating the doctrine in this case will exclude an

entire class of defendants from their Confrontation Clause protection. Murder defendants will retain their confrontation rights with respect to the testimony of other witnesses at their trial—that is, witnesses they have not killed. To describe them as an entire "class" of defendants, as petitioner does, is misleading. Even petitioner's motive-to-tamper embellishment on the doctrine might be said to disentitle a "class" of defendants charged with capital murder based on killing a witness to keep her from testifying. See, *e.g.,* Cal. Penal Code § 190.2(a)(10). There will always be a "class."

If the forfeiture doctrine in truth is a valid exception to confrontation, as this Court has said, it is hard to see what legitimate interest connected to the Sixth Amendment would be advanced by the merely instrumental device of limiting its application in terms of the raw numbers of cases affected. And if the doctrine on its merits applies in witness-murder case regardless of the defendant's motive—as the State argues here—then there can be no valid objection to applying it in any case where it is justified under that understanding of the doctrine. That is simply the rule of law.

b. Petitioner exaggerates when he forecasts a whirlwind from the forfeiture doctrine as interpreted by the California Supreme Court. Here, the forfeiture was based on the gravest crime of murder. The future unavailability of the victim to be a witness was obviously predictable at the time; indeed, a premeditating killer well could anticipate the intervention of law enforcement. Further, the causal link between the wrongdoing and the witness' absence at trial is incontrovertible.

How the forfeiture doctrine would operate in cases involving wrongdoing different from intent-to-kill murder—where unavailability might be debatable, where causation questions well might range beyond that of the

identity of the killer, and where unavailability might not be so clearly foreseeable—is not directly at issue here. The same is true for cases where the wrongdoing might be unintentional. For example, a domestic-violence or child-abuse victim may clearly be "unavailable"—most predictably from the wrongdoing defendant's vantage—even where the defendant might not have specifically intended to bring about their absence at trial. See D. Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 NO. CAROLINA L. REV. 1, 41-46 (2006). The case at bar, however, presents what is the strongest argument for forfeiture irrespective of motive to tamper: the defendant's murder of the witness.

Moreover, beyond petitioner's and NACDL's concerns about the fairness of trials (NACDL Br. 29), this Court must consider the effect on the accuracy of the trial where the defendant unjustly succeeds in excluding the testimony of his victim. A ruling that the defendant has forfeited confrontation indeed will result in admitting un-cross-examined hearsay. But, unless justified, the alternative well might be that of presenting to the jury a one-sided version of crucial events by the defendant. Indeed, as happened in this case, the defendant could easily go further and allege that the victim had made statements that support the defense view of the case, while contrary relevant statement of the victim remain outside the reach of the jury.

Also, as proved to be true in petitioner's case, his forfeiture by wrongdoing did not necessarily lead to forfeiture of all defense hearsay-based objections, or any other objections, to the disputed evidence. Here, petitioner retained his recourse to any other California Evidence Code objections to the proof of Ms. Avie's statement, including state-law hearsay objections. *Giles*, J.A. 64. The Federal Rules of Evidence—on which as many as forty-one

other States pattern their own evidence codes—apparently require proof of the defendant's specific intent to tamper, as petitioner urges in this case, before the defendant will be deemed to have waived his codified hearsay objections to statements such as Ms. Avie's. See Fed. R. Evid. 804(b)(6). Presumably, that Rule will remain the standard in other States that follow the federal example.

There is no reason to think that the States will engage in wholesale rejections of any limits other than the constitutional minima. State evidence codes have never functioned as mere devices to strip criminal defendants of all their rights. Instead, the evidence rules of all American jurisdictions necessarily tend only to enhance those rights and to provide the defendant with extra-constitutional protection deemed appropriate by state and federal policy-makers.

And, despite petitioner's and NACDL's assumed air of fatalism in the face of a couple of articles in legal publications (Pet. Br 43-44; NACDL Br. 28), state courts and state lawmakers do not reflexively cater to policy proposals from individual prosecutors. Even were all local-law protections to suddenly vanish, there would remain constitutional standards, under the Due Process Clause, ensuring fundamental reliability of evidence admitted in criminal cases. See *Stovall* v. *Denno*, 388 U.S. 293, 301-302 (1967).

Petitioner supposes that the prosecution, confident of a forfeiture ruling, will not do its best in trying to produce a witness who has been cowed by the defendant's coercive conduct. But there is no reason to think the prosecution will generally favor recited hearsay over live in-court testimony from a victim. Moreover, there remain constitutional requirements of diligence on the part of the prosecution before a witness might be deemed unavailable. See *Barber* v. *Page*, 390 U.S. 719, 724-725 (1968)

(government fails to pursue available means for producing witness); *Motes* v. *United States*, 178 U.S. 458 (1900) (government negligence); cf. *Mancusi* v. *Stubbs*, 408 U.S. 204, 212 (1972). It should not lightly be assumed that courts will relax their vigilance in assuring genuine unavailability caused by the defendant's wrongdoing.

