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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 California

BRIEF OF THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT (DV LEAP), CALIFORNIA PARTNERSHIP TO END DOMESTIC VIOLENCE, LEGAL MOMENTUM, ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI[1]

Amici are a diverse group of organizations and individuals devoted to combating domestic violence through litigation, legislation, and policy initiatives. *Amici* collectively have decades of experience working with survivors of domestic violence, and have been involved in extensive efforts to improve national and state justice systems' response to these victims.

Amici are extremely concerned about the impact a specific intent requirement as grounds for forfeiture of confrontation rights would have on the ability to prosecute batterers who murder their victims. *Amici* are well aware that the vast majority of domestic homicides culminate a history of battering, and that victims' prior statements about the batterer's abuse and threats are often critical to prove the identity or motive of the killer, or to disprove a claim of self-defense or accident. Without these statements, the equitable purpose of the forfeiture by wrongdoing doctrine will be subverted while murderers benefit from their own crimes and go free. For these reasons, *Amici* are submitting this brief in support of respondent.

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *Amici* provided any monetary contribution to its preparation or submission. The identities and interests of *Amici* are described in Appendix A to this brief.

SUMMARY OF ARGUMENT

In *Crawford v. Washington*, 541 U.S. 36, 62 (2004), this Court stated that it accepts the rule of "forfeiture by wrongdoing," under which "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right of confrontation," *Davis v. Washington*, 547 U.S. 813, 833 (2006), and that this rule "extinguishes confrontation claims on essentially equitable grounds." *Crawford*, 541 U.S. at 62. The Court cited *Reynolds v. United States*, 98 U.S. 145, 158 (1879), which held that the Constitution "does not guarantee an accused person against the legitimate consequences of his own wrongful acts," and, thus, a criminal defendant can forfeit his confrontation right where the witness's unavailability results from the accused's own wrongful conduct.

The equitable forfeiture rule adopted in *Reynolds* and *Crawford*, and the equitable maxim upon which it is based, are fully applicable here, where the defendant is responsible for the victim's absence at trial because he wrongfully killed her. Petitioner and *amicus* National Association of Criminal Defense Lawyers ("NACDL")[2] argue to the contrary based on a misreading of Framing-era and other case law that they claim requires limiting application of forfeiture to cases where the defendant's wrongdoing sprang from a specific intent to interfere with future judicial proceedings. Their argument is incorrect. Neither Framing-era case law and treatises nor consideration of

[2] References to "petitioner" hereinafter include NACDL, unless otherwise indicated.

fundamental Sixth Amendment principles mandate a specific-intent requirement. On the contrary, as the California Supreme Court carefully and correctly determined, such an intent requirement cannot be squared with either the rationale or the history of the forfeiture doctrine and the equitable maxim upon which it is based.

The core issue here is whether the paradigm of "witness-tampering," which provided the context for Framing-era applications of the forfeiture doctrine, should foreclose application of the equitable doctrine to a modern problem that the Framing-era authorities did not confront: the need to prosecute domestic violence as a serious crime, and to deal with the widespread lack of live witnesses due to defendants' wrongdoing occurring *before* they are actually charged with a crime. While modern domestic homicide cases may not fit the paradigm perfectly, killings such as this one, after prior statements were made to police investigating a prior charge, are closely analogous to traditional witness-tampering cases.

Moreover, while Framing-era courts had no occasion to deal with the problems that domestic violence and murders pose for modern courts, they did deal with an analogous problem: child sexual assaults. In that context, they accepted the admission of unconfronted hearsay statements of the children, who were not permitted to testify. Had they faced the domestic violence and homicide dockets of modern courts, they likely would have applied a similar view of "necessity" and fairness to admit the statements.

Finally, a specific-intent requirement would create a windfall for perpetrators who kill rather than merely assault their victims—the epitome of an *inequitable* result. It would both encourage batterers to kill their victims and defeat the truthseeking function of the criminal process by making prosecution of many domestic murders virtually impossible.

ARGUMENT

I. A SPECIFIC INTENT REQUIREMENT FOR FORFEITURE BY WRONGDOING IS INCONSISTENT WITH FRAMING-ERA LAW AND PRACTICE.

Petitioner argues that he should be able to exclude Ms. Avie's past statements based on his "right to confront" the victim who is dead by his own hand. He argues that the very information which would refute his claim of self-defense—her past statements about his intent to kill her—must be excluded to protect his confrontation right, simply because he did not kill her specifically to prevent her testimony at trial. Neither Framing-era authorities nor more modern precedents[3] support such a counterintuitive and troubling proposition.

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[3] Petitioner asserts that no court prior to *Crawford* permitted forfeiture by wrongdoing without finding defendant had a specific intent to interfere with the witness' testimony. Pet. Br. 8. This is untrue. *See*, *e.g.*, *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985) (defendant who murdered undercover federal agent while resisting arrest "waived his right to cross-examine Benitez by killing him"); *United States v. Miller*, 116 F.3d 641, 668 (2d Cir. 1997) (in RICO case concerning gang murders, "although a 'finding that [defendants'] purpose was to prevent [a declarant from] testifying,' is relevant, such a

A. Framing-Era Courts And Commentators Focused On Cause, Not Specific Intent, In Applying Forfeiture By Wrongdoing.

Petitioner's claim that there was only one understanding of forfeiture—and that it universally required specific intent—is untenable. Pet. Br. 20-31; NACDL Br. 5-15.

1. Cases

Contrary to petitioner's claim that Framing-era courts required specific intent, the five early cases discussed at petitioner's brief at pp. 22-26 and cited by this Court in *Reynolds,* make *no* mention of specific intent. Rather, without exception, they focus on *causation,* i.e., whether the defendant was responsible for the witness' absence. *See* J.A. 41, n.3.

Thus, in *Lord Morley's Case,* a murder trial, the Lord Chief Justice inquired as to whether "the witness was detained by means or procurement of the prisoner." 6 How. St. Tr. 777 (1666). The prosecution's witness testified that the absent witness had run away and told others that he would not attend Lord Morley's trial. *Id.* at 777. This evidence alone was found insufficient to link the

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finding is not required"); *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999) (defendant killed federal informant for cooperating with the government). *See also Steele v. Taylor*, 684 F.2d 1193, 1201 n.8 (6th Cir. 1982) ("The connection between the defendant's conduct and its legal consequence under the confrontation clause is supplied by the law and not by a purposeful decision by the defendant to forego a known constitutional right").

defendant to the witness's absence, and the statement was not admitted. *Id.*

In *Harrison's Case,* it was claimed that Harrison *or his agents* had kept a witness away from the trial. 12 How. St. Tr. 833, 851 (1692). The Court required only that the defendant "made him keep away." *Id.* Ultimately, the Court accepted as proof testimony that "a gentleman" had come to offer the witness money "to be kind to Mr. Harrison" and that, later, the witness "was inticed [sic] away by three soldiers" and had not since returned. *Id.* at 851-852. The Court was satisfied that "there has been evidence given of ill practice to take him out of the way." *Id.* at 868. Not only was there no requirement or proof of "specific intent"—there was not even clear proof that the defendant *himself* was involved in the witness's disappearance.

