No. 07-6053

In The
Supreme Court of the United States

DWAYNE GILES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

**On Writ Of Certiorari
To The Supreme Court
Of The State Of California**

BRIEF OF THE NATIONAL ASSOCIATION TO PREVENT SEXUAL ABUSE OF CHILDREN'S NATIONAL CHILD PROTECTION TRAINING CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a criminal defendant forfeits his Sixth Amendment Confrontation Clause claims on a showing that the accused has caused the unavailability of the witness, as some courts have held, or must there also be an additional showing that the actions of the accused were undertaken for the purpose of making the witness unavailable to testify?

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INTEREST OF *AMICUS CURIAE*[1]

The National Child Protection Training Center (NCPTC) is the training arm of the National Association to Prevent Sexual Abuse of Children. The National Association to Prevent Sexual Abuse of Children supports survivors of abuse, and works to change laws and institutions to change the culture which permits abuse. NCPTC was founded in 2003 through funding from the Department of Justice Office of Juvenile Justice and Delinquency Prevention Program. Both organizations are non-profits. NCPTC serves as a national clearinghouse for child protection professionals by providing technical assistance, addressing legal issues, and researching and publishing of materials on child abuse. NCPTC also provides training to frontline professionals throughout the country.

The Court's decision in this case has enormous implications, not only for the rule of law and the ability of courts to ensure the fair administration of

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[1] *Amicus* NCPTC has given the parties more than ten days' notice of its intention to file this brief on behalf of the National Association to Prevent Sexual Abuse of Children's National Child Protection Training Center, and the parties have consented to the filing of this brief. Written statements of their consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation and submission.

justice, but also for children. Children are especially vulnerable to actions, violent or otherwise, that cause the child to be unavailable to testify. It is common in child abuse cases for the abuser to make the child unavailable to testify by telling the child not to "tell," by threatening the child, or the child's family or even pets. The abuser's use of secrecy, threats, and sometimes violence during or after the underlying crime, prevents the child from disclosing and testifying against the abuser.[2]

SUMMARY OF ARGUMENT

I. The Confrontation Clause, and its exceptions, should be interpreted based on its original meaning at the time it was adopted. Decisions by this Court have held that forfeiture by wrongdoing is a recognized exception to confrontation based on long established usage from the time of the Founders. A review of *Reynolds v. United States,* 98 U.S. 145 (1879), and the cases it cites shows that forfeiture was used at the time of the Founders without any showing the

[2] *See, e.g.,* Tom Harbinson, *Using the Crawford v. Washington "Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases,* Reasonable Efforts, vol. 1, No. 3 (2004) *available at* http://www.ndaa.org/publications/newsletters/reasonable_efforts_volume_1_number_3_2004.html (last visited March 1, 2008) (indicating at least twenty-seven percent of child abuse victims are threatened or told not to tell).

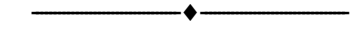
accused had a purpose to cause the unavailability of the witness at trial.

II. Under the original meaning of forfeiture by wrongdoing, forfeiture occurred when the accused caused the unavailability of a witness. Early cases show forfeiture could occur by "means or procurement" of the accused. *King v. Radbourne,* 1 Leach 457, 168 Eng. Rep. 330 (1787), and other cases indicate that forfeiture was used without any showing of a specific purpose to make the witness unavailable to testify. In order to protect the administration of justice, forfeiture doctrine only required that the accused's wrongful, voluntary acts caused the unavailability of the witness.

III. In 1791, statements were admitted under forfeiture by wrongdoing even when the accused had not had an opportunity to cross-examine. Arguments that an opportunity for cross-examination was necessary are not supported by a careful reading of the case law. Forfeiture by wrongdoing under the Marian statutes and the Statute of Pirates was probably used because of Parliament's concerns that witnesses were being murdered and threatened. These statutes were intended to allow use of forfeiture when an accused's acts of wrongdoing were part of the underlying crime. Dying declarations and forfeiture were mutually overlapping and not mutually exclusive confrontation exceptions. The original understanding of the necessity of the oath was as a requirement of evidence law and not as a requirement of the right of confrontation. Since the oath is based on evidence law, use of

the oath is not constitutionally required for the admissibility of unsworn statements under forfeiture doctrine.

IV. Forfeiture by wrongdoing statements should continue to be admissible without pre-trial depositions when the prosecutor makes a good faith effort to have the witness available to testify at trial. The Marian statutes, including use of forfeiture by wrongdoing, did not require the presence of the accused because the declarant was dying. The Constitution should not be interpreted to require use of depositions when the victim is dying. Dying declarations are not testimonial because a dying individual is not deliberating on how her statements might be used in court.



ARGUMENT

I. THE CONFRONTATION CLAUSE, AND ITS EXCEPTIONS, SHOULD BE INTERPRETED BASED ON ITS MEANING AT THE TIME ADOPTED.

In *Crawford v. Washington,* 541 U.S. 36, 43, 53-54, 61 (2004), this Court held that the Confrontation Clause, and its exceptions, should be interpreted based on its original meaning at the time the Founders adopted it. *See also Danforth v. Minnesota,* 552 U.S. ___, No. 06-8273, *slip op.* at 5 (U.S. Feb. 20, 2008) (indicating that case law before *Crawford* "stray[ed] from the original meaning of the Confrontation

Clause" and that *Crawford* relies "primarily on legal developments that occurred prior to the adoption of the Sixth Amendment"). The *Crawford* Court cited *Mattox v. United States,* 156 U.S. 237, 243 (1895), as indicating that the Sixth Amendment should be "read as a reference to the right of confrontation at common law. . . ." *Crawford,* 541 U.S. at 54.