In addition, as the California Supreme Court ruled in this case, the showing of the defendant's wrongdoing may not be made solely on the basis of the absent witness' un-confronted testimony. J.A. 64. "[I]ndependent corroborative evidence" is needed to support a forfeiture ruling. *Id.*

Finally, contrary to NACDL's assertion (NACDL Br. 29), petitioner indeed retained the opportunity to produce evidence to undermine victim Avie's statement. Thus, he was allowed to introduce testimony, including evidence of Ms. Avie's own alleged statements, portraying Ms. Avie as "a violent, aggressive, foulmouthed, jealous, and volatile person." *Giles*, J.A. 56. Under local evidence rules, Cal. Evid. Code § 1202 (impeaching hearsay declarant); Fed. R. Evid. 613(b), 806—if not the Constitution itself, see *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Carver* v. *United States,* 164 U.S. at 697—further available evidence of bias on her part could have been admissible too. True, petitioner could not cross-examine her for that purpose at trial. But whose fault was that?

* * *

In sum: The California Supreme Court properly interpreted the forfeiture-by-wrongdoing rule in petitioner Giles' cases as not requiring any intent to tamper with a witness in a court proceeding. In its decision in that regard, the opinion below is buttressed by the similar holdings of a growing number of state and federal courts.

E.g., *United States* v. *Garcia-Meza*, 403 F.3d 364; *State* v. *Sanchez*, 341 Mont. 240, 177 P.3d 444 (Mont. 2008); *Gonzalez* v. *State*, 155 S.W.2d 603, 610-611 (Tex. App. 2004); *State* v. *Mason*, 160 Wash.2d 910, 162 P.3d 396, 404 (Wash. 2007); *State* v. *Jensen*, 727 N.W.2d 518, 535 (Wis. 2007); see also *State* v. *Meeks*, 88 P.3d 789 (Kan. 2004); *People* v. *Bauder*, 269 Mich. App. 174, 712 N.W.2d 506, 514-515 (Mich. App. 2005); *People* v. *Moore*, 117 P.3d 1, 5 (Colo. Ct. of App. 2004).

II.

FRAMING-ERA PROCEDURE DOES NOT LIMIT THE FORFEITURE DOCTRINE ONLY TO WITNESS-TAMPERING CASES WHERE THE WITNESS' STATEMENT WAS SWORN AND SUBJECT TO CROSS-EXAMINATION

Petitioner and amicus NACDL suggest that—regardless of how forcefully the no-profit-from-wrongdoing principle might compel the application of the forfeiture doctrine to a non-tampering case such as petitioner's—separate historical reasons having to do with common-law pre-trial procedure dictated that the victim's statements remained inadmissible unless the defendant's wrongdoing was motivated by witness-tampering *and* the victim's statements complied with Marian-statute procedure in that they were under oath *and* subject at least to a prior opportunity for cross-examination. (Pet. Br. 20-31; NACDL Br. 5-25.)

Under that view, a criminal defendant would forfeit his confrontation rights to object to the witness' statements if he kills her to keep her from appearing at trial as she leaves the courtroom after testifying at his formal preliminary hearing. But he will not forfeit his right with respect to identical statements she made to the police as long as he kills her on her way into the courthouse rather

than on her way out—even if he does so for the purpose of preventing her from testifying.

If then-existing English statutory procedure were to shape the forfeiture doctrine that way, it would be more than anomalous; it would improperly prescribed a "recipe for its extinction." See *Davis*, 547 U.S. at 830, n.5. The effect would be felt not just in California and in other states where the forfeiture doctrine has been applied without any motive-to-tamper restriction on the wrongdoing. With prior-oath and prior-cross-examination restrictions, as NACDL implies, the Federal Rules of Evidence might become casualties. So might the federal case law of the last quarter-century on which petitioner otherwise relies for his motive-to-tamper argument. And this Court's recognition in *Crawford* and *Davis*—that the forfeiture-by-wrongdoing doctrine "extinguishes confrontation claims"—will have become meaningless. For the doctrine would apply only where the essential confrontation components of unavailability and prior opportunity for cross-examination are present anyway. So it would not be an exception at all.

In the event, any claim based on oath and cross-examination comes too late in this case. More fundamental, petitioner's and NACDL's arguments ignore the principles that governed the way the common law dealt with confrontation where the defendant had killed the witness and that continue to inform it in America as recognized in *Reynolds* and *Crawford*.

A. Any claim that the forfeiture doctrine itself requires oath and a prior opportunity for cross-examination is not properly before the Court.

Petitioner and NACDL argue that, when the Sixth Amendment was adopted, the doctrine at common law allowed admission only of prior sworn testimony where the accused had an opportunity for cross-examination. (Pet.