In *Lord Fenwick's Case*, 13 How. St. Tr. 537 (H.C. 1696), the Peers voted to admit the prior deposition of a witness who it appeared had been spirited away, despite the fact that it was noted that "no such thing [that Fenwick had tampered with the witness] hath been proved." *Id.* at 606. The facts appear to demonstrate, at most, that "J. Fenwick, *or his lady,* had a hand in sending Goodman away" and/or that someone not specifically proven to be employed by Lord Fenwick, had a hand in it. *Id.* (emphasis added). Not only was specific intent not required, it was not even clear that Lord Fenwick himself had knowingly "procured" the witness's absence. *Contra,* Pet. Br. 24, n.6.

Finally, in *Drayton v. Wells,* 10 S.C.L. (1 Nott & McC.) 409, 1819 WL 692 (S.C. Const. App. 1819), and *Queen v. Scaife,* 17 Q.B. 238, 117 Eng. Rep.

1271 (1851), the courts again said nothing about specific intent, nor do the facts appear to support such an inquiry. *Drayton* speaks in *dicta* of whether "the witness had been kept away by the contrivance of the opposite party"—a standard which is met purely by a causal link. 1819 WL at *2. And the *Scaife* court refused to allow a witness' earlier testimony against two co-defendants, where only the third co-defendant had been shown to be involved in procuring the witness's absence. 117 Eng. Rep. at 1273. Specific-intent was neither discussed nor at issue.

In short, these Framing-era cases, while clearly involving allegations of witness-tampering, do not in any way support the assertion that forfeiture by wrongdoing requires a "specific intent" to absent a witness from trial. Rather, they embody only a causation-based analysis of forfeiture.

2. Treatises

Nor do Framing-era treatises support petitioner's position. *See* 2 William Hawkins, *A Treatise of the Pleas of the Crown* 429 (1721) (witness "kept away by the Means or Procurement of the Prisoner"). Petitioner argues that the term "procurement" "clearly connotes a deliberate intent to carry out a specific design." Pet. Br. 26-27. This reads too much into the term. As a matter of ordinary meaning, a witness who is unavailable to testify because the defendant killed her has been "kept away by the means or procurement" of the defendant. Indeed, Webster's 1828 definition of "procure" petitioner cites includes "cause," "bring about," and "effect." Pet. Br. 27. Certainly, defendant's killing of Brenda Avie "caused,"

"brought about," and "effected" her unavailability as a witness at his murder trial. Similarly, Webster's definition of "procurement," "[a] causing to be effected," includes no specific intent requirement. 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

Petitioner further relies on 19th century treatises by Greenleaf, Taylor and Wharton which use the formulation that the witness must have been "kept away" by the accused. *See* Pet. Br. 29-31. As a matter of ordinary English usage (both then and now), petitioner "kept away" Ms. Avie from giving any testimony when he killed her. Nothing in that formulation supports a specific-intent requirement.

3. Witness-Tampering Occurred In This Case.

While the early cases do not support a specific-intent requirement, they do reflect that Framing-era courts generally applied forfeiture to cases involving "witness-tampering." This case can reasonably be characterized as fitting within that paradigm. This Court has acknowledged that "examining police officers . . . perform investigative and testimonial functions once performed by examining Marian magistrates." *Davis*, 547 U.S. at 830, n.5. Ms. Avie's statements to the police were thus essentially the modern equivalent of testimony given to a Marian magistrate. When he killed her, defendant knew he was facing someone who had previously talked to the police about his abuse and might well do so again. The statements here therefore mirror the witness-tampering situations commonly addressed in the Marian-era cases more closely than Petitioner suggests.

Indeed, if an "intent" requirement exists, it is readily satisfied here based on the settled Framing-era "maxim that every man shall be presumed to intend the natural and probable consequences of his own act." *Marble v. City of Worcester*, 4 Gray 395, 405, 1855 WL 5865 (Mass. 1855); *Scott v. Shepherd*, 2 W. Bl. 892, 96 Eng. Rep. 525 (King's Bench 1773) ("Every one who does an unlawful act is considered as the doer of all that follows") (De Grey, C.J.). Here, Ms. Avie's unavailability at petitioner's trial was a foreseeable—indeed inevitable—consequence of his killing her. As a matter of law and Framing-era understandings, therefore, petitioner "intended" the inevitable consequence of his victim's death. *See State v. Romero,* 133 P.3d 842, 868 (N.M. 2006) (intent can be "inferred" in some cases where the logical result of defendant's actions is the victim's inability to testify), *affirmed on other grounds*, 141 N.M. 403, 156 P.3d 694 (N.M. 2007); *People v. Stechly,* 225 Ill. 2d 246, 266-267 (Ill. 2007) ("the total certainty that a murdered witness will be unavailable to testify could theoretically support presuming intent in the context of murder").[4]

Contrary to petitioner's claim (at 43-44), permitting application of forfeiture by wrongdoing without specific intent to tamper with a witness will not "cause an entire class of criminal defendants" to be denied confrontation rights. First, homicide defendants retain the right to confront all other

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[4] *Amici* do not, by this argument, intend to suggest that forfeiture applies only where defendant is aware that the victim spoke to police in the past. The foreseeability analysis applies to all wrongful killings–as all killers know their victims will be unavailable as a witness in a future trial.

witnesses; just not the one they killed. Second, courts must still determine by a preponderance of the evidence whether the defendant *wrongfully* killed the victim. Third, additional evidentiary protections protect against admission of unreliable or overly prejudicial statements. Moreover, where the witness is still alive, forfeiture's unavailability requirement will require specific evidence linking the defendant to the witness' absence. *See* Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation,* 85 No. Car. L. Rev. 1, 41-46 (2006). Petitioner's approach, in contrast, by limiting the doctrine to cases showing a specific-intent to witness-tamper, would exclude "an entire class" of prosecutions from fair process by denying courts in future cases the opportunity to make such fact-specific findings regarding forfeiture.[5]

B. The Equitable Maxim Underlying The Forfeiture Doctrine Denies Benefit to Wrongdoers Regardless of Intent.

Forfeiture by wrongdoing is "the outgrowth of a maxim based on principles of common honesty." *Reynolds,* 98 U.S. at 159. This equitable maxim—that no one should be allowed to take advantage of his or her own wrong—has deep roots in the common law. Nothing in the logic of the maxim or in Framing-era law confines it to cases where the litigation advantage gained by the wrongdoer or a third party was the specific motivation for the wrongdoing. Rather, common-law courts regularly

[5] This Court has itself affirmed that forfeiture "for misconduct" needs no specific intent. *See Illinois v. Allen*, 397 U.S. 337, 339-443 (1970); Illinois, et al. *Amicus* Br. 8-10.

applied the maxim where other considerations motivated the wrongdoing.