In *Crawford,* this Court approvingly cited *Reynolds v. United States,* 98 U.S. 145 (1879), and stated "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds. . . ." *Crawford,* 541 U.S. at 62. The *Reynolds* court also used an originalist analysis of forfeiture by wrongdoing based on "long established usage" of the doctrine. *See Reynolds,* 98 U.S. at 159. This Court has repeatedly cited *Reynolds* and held that it will uphold the forfeiture by wrongdoing doctrine as used in *Reynolds* if the accused's wrongful voluntary acts cause the witness to be unavailable to testify. *See, e.g., Davis v. Washington,* 547 U.S. ___, 126 S.Ct. 2266 (2006); *Diaz v. United States,* 223 U.S. 442, 452 (1912); *Motes v. United States,* 178 U.S. 458, 471-72 (1900); and *Mattox v. United States,* 156 U.S. at 242.

Reynolds gives guidance in the interpretation of forfeiture doctrine. *Reynolds* was the first case in which this Court addressed the forfeiture by wrongdoing doctrine, referring to three English cases, two state court decisions, and several treatises as precedents. *See Reynolds,* 98 U.S. at 158. The Court cited *Lord Morley's Case,* 6 How. St. Tr. 770 (H.L. 1666);

Harrison's Case, 12 How. St. Tr. 834 (1692); *Queen v. Scaife,* 17 Q.B. 228, 118 Eng. Rep. 1271 (1851); *Drayton v. Wells,* 1 Nott. & M. 409 (S.C. 1819) and *Williams v. State,* 19 Ga. 402 (1855).

The *Reynolds* Court never stated a precise definition of forfeiture by wrongdoing or the specific requirements for its use. Instead, it indicated that its application will be based on the particular facts of each case. *Reynolds,* 98 U.S. at 159. The facts and analysis set forth in *Reynolds* support the conclusion that the accused had only to cause the witness to be unavailable in order for the forfeiture doctrine to apply.

In *Reynolds,* a bigamy case, the missing witness was the wife of the accused, and lived with him. The State attempted to serve a subpoena for the wife and the accused told the process server, when asked whether he would disclose her whereabouts, "No; that will be for you to find out." When the process server stated the wife could get in trouble the accused replied, "Oh, no she won't, till the subpoena is served upon her," and then stated, "She does not appear in this case." On subsequent attempts, the process server was unable to find the witness. The Court stated forfeiture was appropriate based on these facts. *Reynolds,* 98 U.S. at 159-60.[3]

[3] An additional fact the Court noted was that the wife had testified at an earlier trial. *Reynolds,* 98 U.S. at 159. The issue of the oath will be addressed in this brief, *infra* at 17 n.9.

Specific facts showing how the husband caused the wife to be unavailable were never shown. But the facts did support the reasonable inference that the husband somehow had caused her unavailability. *Reynolds* indicates no finding of a specific purpose to make the witness unavailable to testify (i.e. no "intent-to-silence" requirement, *People v. Giles,* 152 P.3d 433, 441 (Cal. 2007), was considered necessary.

Reynolds' holding indicates that the imposition of forfeiture was appropriate based on a neglect, omission, or inference that the accused had breached his duty to the administration of justice by effecting her unavailability. *See also, e.g., Republica v. Doan,* 1 U.S. 86 (Penn. 1784) (showing purpose of flight unnecessary); 2 William Hawkins, *A Treatise on Pleas of the Crown* 143, 148, 155, 177-79 (Dublin, Elizabeth Lynch Printer Thomas Leach ed., 6th ed. 1788) (bail forfeiture did not require any showing of purpose) [hereinafter Hawkins]; 2 Matthew Bacon, *A New Abridgment of the Law* (London, 3rd ed. Printed by His Majesty's Law Printers 1768) (definition of forfeiture includes omission or neglect of a duty).

II. UNDER THE ORIGINAL MEANING OF FORFEITURE BY WRONGDOING FORFEITURE COULD OCCUR WHEN THE ACCUSED CAUSED THE UNAVAILABILITY OF THE WITNESS.

A. Forfeiture Did Not Require a Showing that the Accused Had the Purpose or Specific Intent to Make the Witness Unavailable to Testify at Trial.

Petitioner argues that the original meaning of forfeiture at the time of the Founding required a showing of purpose and specific intent on the part of the accused to make the witness unavailable to testify at trial. Petitioner's brief at 20-26. Petitioner focuses much of his argument on what he claims is the Founders' understanding of the term "procurement." Petitioner's brief at 26-29. The definition of forfeiture by wrongdoing that *Reynolds* adopted, based upon "long standing usage," was not limited to the word "procurement."

Reynolds correctly quotes *Lord Morley's Case* and *Harrison's Case* as stating that when a witness is absent, "detained by means *or* procurement of the prisoner," forfeiture by wrongdoing is appropriate if there is "competent evidence" to "supply the place of that which he has kept away." *Reynolds,* 98 U.S. at 158 (*citing Lord Morley's Case* and *Harrison's Case*) (emphasis added; citations omitted).