Br. 10-20; NACDL Br. 6-12.) If pressed as a reason to exclude the victim's statements here, any such argument comes too late in two different senses.

1. First, the certiorari petition never raised such objections to the admission of the statements in this case. The Question Presented asked specifically, and only, whether application of the forfeiture rule depended on a showing of a specific witness-tampering purpose. That question does not subsume completely different objections based on an the alleged need for oath and prior cross-examination in any event.

2. Any such objections also would come too late in that this Court made it clear in *Crawford* and in *Davis* that it accepts the forfeiture rule *as an exception to confrontation*. *Davis*, 547 U.S. at 833; *Crawford*, 541 U.S. at 62. To suddenly argue now that the confrontation rule of unavailability and prior opportunity for cross-examination must be observed, see *Crawford*, 541 U.S. at 68, regardless of the defendant's wrongdoing of any kind, would be to simply deny the *Crawford* and *Davis* premise for the Question Presented.

B. Accepting the claim that the forfeiture doctrine itself requires oath and a prior opportunity for cross-examination, whether the defendant kills the witness or not, would depart from Framing-era law and would make no sense.

i. In any event, it would not be convincing to argue that confrontation may be forfeited by wrongdoing only where the defendant's motive was to tamper with a proceeding and where the victim's out-of-court statement was already subject to oath and cross-examination.[1/] As the state has

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[1] If the Marian-declaration framework exhausted the kinds of

just explained, the argument is fundamentally anti-*Crawford*. And, as the State explained in argument I, the common-law recognized in principle, and in evidentiary rulings, that the defendant's wrongdoing in causing the witness' absence could dispense with confrontation without regard to oath, prior opportunity for cross-examination, or any tampering motivation on the part of the defendant.

2. Even if the Framing-era defendant-kills-witness or defendant-keeps-away-witness precedents are not exact replicas of the case at hand, that would not mean the forfeiture-by-wrongdoing doctrine may not be applied to the new case. Although *Crawford* stated that the Confrontation Clause was "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," 541 U.S. at 54, it accepted the forfeiture-by-wrongdoing doctrine as such an exception, *id.* at 62. The equitable principles that delimit the forfeiture doctrine's exception to confrontation may be seen as separate from the confrontation rule itself, so that applying the cases fitting the wrongdoing-unavailability template does no

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statements that might be admitted, it would be more of a mere artifact of the system than a thoughtful policy choice on the issue of forfeiture. In this case, Brenda Avie summoned the police three weeks before her death when petitioner beat and threatened her; the police dutifully wrote down her statements; and the prosecution used them in petitioner's murder trial. If this case had arisen at common law, it is doubtful there ever would have been a record of that first formal statement of the domestic-violence victim for use in a prosecution of the defendant for the later murder. At common law, for example, a husband had a right to "chastise" his wife with corporal punishment, see R. Siegel, *The Rule of Love: Wife Beating as Prerogative and Policy*, 105 YALE L. J. 2117, 2206 (1996). It is unlikely the a domestic-violence victim would have haled the abuser before the justice of the peace and created a Marian-examination record the first time around.

violence to the original meaning of confrontation itself. See *Davis*, 542 U.S. at 823-824, see also *Georgia* v. *Randolph,* 547 U.S. at 144 (Scalia, J., dissenting). It is not inappropriate to engage in "inference" or "a degree of estimation," in the absence of a direct example, about what the common law of forfeiture "would have been" in a case such as this one fitting the defendant-kills-witness template. See *Crawford*, 541 U.S. at 50, 52-53, n.3.

In *Davis*, for example, this Court drew the line between testimonial statements subject to confrontation and non-testimonial statements not governed by the confrontation clause so that a witness' retrospective statement to the police fell on the side of the line governed by the clause—even though the early American cases invited the view that the clause covered only formalized sworn statements in a judicial setting. *Davis*, 547 U.S. 821; see *id.* at 838 (Thomas, J., dissenting) (noting lack of direct common-law example). In drawing the line where it did, the Court considered whether the line made sense in terms of the confrontation principles at issue. *Id.* at 838.

Similarly, in *Reynolds*, the Court applied a burden-shifting presumption to ascribe to the defendant the act that caused the witness' absence. 98 U.S. at 160. The Court did not pause to consider whether *Lord Morley's Case* ever endorsed application of the forfeiture doctrine in that precise way. Nor did it pause to consider whether Reynolds' failure to assist the government in serving a subpoena constituted the kind of wrongdoing at common law that might have triggered the no-profit-from-wrongdoing maxim.