The "wrongdoing" maxim goes back at least to 1725, when the court refused to entertain an action for accounting between two highwaymen. *See* Note, *The Highwayman's Case (Everet v. Williams)*, 35 L.Q. Rev. 197 (1893). Lord Mansfield later explained that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120, 1121 (K.B. 1775). Indeed, the "wrongdoing" maxim is but a particular application of the bedrock requirement of courts of equity that those seeking equitable relief must have "clean hands" with regard to the matter they seek to vindicate. *See*, *e.g.*, *Barnes v. Starr*, 64 Conn. 136, 28 A. 980, 984 (1894) (discussing relationship of equitable maxims to "clean hands" principle).

The fundamental requirement of equity focuses on the voluntary, wrongful acts of the party and the connection between the wrongdoing and the legal question before the court, not on the specific intent of the wrongdoer. *See*, *e.g.*, Joseph Priestley, *An Essay on a Course of Liberal Education*, 132 (1765) ("Maxim the first. He that will have equity done to him must do it to the same person. 2d. He that hath committed iniquity shall not have equity."); Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional* Law 396 (1857) ("[A]n individual shall not be assisted by the law in enforcing a demand originating in a breach or violation on his part"). As this Court explained in *Deweese v. Reinhard*, 165 U.S. 386, 390 (1897), "[a] court of equity acts only when and as conscience

commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of the them in a court of law, he will be held remediless in a court of equity." *See also* 1 Pomeroy's Equity Jurisprudence §397 (1st ed. 1881).

Of course, the "clean hands" maxim does not mean that a wrongdoer loses all legal rights. The maxim denies relief only "for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication." *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933) (citing 1 Pomeroy, *supra*, § 399; Story's Equity Jurisprudence (14th Ed.) § 100). To grant relief in those circumstances "would make this court the abetter of iniquity." *Id.* (quoting *Bein v. Heath*, 47 U.S. (How.) 228, 247 (1848)). Here, petitioner's killing of Ms. Avie, coupled with his effort to use her death as the basis for excluding her prior statements to police, was directly relevant to the principal question at trial—whether petitioner murdered Ms. Avie or shot her in self-defense. His conduct therefore fits squarely within the maxim, which "is a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief." 2 Pomeroy, *supra*, §397.

The "wrongdoing" maxim recognized in *Reynolds*, like the clean hands requirement on which it is based, was well established and respected by American courts of the Framing era. *Mitchell v.*

Smith, 1 Binn. 110, 1804 WL 966 (Pa. 1804) (dismissing suit to recover on note given for illegal transaction); *accord Bostick v. McLaren*, 2 Brev. 275, 1809 WL 294 (S.C. Constitutional Ct. App., 1809). Of particular importance here, the *principle applies in criminal cases as well as in civil cases*. *See Diaz v. United States*, 223 U.S. 442, 458 (1912) ("Neither in criminal nor civil cases will the law allow a person to take advantage of his own wrong.") (quoting *Falk v. United States*, 15 App. D.C. 446, 460 (D.C. App. Ct. 1899)); *see also Barnes v. Starr*, 28 A. 980, 984 (Conn. 1894) (collecting 19th century cases where relief was denied based on unclean hands due to party's wrongful conduct, "whether willful or not").

The same principle has been embodied in the "slayer rules" widely applied at common law in the insurance and inheritance contexts to preclude even innocent beneficiaries from recovering a wrongfully killed victim's assets. *See, e.g., Amicable Society v. Bolland*, 4 Bligh N.R. 194, 211 (House of Lords 1830) (where insured was executed for forgery, beneficiary's innocent assignees denied recovery even though the insured never "intended" to be hanged); *accord Burt v. Union Cent. Life Ins. Co.*, 187 U.S. 362 (1902) (refusing to allow the assignees of the husband's life insurance policy to recover after he was hanged for murdering his wife); *Box v. Lanier*, 79 S.W. 1042 (Tenn. 1904) (barring husband's heirs from recovering on insurance policy on husband's life, where husband murdered wife and then killed himself).

Similarly, in inheritance cases, "[i]t seems to be nearly universally accepted by the courts . . . that a slayer may be prevented from taking under the will

of his victim *without regard to whether he was actually motivated by the prospect of so benefiting from his act*." Walsh, Annotation, "Homicide as Precluding Taking Under Will or by Intestacy," 25 A.L.R.4th 787, § 12 (emphasis added).[6] *See, e.g., Van Alstyne v. Tuffy*, 169 N.Y.S. 173, 174 (Sup.Ct. Monroe Cty 1918) (holding that equity barred the killer's intestate successors from profiting from "the natural and direct consequence of [the] criminal act . . . whether the crime was committed for that very purpose or with some other felonious design"); U.P.C. §2-803(f) (codifying slayer rule without any intent requirement).

That the equitable principle of "unclean hands" did in fact underlie Framing-era understandings of "forfeiture" is clear from contemporaneous definitions of the term: A highly regarded legal treatise of the day defined forfeiture as:

> [t]he omission or neglect of a duty, which the party binds himself to perform, or to the performance of which he is enjoined by the law, and is upon the breach or neglect thereof called a forfeiture, that is the advantages occurring from the performance of the thing are by this omission defeated and determined.

2 Matthew A. Bacon, *A New Abridgement of the Law* (London 3d. ed. Printed by His Majesty's lawprinters

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[6] Cases supporting this view — and some exceptions - are set forth at Walsh, *supra,* at §§ 3[b], 3 [c], 14[b], 14 [c]. A minority view is that forfeiture is precluded by statutes governing inheritance, absent any provision barring killers. Walsh, *supra*, §§ 2[a], 3[a], 14[a].

1768).[7] Similarly, Webster defined the term forfeiture as: "[t]he act of forfeiting; the losing of some right or privilege, estate, honor, office or effects, by an offence, crime, breach or condition or other act." 1 N. WEBSTER, *supra,*.

Petitioner argues that his right to confront the witnesses against him is not a "benefit" or "privilege" which can be forfeited pursuant to unclean hands. Pet. Br. 47-48. However, the fact that the confrontation right is a "bedrock principle" of the Constitution does not mean it cannot be forfeited by defendant's wrongful conduct. Indeed, if it is a "benefit" or "privilege" that can be forfeited for intentional witness-tampering, it is just as much a "benefit" or "privilege" when forfeited for other wrongful conduct which makes confrontation impossible. Certainly, the idea that a person may kill a victim and then object to her absence from his trial and claim rights flowing from his own wrongdoing, is "offensive to the dictates of natural justice." *Deweese,* 165 U.S. at 390.