Petitioner fails to acknowledge that the disjunctive "or" between the words "means or procurement"

results in forfeiture being appropriate if either of these terms applies. *Reynolds* also states "This resolution . . . was followed in *Harrison's Case,* and seems to have been recognized as the law of England ever since." *Id.* (citation omitted). Since both *Lord Morley's Case* and *Harrison's Case* use the term "means," it is important to know the Founders' original understanding of that term.

The Founders understood the term "means" as "Instrument of action or performance." 2 N. Webster, *An American Dictionary of the English Language* (Johnson Corp. Reprint ed. 1970) (1828). When used in the singular, the Founders would have understood the term to be "An instrument; that which is used to effect an object; the medium through which something is done." *Id.* This definition is consistent with the use of the term in forfeiture cases. The accused effects the unavailability of the witness, justifying forfeiture by wrongdoing. If the accused is the "instrument" or "medium" which results in the witnesses' unavailability, no showing of purpose or a specific intent is necessary.

Petitioner argues "procurement" is limited to intentional or purposeful actions, but that is not the understanding the Founders had of the term. To "procure" is "[t]o cause, to bring about, to effect, to contrive and effect." *Id.* Although "to procure" can also involve intentional acts, such as to contrive, the Founders' use of the term was not limited to purposeful acts. The use of the phrase "means or procurement" in *Lord Morley's* and *Harrison's Case* makes

clear that "procurement," which follows the more general term "means," is not limited to purposeful action but can include solely causing, bringing about, or effecting something.

Another case that informed the Founders' understanding of the doctrine also supports the conclusion that forfeiture did not require a purpose to make the witness unavailable to testify. In *King v. Radbourne,* 1 Leach 457, 168 Eng. Rep. 330 (1787), the Twelve Judges[4] with Lord Mansfield absent, unanimously upheld the use of statements in a murder case based on forfeiture by wrongdoing when the out-of-court statements were not admissible as dying declarations because the victim did not appear to be apprehensive of her approaching death. *See id.,* 1 Leach at 462, 168 Eng. Rep. at 333. The attack resulting in her injuries occurred on May 31st, but her deposition did not occur until June 9th. 1 Leach at 458-59, 168 Eng. Rep. at 331. The victim languished another three weeks after the deposition before she died. 1 Leach at 460, 168 Eng. Rep. at 332.

The trial court, without specifically finding that the victim felt death was imminent when she gave the deposition, upheld the use of the statements based on *King v. Woodcock,* 1 Leach 457, 168 Eng.

[4] The Twelve Judges' decisions were considered to be precedent, but technically they did not act as an appellate court. *See* J.H. Baker, *An Introduction to English Legal History* 139 (4th ed. 2002).

Rep. 352 (1789), apparently as a dying declaration. *See Radbourne,* 1 Leach at 461, 168 Eng. Rep. at 332. Significantly, the Twelve Judges approved use of forfeiture although no showing was made that the accused murdered the victim with the purpose of making her unavailable to testify at trial. *See* 1 Leach at 462, 168 Eng. Rep. at 333.[5]

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[5] Petitioner and *Amicus* National Association of Criminal Defense Lawyers (NACDL) argue that the existence of dying declarations at the time of the Founders forecloses the use of a forfeiture doctrine that does not have a purpose requirement, i.e., that the accused acted to make the witness unavailable to testify. Petitioner's brief at 14-17; NACDL brief at 15-22. The NACDL argues that California's version of forfeiture would "subsume the dying-declaration rule." NACDL brief at 23. Since dying declarations were not subsumed by forfeiture doctrine in 1791, NACDL argues that forfeiture requires a purpose requirement to make the witness unavailable. The NACDL argument is erroneous. In 1791, forfeiture did not "subsume" the dying declaration rule because forfeiture cases, at that time, had to be taken under oath. Dying declarations were not required to be taken under oath, but did require a showing the declarant thought death was imminent.

In *Radbourne,* the Twelve Judges upheld use of the sworn deposition under forfeiture by wrongdoing under the Marian statutes but not as a dying declaration. In *King v. Woodcock,* 1 Leach 500, 168 Eng. Rep. 352 (1789), the court upheld the statements as dying declarations but not under forfeiture because the court did not believe the Marian statutory requirements had been met. In *Wilson's Case,* 1 Lewin at 68, 69-71, 168 Eng. Rep. 962, 963 (1829), the court upheld the use of the sworn deposition under dying declarations and forfeiture by wrongdoing. As these cases illustrate, forfeiture by wrongdoing and dying declarations were not mutually exclusive confrontation exceptions but were overlapping. In some cases the courts concluded the requirements necessary to apply the exception

(Continued on following page)

Radbourne's approval of forfeiture by wrongdoing without a showing of a purpose to make the witness unavailable to testify continued to be the understanding of forfeiture doctrine well past the ratification of the Sixth Amendment. *See, e.g., Wilson's Case,* 1 Lewin 68, 69-71, 168 Eng. Rep. 962, 963 (1829); *Rex v. Smith,* Russ. & Ry. 339, 341, 168 Eng. Rep. 834, 835 (1817) (Twelve Judges); and *King v. Forbes,* [1814] Holt 599, 171 Eng. Rep. 354 (1814).[6]

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were not met, but this did not mean the Founders believed use of dying declarations foreclosed use of forfeiture by wrongdoing or vice-versa.