Here, the Framing-era cases spoke to clearly delineated problem: that of the defendant wrongfully exploiting the witness' unavailability. They accepted the no-profit-from-wrongdoing maxim and its underlying principles—equitable considerations of fairness and

necessity and integrity of the proceedings—for resolving the problem and did so especially in the criminal-homicide setting. They support the best representation of the rule originating in *Lord Morley's Case* and reflected in the dying-declaration rule: where the defendant kills the witness, her statements may be admitted against him regardless of his tampering motive, regardless of oath, and regardless of any prior opportunity for cross-examination.

3. That inference becomes stronger in view of the injustice and weakness of the alternative interpretation. NACDL and perhaps petitioner suggest that the common law would not have distinguished the defendant's murder of a witness from the witness' innocent absence form the proceeding on account of illness. (Pet. Br. 10-20; NACDL Br. 6-12.) In this view, these are morally equivalent examples of neutral "unavailability" law. But that is an improbable estimation of what the law would have been. In *Lord Morley's Case*, 6 St. Tr. at 770, the judges' "fourth resolution" pertained to the ramifications of a witness' death or unavailability to travel; but a separate "fifth resolution" pertained separately to the distinct evil of a defendant wrongfully keeping the witness away. And, as noted earlier, Gilbert's treatise and Taylor's treatise gave distinct justifications for the forfeiture rule triggered where the defendant is at fault for the unavailability of the witness. Wigmore's treatise also dealt with the defendant's wrongdoing in a separate sub-section; and Wigmore further reported that the defendant in the specific instance of wrongdoing would be "estopped from making *any objection* based on the results of his own chicanery." 3 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 1766 [§ 1405] (1904 ed.); *id.*, at 120 [§ 1405] (1923 ed.) (emphasis added). Under such a rule, unlike in the case of innocent unavailability, all objections based on any interest in cross-

examination made impossible by the defendant's own misconduct logically would be barred. Otherwise, the defendant's wrongdoing—as opposed to the bare unavailability of the witness—improbably would have no consequence.

4. Under NACDL's numb-to-equity view of common law, a defendant might forfeit his confrontation rights by killing, with a tampering motive, a witness who already had testified against him at a preliminary hearing—but he could exclude his victim's statement on account of her absence if he killed her for the same witness-tampering reason on her way to the preliminary hearing after she merely had given the statement to the police. If wrongdoing ever justifies dispensing with confrontation, it makes no sense to dispense with confrontation in the former instance but to insist on it in the latter.

5. Petitioner himself ultimately seems to acknowledge that the *Lord Morley's Case* rule was a distinct one that applied to admit statements of the detained or killed witness without regard to a prior opportunity for cross-examination. (Pet. Br. 20 et seq.) (Elsewhere in his brief, however, petitioner claims that early nineteenth century cases precluded use of a dead witness' ex parte statements. (Pet. Br. 12.) But the cases he cites—*State* v. *Webb*, 2 N.C. 103 (1794), *Johnson* v. *State*, 10 Tenn. 58 (1821), and *State* v. *Campbell*, 30 S.C.L. 124 (1844)—involve situations where the witness simply had died in the meantime. They were not cases where the defendant had killed him. Two of them, moreover, were horse-stealing cases, and not murder cases.) Still, he says that the law still imposed a requirement that such statements be under "oath." If observed at all, however, the forfeiture-by-wrongdoing doctrine's traditional justifications would serve to allow the admission of the prior statement of a murdered or detained witness without regard to any oath that the defendant's

wrongdoing had obviated—just as they would admit the statement without regard to the cross-examination that the defendant's misconduct had also made impossible.

The absence of oath, in any event, would not provide petitioner with a Confrontation Clause claim now. As noted earlier, such a claim was not raised in the certiorari petition in this case. The claim would lack substance anyway. The Sixth Amendment guarantees the defendant's right "to be confronted with the witnesses against him." As this Court made clear in *Crawford*, that guarantee is a cross-examination guarantee. 541 U.S. at 59-62; see *Mattox* v. *United States*, 156 U.S. at 242-243 . The Constitution does not state that the witnesses also must testify under "oath." The Framers imposed oath requirements elsewhere in the Constitution, see U.S. Const., Art. I, § 3(5), Art. II, § 1(8), Art. VI, § 3, but they did not set one out in the Confrontation Clause.

* * *

This Court in *Crawford* accepted the doctrine dictating that a defendant may forfeit his confrontation right when he wrongfully causes the victim's absence from the trial. However that forfeiture doctrine might apply in other situations, it at least must apply in a murder prosecution where the defendant has intentionally killed the witness and seeks to exclude her "testimony" on grounds of her absence. Framing-era cases illustrate the principles supporting the confrontation-dispensing rule in fundamentally similar situations. This Court's precedents support those principles and their application to cases similar to this one. To require proof that the murder was motivated by a witness-tampering purpose makes no sense under the traditional maxim undergirding the doctrine: no one may take legal advantage from his wrongdoing.

CONCLUSION

The judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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