C. Framing-Era Cases Concerning Deceased Witnesses Have No Bearing On The Forfeiture Doctrine.

Petitioner's and NACDL's reliance on dying declaration cases in support of their specific-intent requirement is, at best, misguided. First, they do not cite a single case in which forfeiture by wrongdoing was addressed in conjunction with a dying declaration. Both *King v. Woodcock,* 168 Eng.

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[7] Like many early dictionaries this treatise did not have page numbers. All quotes are as stated in the original except archaic spelling has been replaced.

Rep. 352 (1789), and *King v. Dingler,* 168 Eng. Rep. 383 (1791) held that magistrates who took the victims' statements had failed to properly apply mandated procedures under the Marian statutes, including obtaining the defendant's presence at the deposition, even though those statutory procedures were well-established and capable of being followed. Forfeiture by wrongdoing is nowhere discussed. There is no comparable procedural violation in the case before the Court—thus *Woodcock, Dingler* and other *Marian*-statute cases are inapposite to the question here.[8]

In contrast, the early American case of *McDaniel v. State*, 8 Smedes & M. 401, 1847 WL 1763 (Miss. Err. & App. 1847), *does* analyze forfeiture, along with dying declarations. Here, the court, after finding the statements met the dying declaration standard, rejected the defendant's claim that admission of the evidence violated his Sixth Amendment right to confrontation, holding that "[i]t would be a perversion of [the Sixth Amendment'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." *Id*. at *8. The court therefore rejected the confrontation claim based on the wrongdoing maxim.

That case highlights the core reason why dying declaration cases cannot answer the forfeiture question here: The requirements for dying

[8] Indeed, even petitioner asserts that the Marian statutes, as distinct from the common law, are not the proper basis for deriving the original meaning of the Confrontation Clause. Pet. Br. 17.

declarations are less about confrontation than about evidentiary reliability/prejudice. *See* NACDL Br. 16. As a leading treatise explained, "[d]ying declarations have every element of dramatic evidence" and "possess an impressiveness out of all proportion to their evidentiary value" that, in turn, threatens to inflame "the elemental passions" of the court and jury. 1 Wharton, Evidence 529 (10th ed. 1912); *accord Commonwealth v. Mulferno*, 108 A. 639, 640 (Pa. 1919) ("the court and jury may sometimes have their better judgment overridden by the admission of such statements, having the effect of sweeping away their impartial attitude, and substituting for it the emotional element, as presented by the picture depicted by the dying man; and it is on this account courts have imposed a certain strictness on the admission of these declarations"). Because they were uniquely capable of distorting factfinding, such statements had to satisfy strict reliability/prejudice-based conditions to be admitted. This analysis was principally a reliability, evidentiary inquiry—it was not an inquiry into forfeiture or confrontation per se.

Thus, where courts *rejected* dying declarations as failing to meet the special reliability/prejudice requirements, there was no need to reach the confrontation/forfeiture question. Where such statements were *admitted*, there also has no need to address forfeiture. Either way, dying declaration determinations provide no support for petitioner's construction of the forfeiture-by-wrongdoing doctrine.

Finally, even if these cases were seen as indicative of the scope of forfeiture by wrongdoing, at most they would indicate only that Framing-era courts did not address forfeiture by wrongdoing

outside of the witness-tampering context. Given the dramatic differences between modern adjudications of domestic violence and domestic homicide and the types of adjudications dealt with by Framing-era courts, *cf.* Section I.D., *infra,* it is unsurprising that they did not face the questions of *pre*-charge interference with witnesses raised by domestic violence and homicide cases of today. The absence of such applications at that time thus tells us little about what they would have thought about forfeiture in the context we confront today.

The differences between then and now are particularly salient given the equitable nature of the forfeiture by wrongdoing doctrine. Unlike specified constitutional rights, equitable doctrines such as the "wrongdoing" maxim are inherently based in community norms. Equity, which embodies the concept of "fairness," is intrinsically bound up with society's sense of right and wrong. As society's values and norms change over time, so must notions of "equity." *See*, *e.g.*, *Union Pacific R. Co. v. Chicago, R.I. & P.R. Co.*, 163 U.S. 564, 601 (1896) (Equity "has always preserved the elements of flexibility and expansiveness . . . in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed." (citing 1 Pomeroy, *supra*, § 111); 1 Pomeroy, *supra*, § 67 (The "American system of equity is preserved and maintained . . . to render the national jurisprudence as a whole adequate to the social needs. . . . [I]t possesses an inherent capacity of

expansion, so as to keep abreast of each succeeding generation and age.").[9]

Thus, to the extent that in certain dying declaration (or other cases) past courts undoubtedly ruled without consideration of modern equitable concerns, such decisions should not dictate the contours of the modern application of equitable forfeiture by wrongdoing. As is addressed below, modern concerns not shared in the Framers' era include: the disturbing rates of domestic violence and domestic murder today; the prevalence of defendants keeping witnesses away through *pre-*

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[9] In *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund*, this Court declined to accept a construction of the Judiciary Act of 1789's conferral of federal court jurisdiction over "all suits . . . in equity" to include "a type of relief that ha[d] been specifically disclaimed by longstanding precedent." 527 U.S. 308, 318-19, 22 (1999). This Court held that Congress could not have intended to grant federal courts such power in the Judiciary Act. In so holding, however, the Court made clear that it "[did] not question that equity is flexible." *Id.* at 322. Similarly, in *Great Western Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002), the Court adopted a narrow construction of ERISA Section 502(a)(3), precluding money damages, in light of historical evidence that such damages historically had been considered "legal" rather than "equitable" relief. In both cases, the Court was driven by concerns over the proper limits of federal court jurisdiction. *See Stonebridge Invest. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761, 772 (2008) (reaffirming that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation") (citation omitted). Such jurisprudential and political concerns are entirely absent here, where concerns over the limited jurisdiction of federal courts are not implicated and the existence of both the equitable "wrongdoing" maxim and the use of forfeiture to vindicate the maxim are settled features of equity jurisprudence.

charge wrongdoing, including domestic murders; the understanding that domestic murders typically occur only after a long history of domestic abuse, prior reports to police, and potential prosecution; and the fact that understanding the past abuse is often essential to discerning the truth about the final killing. These realities must be part of a determination of what "equity" demands.

D. The Problem of Domestic Murders In The Context Of A History Of Battering Was Simply Not An Issue For Framing-Era Courts And Framers.