[6] If the depositions in *Radbourne* and these three other cases were not admissible as forfeiture by wrongdoing without a showing of an intent to silence, only one other rationale existed for admissibility under the Marian statues: the witness was dead for any reason. *See* Hawkins, *supra* at 605. But none of these cases required a showing of purpose to make a witness unavailable to testify at trial, whether the deposition was arguably admissible because the witness was dead, for whatever reason, or under forfeiture doctrine. It is clear that the courts interpreted the Marian statutes as allowing deposition admissibility without any showing an accused had the purpose of making the witness unavailable to testify. If Petitioner argues the depositions in these cases were admissible because the witness was dead, for whatever reason, rather than forfeiture without an intent to silence requirement, Petitioner would be acknowledging a confrontation exception that let in more out-of-court statements than forfeiture without an intent to silence requirement.

The use of forfeiture, without a showing of intent to silence was also recognized in America. *See, e.g., Rex v. Barber,* 1 Root 76 (Conn. 1775) (forfeiture appropriate without specific purpose shown on the part of Barber, although court stated that Bulloch acted so White "could not be had to testify"). *See also Fenwick's Case,* 13 How. St. Tr. 537, 583, 585, 590, 595-97, 598 (H.C. 1696) (presuming that Lady Fenwick acted at the direction of her husband in causing a witness to be unavailable to testify although no showing accused took actions purposefully to make witnesses unavailable). Secondary sources that could have informed the Founders' understanding also support this interpretation.[7]

[7] Two of the most widely cited treatises of the time support the conclusion that a finding of purpose was unnecessary. *See* Hawkins, *supra* at 605 (statements before the justice of the peace or statements before the coroner are admissible if the accused kept the witness away "by means or procurement of the prisoner"); Michael Foster, *A Report of Some Proceedings on the Commission For the Trial of the Rebels in the Year 1746, in the County of Surrey and of Other Crown Cases* 337 (Dublin, James Moore College-Green 2d. ed. 1791) ("if kept out of the way by the prisoner or by his procurement"). *See also, e.g.,* John Keble, *A Report of the Divers Cases in Pleas of the Crown* 55 (London, Isaac Cleave 1708) (coroner deposition admissible if witness "detained by means or procurement of the prisoner"); and James Parker, *Conductor Generalis: or the Office and Duty and Authority of the Justice of the Peace* 168 (New York, Hugh Gaine Printer 1788) ("or kept away by means or procurement of the prisoner").

B. In Order to Protect the Administration of Justice, Forfeiture Only Required a Showing the Accused's Wrongful Voluntary Acts Caused the Unavailability of the Witness.

Both Petitioner and *Amicus* NACDL argue that allowing forfeiture without a showing of a specific purpose to make the witness unavailable to testify will result in admitting any and all of an alleged victim's prior statements. Petitioner's brief at 43; NACDL brief at 25. Petitioner and the NACDL's view of forfeiture doctrine fails to acknowledge the limitations the Founders placed on the doctrine's use. The actions of the accused must cause the witness to be unavailable. *See, e.g., Lord Morley's Case,* 6 How. St. Tr. at 776-77 (when a witness is a "run away" that alone is not sufficient to support use of forfeiture unless the accused's actions caused the witness to be unavailable). Actions of the accused resulting in forfeiture must be voluntary. *Cf. Fenwick's Case,* 13 How. St. Tr. 537, 587, 589-93 (H.C. 1696) (if Lady Fenwick caused a witnesses' unavailability and if Sir. John Fenwick "was privy to it" forfeiture appropriate). The actions of the accused must be wrongful. *See, e.g., Harrison's Case,* 12 St. Tr. at 833, 851 (1692) (attempted bribery).

Whatever standard of proof may be applied, the burden of showing causation, voluntariness, and wrongful acts is on the State. *See Davis v. Washington,* 126 S.Ct. at 2280. Accordingly, the doctrine is not "forfeiture by causation" as Petitioner argues.

Petitioner's brief at 7. Showing causation alone does not result in forfeiture by wrongdoing.

Petitioner's and the NACDL's arguments are based on a misunderstanding of the original meaning of forfeiture as the Founders understood it. Forfeiture by wrongdoing, unlike forfeiture of property after a criminal conviction, is not intended to punish the accused. Charging the accused with witness tampering would not correct the wrong forfeiture by wrongdoing is intended to prevent and correct. Accordingly, the NACDL argument that forfeiture is limited to witness-tampering cases is mistaken. NACDL brief at 6, 13-14.

The accused's duty to the administration of justice does not start only when a criminal charge is filed or the witness appears on the prosecutor's witness list. By causing witness unavailability the accused interferes with a court's administration of justice whether he does so before or after charges are filed. Under forfeiture theory the unavailable witness, whether murdered or made unavailable by other acts, could have testified, but for the accused's acts.

A court's obligation to see that justice is done is not limited to what occurs in the courtroom. Part of a court's obligation to carry out the administration of justice is to uphold the rule of law. To allow the criminal a windfall simply because his voluntary wrongdoing constitutes part of the underlying crime, would impair the ability of courts to ensure "the

twofold aim (of criminal justice) . . . that guilt shall not escape or innocence suffer." *United States v. Nixon,* 418 U.S. 683, 709 (1974) (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)) (first alteration in original). A court's "looking the other way," by suppressing the witnesses' out-of-court statements, would inadvertently sanction the wrongdoing; defeat the administration and ends of justice; and undermine the rule of law. *See, e.g., State v. Brown,* 285 S.W. 995, 996 (Mo. 1926).[8]

Petitioner argues that use of the doctrine denies those accused of murder the protections of the Confrontation Clause. Petitioner's brief at 43. On the contrary, no robust Confrontation Clause could exist without forfeiture by wrongdoing. The doctrine works best when it deters the accused from causing witness unavailability. If criminals know statements of any witnesses or victims will be admissible under this doctrine it may deter them from committing the crime or wrongful acts that necessitate forfeiture. An absolute confrontation right with no exceptions whatsoever would give an accused an incentive to commit murder or otherwise cause witness unavailability.

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[8] As Justice Brandeis eloquently put it, "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Constitutional rights impose duties on all Americans, not just those accused of crimes.

III. IN 1791, STATEMENTS WERE ADMITTED UNDER FORFEITURE BY WRONGDOING EVEN WHEN THE ACCUSED HAD NOT HAD A PRIOR OPPORTUNITY FOR CROSS-EXAMINATION.

Most of Petitioner and the NACDL's arguments oppose any use of forfeiture by wrongdoing unless the unavailable witnesses' statements are under oath[9]

[9] The Founder's original understanding of the requirement of the oath was based on evidence law not the right of confrontation. *See* James Oldham, *Truth-Telling in the Eighteenth-Century Courtroom,* 12 Law & Hist. Rev. 95, 102-07 (1994). Oldham refers to one of the leading evidence treatises of the time which stated that statements not under oath were not evidence and since hearsay statements were not under oath, they should not be considered evidence. *Id.* at 102-03; *see* Geoffrey Gilbert*, The Law of Evidence* 152 (London, His Majesty's Law Printers 3d ed. 1769). The issue was not one of confrontation but admissibility under the common law of evidence. The requirement of the oath and the right of confrontation were based on separate rules of law. A case from the Founders' era makes this clear. *King v. Powell,* 1 Leach 109, 168 Eng. Rep. 157 (1775), was a case in which the child was in the physical presence of the accused and would have been available to be cross-examined. *See Powell,* 1 Leach at 201, 168 Eng. Rep. at 157-58.

The case was reversed because the young child witness was not put under oath. *See id.* Reversal was not based on the violation of any right of confrontation; there clearly was none, but because a rule of evidence law had been violated.

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and subject to cross-examination when made. Petitioner's brief at 18-19; Amicus NACDL brief at 6-9. But if this Court were to adopt their arguments, the Court would have to reverse *Crawford*'s holding and approval of the forfeiture by wrongdoing exception to the Confrontation Clause.

Before the time of the Founders, courts interpreted the Marian statutes to allow admissibility of sworn depositions if necessity could be shown. *See* Hawkins, *supra* at 605. These depositions were considered admissible at trial even if no cross-examination or confrontation occurred when they were taken. *See, e.g.,* Geoffrey Gilbert, *The Law of Evidence* 99-100 (Garland Pub'g reprint ed. 1979) (1st ed. 1754).

The Marian statutes were probably passed by Parliament because of Parliament's concerns about the inability to prosecute felony cases when the witness had been murdered or the accused had threatened the witness. *See* John Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* 55 (Lawbook Exchange reprint ed. 2005) (1974). The Marian statutes reduced the discretion of

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If the Founders had considered the oath to be part of the original understanding of confrontation they would have put language to that effect in the Clause; the oath is not listed in the Confrontation Clause because it was considered a rule of evidence. *See* U.S. Const. amend. VI. Accordingly, this Court should reject arguments that forfeiture can only be used when the prior statements were taken under oath.

justices of the peace to release the accused, *id.* at 6-11, 111, and thus increased the likelihood an accused would stay in custody and be unable to threaten or murder witnesses.

The Statute of Pirates passed by Parliament in roughly the same time period was also an attempt to address the problem. *Id.* at 55. This statute, of which the Founders would have been aware, suggests that the original meaning of forfeiture by wrongdoing, as a Marian statutory exception, was intended to include an accused's acts before charges were filed and which occurred as part of the underlying crime:

> Where pirates, thieves, robbers and murders, upon the sea, many times escape unpunished . . . because such offenders commit their offences upon the sea, and at many times murder and kill such persons being in the ship or boat where they commit their offences, which should bear witness against them in that behalf, and also such as should bear witness. . . .

27 Hen. VIII c. 4 (1535-36); 28 Hen. VIII c. 15 (1536) (Eng.).[10]

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[10] Archaic spelling has been corrected. In the Statute of Pirates, Parliament ousted Admiralty criminal jurisdiction from civilian to English common law procedure. *See* John Langbein, *Prosecuting Crime*, *supra* at 55, 81. After the Marian statutes were passed, Admiralty Courts were free to use forfeiture by wrongdoing because common law procedures, which incorporated

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NACDL argues American authorities refused to allow sworn coroner depositions taken without cross-examination outside the presence of the accused to be admissible when the deponent was unavailable at trial. NACDL brief at 10. NACDL cites four cases, which were ruled on decades after ratification of the Sixth Amendment, and suggests these cases support its argument about the original meaning of forfeiture in 1791. NACDL brief at 10. But the four cases cited by NACDL do not support its argument at all.[11]

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forfeiture, had been adopted by the Admiralty courts under the Statute of Pirates.

[11] In *State v. Campbell*, 30 S.C.L. (1 Rich.) 124 (App. L. 1844), the court stated it looks "to modern decisions . . . and by no means to the old English cases . . . " *Id.* at 30. In other words, *Campbell* reflects the "modern" view of 1844 and does not base its holding on an originalist analysis.