At root, the debate in this case is whether the traditional paradigm of "witness-tampering," which dominated Framing-era courts' consideration of forfeiture by wrongdoing, should define the outer limits of the doctrine – or whether the doctrine may also be applied to a new type of problem not considered or addressed by the Framers.[10] This

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[10] Petitioner's reliance on Federal forfeiture Rule 804(b)(6), which does require specific intent, is subject to the same response. Pet. Br. 34-40. The Advisory Committee, headed by Judge Ralph Winter, author of *United States v. Mastrangelos,* 693 F.2d 269 (2d Cir. 1982), a mob-related witness-tampering case, was focused solely on witness-tampering when determining the scope of the new Rule. Insofar as federal courts rarely adjudicate domestic violence or domestic murders, they, like Framing-era courts, have had no occasion to confront the problem which dominates the nation's state criminal court dockets–whether *pre-charge* intimidation, control and criminal conduct which causes the witness' absence or explains the witness' murder, should constitute grounds for forfeiture by wrongdoing. Furthermore, in any event, the Federal Rule does not define the scope of the constitutional doctrine. *Crawford,* 541 U.S. at 50-51, 61.

Court is regularly required to apply original meaning to modern problems. *See*, *e.g.*, *Kyllo v. United States,* 533 U.S. 27, 33-34 (2001) (acknowledging that the "advance of technology" inevitably affects the privacy secured to citizens by the Fourth Amendment); *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (applying Sixth Amendment to uphold rape shield statute). As explained below**,** confrontation rights in domestic violence cases and domestic homicides—as we now understand them—are a modern problem not faced by Framing-era courts or lawmakers.

In the 1700's and 1800's, domestic violence had ambiguous legal status in England and America. To some extent the use of force against wife and children was considered a man's obligation. "By law, a husband acquired rights to his wife's person . . . A wife was obliged to obey and serve her husband . . . As master of the household [he] could command [her] obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority." Reva B. Siegel, '*The Rule of Love': Wife Beating as Prerogative and Privacy,* 105 Yale L. J. 2117, 2122-23 (1996) (citing cases); 1 William Blackstone, *Commentaries on the Laws of England* 430 (1765) (describing the doctrine of "coverture" whereby women lost legal existence upon marriage).

Legal remedies for wife-beating existed only to a limited degree. Blackstone suggested that the "moderate chastisement" which the "old law" had prescribed was in flux in the "politer reign of Charles the Second." *Id.* at 433 ("with us . . . this power of correction began to be doubted: and a wife may now have security of the peace against her husband . . ."). In the colonies, some Puritan-

leaning states adopted laws against wife-beating and others incorporated English common law remedies such as the "peace bond." Ruth Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy,* Early American Studies, Vol. 5, No. 2, Fall 2007, 223-251, 232. Such proceedings were "summary" proceedings "without the need for a trial or jury, in petty sessions." Elizabeth Foyster, MARITAL VIOLENCE: AN ENGLISH FAMILY HISTORY 1660-1857, 16, 21-24 (Cambridge Univ. Press, 2005); Bloch, *supra,* at 234. The dominant goal of these proceedings was reconciliation and future safety, not punishment. Foyster, *supra*, at 16, 21-22. Constitutional protections thus were not at issue. *Id*. at 25 ("witnesses were only occasionally examined"); J.F.S., *Peace and Behavior Bonds,* 52 Va. L. Rev. (Jun. 1966), 914-933, 927-28 (as late as the 1960's many states provided peace bond proceedings without constitutional protections).[11]

Legal responses to wife-beating became even less available to women after the Revolution. Bloch, *supra,* at 248 ("the Revolution if anything reinforced

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[11] The courts offered uncertain and limited protection, reflecting the society's acceptance of some amount of wife-beating. Foyster at 21 (husband claimed wife "mad" and no bond issued); A Gentleman of the Law, *The Conductor Generalis: or, The Office, Duty and Authority of Justices of the Peace*, 335 (Philadelphia: 1801) (noting that some continued assaults "even [by] a husband [against] his wife, as some say," may not result in forfeiture of the bond); *Bradley v. State,* 1 Miss. (1 Walker) 156, 1824 WL 631, at *1 (1824) (permitting "moderate chastisement" of wives); *State v. Black,* 60 N.C. 262, 1864 WL 1041, at *1 (1864) (approving use of force "to control [a wife's] unruly temper").

the baseline of male coercive control over women"). Greater emphasis on family privacy, and lesser authority to the State, meant that the "older justifications for holding male heads of families accountable to governmental authority eroded in the early republic, and American law moved toward the recognition of a new, institutional right to familial privacy that accorded fewer legal protections to household dependents like abused wives." *Id.* at 250. *See State v. Rhodes,* 61 N.C. 453 (N.C.1868) (adopting family privacy rationale for refusing to allow prosecution of "trifling violence" between spouses).

Thus, at the time of the Framing, wife-beating was rarely adjudicated, and was dealt with primarily, if at all, through informal mechanisms lacking criminal penalties or constitutional protections. Wife-beating was scarcely recognized as a problem. In March 1776, Abigail Adams wrote her famous letter to her husband who was then at the second Continental Congress preparing to declare America's independence. She urged that "the new code of laws" end husbands' "unlimited power" over wives, asking "[w]hy not put it out of the power of the vicious and the lawless to use us with cruelty and indignity with impunity?" John Adams's response is emblematic of the views of his time that wife-beating was a trivial problem of no legal or constitutional significance: "As to your extraordinary code of laws, I cannot but laugh . . . . Depend upon it, we know better than to repeal our masculine systems. . . [we must avoid] the despotism of the petticoat . . . ." MY DEAREST FRIEND: LETTERS OF ABIGAIL AND JOHN ADAMS 110-111, 112, 116 (Margaret A. Hogan & C. James Taylor, eds., 2007).

The fact that wife-beating was barely legally cognizable and deemed insignificant at the time of the Framing has several important implications. First, it means that when killings of wives occurred, there were unlikely to be prior complaints or investigatory records establishing a pattern of assaults or threats, because such abuse had minimal legal significance and was rarely documented by authorities.[12] Thus, the kinds of witness statements and investigatory reports at issue here would not have existed in Framing-era domestic homicide cases. Indeed, even if the victim had told someone privately of her husband's violence, prosecutors in that era would have been much less likely to even *look* for past hearsay, lacking the perspective we now have on the links between ongoing domestic violence and ultimate domestic murder.[13] Framing-era courts and legal thinkers would not have considered, for example, whether an accused murdered his wife to *retaliate* for her reporting his

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[12] Foyster, *supra* at 26 ("Much of the important work that magistrates conducted informally in petty sessions and in the police courts . . . rather than legal proceedings, was not minuted [*i.e.,* documented].").

[13] Understanding of the link between murder and domestic violence has only recently emerged in this country as well, largely as a result of the O.J. Simpson case. Prior to that time, it is *Amici*'s experience that many people thought that "domestic violence" did not involve "murder" and that the two problems were entirely distinct. *See* Donna Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill,* 2(1) So. Calif. Rev. of L. & Women's Studies 71 (1992); Lynnell Hancock, *Why Batterers So Often Go Free,* Newsweek (October 11, 2005)("Prosecutors need to do a better job of making this gruesome link between murder and abuse very clear for jurors, say legal experts").

battering, a current and realistic scenario close to the "witness tampering" paradigm but not involving a specific-intent to "prevent" the witness's in-court testimony. In short, the post-charge, witness-tampering paradigm does not describe why most battered women - whether dead or alive - are absent from trial. Yet the accused's role in such witnesses' absence is equally critical and equally (or more) wrongful than in a witness-tampering case.

Second, the fact that domestic violence was generally not treated as a serious crime or even recognized as a significant legal problem in the Framing era means that courts and commentators had little or no need to apply the forfeiture principle outside of the traditional witness-tampering paradigm. But this Court has recognized that the Confrontation Clause (like all constitutional provisions) cannot be limited to the precise factual scenarios that existed in the Framing era. *See Davis*, 547 U.S. at 830 n.5 ("Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.").

Modern realities could not be more different: All states now criminalize domestic violence. Many have adopted mandatory arrest statutes. Proactive and aggressive prosecution of battering has become the norm, strongly encouraged by federal and state governments.[14] Prosecutions of domestic violence,

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[14] *See generally* Emily Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy,* 2004 Wisc. L. Rev. (6), 1657, 1670, 1672 (twenty-one states and the District of Columbia had adopted mandatory arrest as of June 2003; also discussing "aggressive prosecution policies")

child abuse, and domestic homicide cases are characterized by absent witnesses, because abuse victims are intimidated, terrorized or ambivalent. *See generally,* James Ptacek, BATTERED WOMEN IN THE COURTROOM 145-46 (1999) (detailing victims' fears of retaliation); Tom Lininger, *Prosecuting Batterers After Crawford,* 91 VA. L. R. 747, 768, 769 (2005) (in one study half of all victims suffered threats of retaliation). In this context, the problem of absent witnesses derives not solely from post-charge "witness tampering" by the defendant, but very often from *pre*-charge abuse, coercion, intimidation, or at worst, killing by the defendant. *See generally* Tuerkheimer, *supra.* Thus, while reliance on the types of cases adjudicated in the Framing-era provides some guidance, it cannot fully resolve the question of the proper application of the original meaning of the Confrontation Clause to the modern problems of domestic violence and domestic murders.

(citations omitted); Jeffrey Fagan, *The Criminalization of Domesic Violence: Promises and Limits,* NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT (JAN. 1996), p. 1 ("[d]uring the past 30 years, the criminalization of domestic violence has developed along three … tracks: criminal punishment and deterrence of batterers, batterer treatment, and restraining orders designed to protect victims through the threat of civil or criminal legal sanctions"); Violence Against Women Office Press Release, "Justice Department Funds Community Initiatives to Treat Domestic Violence as a Crime," (1998), available at http://www.ojp.usdojgov/pressreleases/1998/VAW98204.htm; International Association of Chiefs of Police, National Law Enforcement Policy Center, *Model Policy on Domestic Violence* (1996 & 1997) (urging equal treatment of domestic assaults and calling for non-arrest decisions to be justified).

However, if we seek to draw "reasonable inferences," *Crawford,* 541 U.S. at 52, n. 3, as to how the Framers would have applied this doctrine to the modern problem, there is one piece of significant historical evidence that suggests that Framing-era courts, had they faced the domestic violence/homicide dockets of today, would have recognized the applicability of forfeiture to cases such as these. That evidence concerns the courts' and commentators' treatment of cases involving sexually assaulted children. In such cases, pre-Framing-era British courts routinely admitted hearsay from those to whom the children reported, when the children were legally prohibited from testifying under oath. *See generally* Tom Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis,* 82 Ind. L. J. 1029, 1035-1044 (2007) (surveying practice of admitting children's hearsay in child rape cases, primarily in the 1700's). Sir Matthew Hale's famous Treatise asserted that child rape victims' unsworn testimony should be admitted, since it was preferable to the hearsay reports of their statements which were *already admissible*, and their information was the only possible proof of the crime. 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 634 (London, Prof'l Books Ltd. 1971) (1736). *See, e.g., Rex v. Robbins*, Old Bailey Session Papers (hereafter "OBSP") (Jan 13, 1721) (mother testified as to daughter's descriptions of the rape); *Rank v. Tankling*, OBSP (Jul 11, 1750) (doctor testified regarding child's description of the rape); *Rex v. Larkin*, OBSP (July 3, 1751) (aunt and an additional witness testified as to child's descriptions of the rape).

This reality is directly contrary to petitioner's absolutist position that Framing-era defendants could never be convicted without the right to cross-examine the accuser. And it suggests that in cases concerning a heinous crime occurring behind closed doors, Framing-era courts and leading thinkers recognized that hearsay from such witnesses—who could not be sworn and give testimony—was admissible as the only viable means of proving the crime. *Lyon & LaMagna, supra,* at 1035-1036 ("Hale, Bathurst and Blackstone thus took a 'best evidence' approach to the receipt of children's statements"); 4 William Blackstone, *supra*, at 214 (1769) (referencing Hale's argument that such information ought to be heard, "because the nature of the offence being secret, there may be no other possible proof of the actual fact" but arguing that corroboration was still necessary). These courts' and commentators' recognition of the necessity to admit hearsay in such cases would be applicable to the problems of domestic murder prosecutions today, which also involve a crime committed behind closed doors, and of which, very often, "no other testimony can be had of the very doing . . . but the party upon whom it is committed . . . ." 1 HALE, *supra,* at 634.

II. PETITIONER'S SPECIFIC-INTENT REQUIREMENT WOULD CRIPPLE THE TRUTH-SEEKING PURPOSE AND INTEGRITY OF ADJUDICATIONS AND CREATE AN INCENTIVE FOR BATTERERS TO KILL THEIR VICTIMS.

This Court has repeatedly held that the truth-seeking purpose and integrity of the judicial system are core considerations in applications of 6th

Amendment rights such as confrontation. These values are particularly weighty here, where the forfeiture doctrine must be applied "equitably."

As this Court has explained, "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988) (citation omitted). Furthermore, "'one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.* at 413 (citing *United States v. Nobles*, 422 U.S. 225, 241 (1975)). Accordingly, "presentation of reliable evidence and the rejection of unreliable evidence . . . and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance." *Id.* at 414-15.