In *State v. Hill,* 20 S.C.L. (2 Hill) 607 (App. L. 1835), the case did not involve a statement taken by the justice of the peace or coroner, but was taken by the state attorney general. *See id.* The statements in *Hill* would not have been admissible under the Marian statutes either. *See* HAWKINS, *supra* at 605 (indicating statements had to be taken by the justice of the peace or coroner). In *State v. Houser,* 26 Mo. 431 (1858), the court ruled the statement was not admissible because the deponent was still alive. *Id.* at 439-41. The deposition in *Houser,* would not have been admissible in 1791 under the Marian procedures because the deponent was alive and no showing had been made that the witness was unable to travel. *See* HAWKINS, *supra* at 605 (stating deposition admissible only if witness who is alive is unable to travel).

In *People v. Restell,* 3 Hill 289, 297 (N.Y. Sup. Ct. 1842), the court ruled that its holding was based on its interpretation of a state statute. *Id.* at 298. At the time of these decisions, each

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The NACDL has cited no cases from the time of the ratification of the Confrontation Clause or before 1791, in support of its argument regarding sworn coroner statements. NACDL brief at 10. American authorities show that the NACDL argument is historically inaccurate and that for decades after ratification of the Confrontation Clause, forfeiture by wrongdoing resulted in admissibility of sworn coroner statements at trial even when the deponent had not been subjected to cross-examination and the deposition was not taken in the presence of the accused. *See, e.g.,* 2 Joseph Chitty, *A Practical Treatise on the Criminal Law* 586-87 (Garland Publ'g reprint ed. 1978) (1816); S. M. Phillips, *A Treatise on the Law of Evidence* 277 n.1 (New York, Gould, Banks & Gould

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state was free to interpret the right of confrontation, under its own constitution, common law, or state statutes, in any manner it wished. *See West v. Louisiana,* 194 U.S. 258, 262-64 (1904). Accordingly, these cases tell us very little about the Founders' understanding of the Marian confrontation exceptions in 1791.

The NACDL cites three other cases which do not support its argument either. NACDL brief at 9 n.5. In *State v. Webb,* 2 N.C. (1 Hayw.) 103 (Super. 1794), the court stated that its holding was dependent on a state statute that did not allow for the admissibility of a deposition if the defendant was not present. *See id.,* 1 Hayw. at 104. *State v. Moody,* 3 N.C. (2 Hayw.) 31 (Super. 1798), merely states that because the deponent was not placed under oath before he gave the deposition, but only afterwards, the deposition was not valid. *See id.,* at 3 N.C. at 50-51. In *Johnston v. State,* 10 Tenn. (2 Yer.) 58 (1821), the court did not state that an opportunity for cross-examination was required, merely that the accused should be present because that court interpreted Marian procedures as requiring presence. *See id.,* 1 Yer. at 58-59.

1st American ed. 1816); 2 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 487-92 (Philadelphia, Wells & Lilly & P.H. Nicklin 2d ed. 1828) (stating it should be a matter of "grave and serious consideration" "when the question arises," but indicating the law continued to allow use of coroner statements in 1828).

Authorities from the Founders' era flatly contradict the NACDL argument. For example, in *King v. Flemming and Windham,* 2 Leach 854, 168 Eng. Rep. 526 (1799), the Twelve Judges upheld the criminal conviction of individuals who raped a girl under the age of twelve, even though no confrontation and cross-examination had occurred at trial. *Id.* at 854-56, 168 Eng. Rep. at 526-27. No confrontation or cross-examination occurred because at the time of trial the girl was dead. *Id.* at 854, 168 Eng. Rep. at 526.

Although the accused were present at the time the deposition was taken, the opinion does not show that they were given an opportunity for cross-examination. *See id.* at 854-56, 168 Eng. Rep. at 526-27. Nor does the girl's deposition indicate that the accused were given an opportunity to cross-examine the girl. *See id.* at 854-55, 168 Eng. Rep. 526. The Twelve Judges upheld admissibility of the out-of-court statements under the Marian statutes without requiring that the accused be given an opportunity for cross-examination. *Id.* at 856, 168 Eng. Rep. at 527. The defense attorney did not even argue that the accuseds' right of confrontation or cross-examination

had been violated. *See id.* at 854-56, 168 Eng. Rep. at 527.

Flemming and Windham's Case shows that at least until 1799, when sworn statements were taken by the justice of the peace or the coroner, courts considered forfeiture by wrongdoing, as one of the Marian statutory exceptions, to create an exception to the right of an opportunity for cross-examination. *Flemming and Windham's Case* was cited in American legal treatises. *See, e.g.,* Zephaniah Swift, *A Digest of the Law of Evidence in Criminal And Civil Cases* 125-26 (Arno Press reprint ed. 1972) (1810); S.M. Phillips, *supra* at 279.