In *Taylor,* this Court affirmed *exclusion* of a defense witness' testimony as a sanction for a discovery violation which undermined the prosecution's ability to cross-examine the defense witness. In domestic homicides, the potential for the justice process to pursue the truth is critically dependent upon the *admission* of past statements of the dead victim such as those in this case. Here the defendant claimed self-defense, and testified that the victim had threatened to kill him and others, and had approached him aggressively. J.A. 34. By contrast, the victim had previously told the police of a prior assault, stating while crying that the defendant had choked her, threatened her with a knife and threatened to kill her. *Id.* at 35-36. These statements are inextricably connected to any jury's

assessment of defendant's self-defense claim. Excluding Avie's past statements to protect Giles' confrontation right would thus be tantamount to treating that right as mandating a trial process which proceeds solely on "half-truth." *Taylor, supra,* at 413. This destruction of the integrity of the criminal trial process cannot be mandated by the Sixth Amendment.

The incompatibility of exclusion of such past statements with a "truth-seeking" or fair adjudication is epitomized in *State v. Romero,* 141 N.M. 403, 156 P.3d 694 (N.M. 2007), cert. dismissed, 128 S.Ct. 976 (Jan. 11, 2008). Defendant was on trial for murdering his estranged wife. He testified that when he woke up his estranged wife was dead in his bed, after a night in which they had fought, then "made up and had consensual sex," and then "fought some more." *State v. Romero,* 139 N.M. 386, 400, 133 P.3d 842, 855 (2006). He claimed that the victim had grabbed him in the genitals, punched him in the face and elbowed him in the mouth; that he bit her and struck her on the side of the head to get her to loose her grip; that they then went to sleep; and that when he woke up the victim was not breathing. *Id.*

In fact, defendant's version of events is ludicrous in light of his history of terrorizing the victim. In prior testimony before the grand jury, the victim had detailed the facts that the parties were separated and Defendant wanted her back, that he told her while choking her that "if he couldn't have [her] . . . nobody could," that she may have passed out, that after her roommate called the police, the defendant forced the victim into the bathroom with a knife to her abdomen and told her to tell everyone that the

marks on her neck were a result of "rough sex." 133 P.3d at 846-847. The victim also told a police officer and Sexual Assault Nurse Examiner that the defendant raped her in connection with these events, and said he would kill her. *Id.*

The trial court excluded the victim's statements, and the New Mexico Supreme Court affirmed (subject to a remand) and held that intent to procure the witness's unavailability must be proven before a defendant's right to confront the witness could be forfeited. 141 N.M. at 412. To paraphrase this Court in *Keystone*, such an inequitable result, allowing the defendant's outrageous version of the truth without admitting the victim's past testimony and statements demonstrating its falsity, makes the justice system "the abetter of iniquity." 290 U.S. at 245.

Cases like these—in which past statements by the victim are critical to a prosecution for murder—are tragically common.[15] Almost two-thirds of women

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[15] *See, e.g., State v. Sanchez,* 341 Mont. 240,177-P.3d 444 (Mont. 2008) (homicide conviction after statements admitted); *State v. Throm,* 695 N.W.2d 904 (Ct. App. Wis. 2005), pet. for review denied, 303 Wis.2d 743 (Ct. App. Wisc. 2007) (statements admitted; defendant convicted of intentional homicide after defense of intoxication); *People v. Romero,* 149 Cal. App. 4th (2007) (defendant acquitted of murder, convicted of manslaughter after statements admitted)); *People v. Bauder,* 269 Mich. App. 174, 712 N.W.2d 506 (2005), *lv. den.* 476 Mich. 863 (Aug. 29, 2006) (girlfriend killed by baseball bat and sexual assault with bat; defendant claimed he "snapped"; convicted of felony murder); *United States v. Garcia-Meza,* 403 F.3d 364 (6th Cir. 2005) (statements admitted and first degree murder conviction); *People v. Pantoja,* 122 Cal. App. 4th 1 (2004) (first-degree murder conviction thrown out; 2d degree murder conviction after past statement excluded).

murdered are killed by their intimates. Violence Pol'y Ctr., *When Men Murder Women: An Analysis of 2003 Homicide Data* 3 (Sept. 2005), http://www.vpc.org/studies/wmmw2005.pdf (92% of female victims were murdered by someone they knew; 62% of these were killed by husbands or intimate *partners*). These femicides typically culminate a long history of domestic abuse aimed at dominating and silencing the victim. Jacquelyn C. Campbell, ed., ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS (2007)*;* G.W. Wilt, *et al.*, *Domestic Violence and the Police: Studies in Detroit and Kansas City,* (Police Foundation 1976) (police had intervened at least once in the previous two years in 85% of spousal homicides). Batterers commonly threaten their victims never to report their abuse. Ptacek, *supra*, at 145-46. The chance of murder is at its peak upon separation.[16] Prior contact with the police is common.[17] And the abuse is frequently hidden from friends and neighbors, making prior statements to police officers sometimes the only evidence of the prior abuse.[18]

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[16] American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996) at 39; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 Mich. L. Rev. 1 (1991).

[17] *Domestic Violence and the Police, supra*; Friedman and McCormack, *Dial-In Testimony*, 150 U.Pa.L.Rev. 1171, 1196 (2002).

[18] *See*, *e.g.*, cases cited at n.16*, supra.* Miller, *The Silent Abuser: California's Promotion of Misdemeanor Domestic Violence*, 34 W.St.U.L.Rev. 173, 181 (2007) ("It is undisputable that the overwhelming number of encounters between

While constitutional protections for defendants are essential, "justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), *overruled on other grounds* by *Malloy v. Hogan*, 378 U.S. 1 (1964). This Court has upheld a confrontation restriction specifically aimed at protecting fairness in light of contemporary understandings of violence against women and the criminal process. *Lucas*, 500 U.S. at 149 (upholding preclusion of cross-examination of victim's sexual history under rape shield statute because "the right to present relevant testimony is not without limitation"). While recognizing that the statute diminished the defendant's ability to confront adverse witnesses and present a defense, the Court held that "[t]he Sixth Amendment does not confer the right to present testimony free from legitimate demands of the adversarial system.'" *Id.* at 149 (noting "'trial judges retain wide latitude' to limit reasonably a criminal defendant's right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant'") (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986)). *Accord Taylor, supra,* at 412-415 (emphasizing the "integrity of the judicial system . . . of the adversary process . . . and the interest in the fair and efficient administration of justice"); *United States v. Nobles*, 422 U.S. 225, 234,

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husbands and wives [or cohabitants] take place in the home.") (citations omitted).

241 (1975) (preclusion of defendant's expert investigator's report where defendant failed to produce for prosecutor's cross-examination does not violate Sixth Amendment); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (the right to present testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"), quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). In homicide prosecutions, excluding the only likely truthful version of the killing because it cannot be proven that the defendant killed with the specific intent to distort the justice process will itself profoundly distort the justice process by sacrificing any possible fairness or truth while allowing accused murders to control that process.