The entire historical analysis upon which the NACDL argument relies is simply inaccurate. Although dicta in *Crawford* states that the Marian statutory exceptions were in "derogation of the common law," *see Crawford,* 541 U.S. at 46, apparently without realizing that forfeiture by wrongdoing was one of those Marian statutory exceptions,[12] the

[12] The original meaning of forfeiture doctrine at the time of the Founders was that forfeiture by wrongdoing, as a Marian statutory exception, was an exception to confrontation and cross-examination; however, *Crawford* states that the only exception it could find for testimonial statements in 1791 was dying declarations. *See Crawford,* 461 U.S. at 56 n.6. The Court's historical analysis is mistaken. In 1791, forfeiture by wrongdoing statements were often taken by justices of the peace, whom the Court in *Crawford* states were the equivalent of modern police, *id.* at 52, indicating forfeiture by wrongdoing statements meet *Crawford's* definition of testimonial statements. Since

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Marian statutory exceptions were not in derogation of the common law in 1791. If derogation means "the act of annulling or revoking a law"[13] the Marian statutes

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Crawford itself states it accepts forfeiture by wrongdoing, *Crawford* at 62, the Court's historical analysis that the Marian statutory exceptions, i.e., forfeiture by wrongdoing, were in derogation of the common law cannot be correct. The dicta about dying declarations being the only exception for testimonial statements need not pose a problem for the Court's originalist analysis if the Court simply acknowledges that there were two exceptions for testimonial statements in 1791: dying declarations and forfeiture by wrongdoing. Or the Court could do as *Amicus* Professor Richard D. Friedman suggests (see Brief of *Amicus* Professor Richard D. Friedman in Support of Petition for Writ of Certiorari in this case at 11-14 (Nov. 9, 2007) [hereinafter Friedman brief]), and incorporate the dying declarations exception into the forfeiture by wrongdoing exception which would leave only one *sui generis* exception – forfeiture by wrongdoing.

Another confrontation exception that appears to have been used in the Founders' era was an exception for children's complaints of abuse. *See* Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis,* 82 Ind. L. J. 1029 (2007).

[13] 1 Noah Webster, *An American Dictionary of the English Language* (Johnson Corp. reprint ed. 1970) (1828). Another definition is, "The partial repeal or abolishment of a law, as by a subsequent act which limits its scope or impairs its utility and force." *Black's Law Dictionary* 339 (5th ed. 1979).

Dicta in *Crawford* states that the right of an opportunity for cross-examination became applicable to the Marian statutory felony exceptions based on the rulings in *King v. Woodcock,* 1 Leach 500, 168 Eng. Rep. 352 (1789) and *King v. Dingler,* 2 Leach 561, 168 Eng. Rep. 383 (1791). But *Dingler* and *Woodcock* only address the issue of whether the accused should be present when the declarant gave the deposition under oath (The issue of the presence of the accused is discussed further in this brief,

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could not have been in derogation of the common law. The Marian statutes were passed in the mid 1500's,[14] well before development of the common law right of confrontation occurred.

At the time of passage of the Marian statutes, the common law right of confrontation did not yet exist. Sworn deposition evidence was considered widely admissible in the mid 1500's. *See* J. Langbein, *Prosecuting Crime*, *supra* at 26. As the common law development of the right of confrontation and cross-examination occurred, forfeiture by wrongdoing and the other Marian statutory exceptions were "grandfathered" in as exceptions to the right of confrontation. Later, by equitable construction of the law, the requirement for cross-examination was applied to the Marian statutes. However, this development did not

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infra at 27 n.16). Neither case held that the accused should be given an opportunity for cross-examination. Given that *King v. Flemming and Windham* was decided in 1799, and the other two cases were decided before *Flemming and Windham's Case, Dingler* and *Woodcock* cannot be the controlling authorities *Crawford* interprets them to be. *Radbourne,* which was decided before *Dingler* and *Woodcock*, cannot reasonably be considered a case that supports an opportunity for confrontation and cross-examination. As Starkie noted, "the deposition was taken in the hearing of the prisoner, and of course the question [whether an opportunity for cross-examination was required] did not arise." 2 Thomas Starkie, *supra* at 488 n.(c). *Radbourne* and *Flemming and Windham's Case,* as decisions by the Twelve Judges would have been considered at the time to have greater authority as precedents than *Dingler* or *Woodcock*.

[14] *See* Phil. & M., c. 13 (1554) (Eng.); 2 & 3 Phil. & M., c. 10 (1555) (Eng.).

occur until after the ratification of the Confrontation Clause.[15]

Analysis by scholars who have reviewed the requirement of cross-examination and the Marian statutes, whether taken by the coroner or the justice of the peace, supports the conclusion that an opportunity for cross-examination only became a common law requirement for admissibility of depositions at least a decade after ratification of the Confrontation Clause. *See, e.g.,* 5 John H. Wigmore, *The Law Of Evidence* § 1374-1375 (3d ed. 1943); David J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* 1800-1865, 120 (1998); David Freestone and J.C. Richardson, *The Making of English*

[15] *Crawford* cites an 1854 case for the proposition that an opportunity for cross-examination was required at the time the deposition was taken based on an "equitable construction of the law" as part of its analysis that the Marian statutes, which included the forfeiture by wrongdoing exception, were in derogation of the common law. *See Crawford,* 461 U.S. at 47 (citing *The Queen v. Beeston,* 29 L. & Eq. Rep. 527, 529 (Ct. Crim. App. 1854) (Jervis, C.J.) (also reported at 405 Dears, 179 Eng. Rep. 782, 785 (Ct. Crim. App. 1854). *Beeston,* however, was decided over sixty years after ratification of the Confrontation Clause and does not support an originalist interpretation that this "equitable construction of the law" happened by 1791. When *Beeston* refers to an equitable construction of the law having occurred it refers to an equitable construction of the law having occurred by the time Parliament acted in 1848 to make cross-examination a requirement of Marian procedure by statute. *See* Dears at 407, 179 Eng. Rep. at 785. *Beeston* was rebutting the argument that cross-examination was only required in 1854 because of statutes passed by Parliament in 1848. *See id.*