Lastly, a specific-intent requirement as a predicate for forfeiture threatens the safety of still-living domestic violence victims because it will encourage their batterers to kill them. Abusers pay close attention to legal processes and outcomes. Lynnell Hancock, *Why Batterers So Often Go Free,* Newsweek (October 16, 1995) (after Simpson acquittal, batterers told victims things like "I'm going to O.J. you"). Batterers are often intelligent and calculating experts at manipulating the legal system.[19] It will not take long for them to learn that no evidence of the victim's past statements to police

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[19] Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution,* 7 UCLA Women's L.J. 173, 179-80 (1997); Sack, *supra,* at 1682 (batterers make false accusations to manipulate the justice system against their victim); *Chieco v. Chieco,* 170 A.D.2d 569, 566 N.Y.S.2d 345 (App. Div. 1991) (reversing protection order issued to husband because he was using it solely to intimidate his wife who was seeking divorce based on cruelty).

can get before the jury if the victim is dead—so long as it cannot be demonstrated that they killed the victim for this purpose. Given the obvious other motives and contexts for killings by batterers, victims' incriminating past hearsay will be virtually guaranteed to be excluded in murder prosecutions, while in a mere battering prosecution it will still be possible for the victim to testify or for tampering conduct to be proven so as to admit past hearsay. Abusers will thus know that if they kill their victim their risk of conviction will be significantly lower than if they merely beat her. *See, e.g.,* Lininger, 91 Va. L. Rev. at 772 (when batterers know that live testimony is required they increase the coercion of the victim to not testify). It is inconceivable that the Constitution requires the creation of an incentive to kill, and certainly no principle grounded in equity could do so.

CONCLUSION

For all the foregoing reasons, *Amici* DV Leap et al. urge this Court to affirm the decision below.

Respectfully submitted,

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APPENDIX A

INTEREST OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Respondent, and urge the Court to affirm the decision of the Supreme Court of California.

The **Domestic Violence Legal Empowerment and Appeals Project (DV LEAP)** was founded in 2003 by one of the nation's leading domestic violence lawyers and scholars. DV LEAP's mission is to enforce battered women's and their children's constitutional and legal rights and to promote fairness for victims and defendants by providing expert representation to appeal unjust trial court decisions. DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law in deciding domestic violence cases, and has previously co-authored two other amicus briefs to the United States Supreme Court: *Castle Rock v. Gonzalez* and *Davis v. Washington, Hammon v. Indiana.* In *Davis* DV LEAP's brief specifically addressed forfeiture by wrongdoing. DV LEAP is a partnership of George Washington University Law School and a network of participating law firms.

The **California Partnership to End Domestic Violence (CPEDV)** is the federally recognized statewide domestic violence coalition for California. Its members include approximately one hundred domestic violence service organizations, supportive organizations, survivors of domestic

violence, and other concerned individuals. CPEDV was formed in 2005 out of a merger of two former entities, the California Alliance Against Domestic Violence (CAADV) and the Statewide California Coalition for Battered Women (SCCBW). CPEDV works to end domestic violence through public education, partnerships, advocacy, public policy, and direct services and is member driven. CPEDV authored the domestic violence amicus brief in support of the People of California that was submitted to the Supreme Court of California in this case.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum is dedicated to working to end violence against women. Legal Momentum was one of the lead advocates for the landmark Violence Against Women Act and its reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic violence. Legal Momentum also represents victims of domestic violence who suffer housing and employment discrimination related to the violence. Legal Momentum previously co-authored an *amicus curiae* brief in *Davis v. Washington* and *Hammon v. Indiana,* 547 U.S. 813 (2006), which highlighted the issue of forfeiture by wrongdoing.

The **District of Columbia Coalition Against Domestic Violence (DCCADV)** is a not-for-profit organization incorporated in the District of Columbia in 1986. The mission of DCCADV is two fold: (1) to eradicate all types of relationship violence including: domestic violence, spousal rape, sexual assault, stalking, mental and emotional abuse, and

acquaintance rape through the coordinated mobilization of efforts to effect systemic social change; and (2) to build a city wide response in the District and surrounding jurisdictions in partnership with the community, providers, and concerned others to more effectively ensure the safety and security and justice needs of those living with violence and abuse. DCCADV pursues these goals through its focus on advocacy, public education, public policy, technical assistance, training, resources, research and direct services. DCCADV has a long history of working at state and local levels to promote a strong criminal justice response to domestic violence. DCCADV works with the community to implement best practices in the prosecution of domestic violence cases. DCCADV provides training for law enforcement officers and prosecutors about domestic violence and the needs of victims. DCCADV has been involved in the reform of local laws addressing domestic violence for more than a decade. Along with governmental agencies and not-for-profit direct service providers in domestic violence and criminal justice issues, DCCADV continues to formulate new approaches and innovative legal solutions to ending domestic violence.

The **Michigan Domestic Violence Prevention and Treatment Board (MDVPTB)** is a 7-member, Governor-appointed Board established by the Michigan Legislature in 1978 (Act 389 of 1978). The MDVPTB is administratively housed within the Michigan Department of Human Services, and served by an Executive Director and staff members who assist it in fulfilling its responsibility to focus state activity on domestic

violence and sexual assault. The MDVPTB's statutory charge includes: (1) studying and recommending changes in civil and criminal procedures which will enable victims of domestic violence to receive equitable and fair treatment under the law, and (2) advising the Legislature and Governor on the nature, magnitude, and priorities of the problem of domestic violence and the needs of victims of domestic violence. The MDVPTB also administers funding for private, nonprofit agencies serving victims of domestic and sexual violence across the state of Michigan. Past and present MDVPTB members represent a cross-section of professions that assist victims of domestic and sexual violence, including judges, prosecutors, law enforcement officers, domestic violence advocates, and social work and health care professionals.

The MDVPTB bases much of its work on a core belief that an effective response to domestic violence requires strong, swift criminal justice intervention to hold perpetrators accountable for crimes against their intimate partners. An evidence rule that conditions admissibility of a homicide victim's statement on proof that the killer intended to procure the victim's absence at trial is antithetical to justice system efforts to impose appropriate consequences for the ultimate domestic violence crime, because it offers homicide perpetrators an advantage at trial at the expense of their victims. Such a rule impedes the court in its search for truth in a way that is likely to encourage domestic homicides, given the complexities of intimate partner violence and the difficulty of proving that a killing in this context was done with the specific intent to procure the victim's silence at trial.

D. Kelly Weisberg, is a family law professor at Hastings College of the Law. She has taught in the fields of Family Law and Children and the Law for 25 years at several law faculties (Hastings, Washington University, University of San Francisco, and Boston University). She has authored leading casebooks on Family Law and Children and the Law. Ms. Weisberg's Family Law casebook addresses many aspects of domestic violence, including: battered woman syndrome, the duties of law enforcement, marital rape, tort remedies, evidentiary privileges arising from the marital relationship, and discrimination (housing, employment) against survivors.