Criminal Law: (7) Sir. John Jervis and his Acts, 1980 Crim. L. Rev. 5, 11 n.30-31 (1980); and W. Wesley Pue, *The Criminal Twilight Zone: Pretrial Procedures in the 1840's,* 21 Alberta L. Rev. 335, 336, 361 n.180 (1983).[16]

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[16] By 1791, some courts were beginning to apply a requirement for the accused's presence at the taking of the deposition before the justice of the peace, *see, e.g., Woodcock,* 1 Leach at 502, 168 Eng. Rep. at 353; *Dingler,* 2 Leach at 562, 168 Eng. Rep. at 384, but this doctrine only applied to justice of the peace depositions and was not for purposes of confrontation in the sense in which we use the term today. The reason the accused was supposed to be present was so he could observe the deponent giving the deposition under oath; he was not present in order to have an opportunity for cross-examination. When the justice of the peace was conducting a Marian hearing "it does not appear that the prisoner has any right to examine witnesses in this stage of the case. If the magistrate proceeds under the statute (citations omitted) he must examine the witnesses on oath." *Cox v. Coleridge,* 1 B. & C. 37, 43, 107 Eng. Rep. 15, 17 (K.B. 1822). If the accused had been allowed an opportunity for cross-examination the depositions would have indicated such. When depositions were taken the justice of the peace indicated on the affidavit who conducted the examination. *See* John Langbein, *Prosecuting Crime*, *supra* at 91. Scholars who have studied the Marian statutes have not indicated they have found any depositions where the accused was given the opportunity to cross-examine. *See id.* at 1-125. If opportunity for cross-examination had been a right under the Marian statutes then the accused should have had the right to counsel to be present to conduct cross-examination. Presence of defense counsel was not considered a right at the Marian hearing but was totally discretionary on the part of the justice of the peace well until the nineteenth century. *See, e.g., King v. Borron,* 3 B. & A. 432, 438, 106 Eng. Rep. 721, 723 (K.B. 1820) ("An attorney has no right to even be present at such an inquiry [a Marian hearing]"). *See*

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IV. STATEMENTS SHOULD CONTINUE TO BE ADMISSIBLE, UNDER FORFEITURE BY WRONGDOING WITHOUT THE USE OF PRE-TRIAL DEPOSITIONS IF THE PROSECUTOR MAKES A GOOD FAITH EFFORT TO HAVE THE WITNESS AVAILABLE TO TESTIFY AT TRIAL.

Amicus Richard D. Friedman has made important contributions to confrontation jurisprudence as reflected in his advocacy of a testimonial test. *See Crawford,* 541 U.S. 36, 38, 61 (2004). But this Court should not adopt his argument for use of pre-trial depositions in forfeiture cases. *Amicus* NCPTC anticipates, based on Professor Friedman's *Amicus* Brief in Support of Petition for Writ of Certiorari in this case, at 6 n.3 and at 14 n.7, that he will argue that use of forfeiture doctrine should have a requirement that if a prosecutor "foregoes reasonable opportunity to preserve the right, as by conducting a deposition" the forfeiture rule should not apply. *Amicus* Friedman cites *King v. Forbes,* [1814] Holt 599, 171 Eng. Rep. 354 (1814), as an example, and in his parenthetical refers to *Forbes* as "establishing [the] right of the accused to be present at deposition of the dying victim." Friedman brief at 14 n.7. Actually, that is not the right established in *Forbes.*

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also generally Tom Harbinson, *Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause,* 58 Mercer L. Rev. 569 (2007).

At the time of the *Forbes* decision, whether the declarant was dying or not, sworn depositions with the accused present were considered admissible because they met the requirements believed necessary for admissibility under the Marian statutes. Dying had nothing to do with it. The victim may have been dying but the court did not hold that the accused had the right to be present at the deposition because the victim was dying. *See id.*

Amicus Friedman's argument is a deeply disquieting one. Opining when death may occur is a medical diagnosis and one that prosecutors are not qualified to make. Suppressing forfeiture by wrongdoing statements because the prosecutor "guessed wrong" on how long the declarant will take to die is not only ahistorical but raises a host of profoundly difficult ethical issues.

The Constitution should not be interpreted to require that a dying person, perhaps in a hospital bed and hooked up to life support equipment, is to be confronted by the person who inflicted her injuries, as well as defense counsel, the prosecutor, a bailiff, a court reporter, a victim-witness advocate, (and perhaps a judge on standby to rule on any objections), and subjected to cross-examination simply because she is taking longer to die than other victims do.

More disturbing perhaps would be the ethical conundrums created if this Court were to adopt such a forfeiture jurisprudence. If the patient's physician vetoes the plan on medical grounds, but other physicians opine it would not be harmful, would that

require suppression of statements admitted under forfeiture doctrine? What if the patient's family refuses on the reasonable grounds they want their loved one to "die in peace" and they don't want the accused to have another opportunity to "finish her off"?[17] Although *Amicus* Friedman states the requirement to take pre-trial depositions would only require doing so when there is a "reasonable opportunity" to do so, Friedman brief at 14 n.7, "reasonable opportunity" is an elastic concept, and use of such a doctrine would actually create more problems than the "problem" it is intended to solve.

Amicus Friedman's argument is also not persuasive if applied to declarants who are not dying. Many domestic abuse victims and child witnesses are terrified of having to testify in the defendant's presence and requiring them to do so at a pre-trial deposition, based on a "prosecutors' negligence" doctrine, would actually make it harder for them to testify at trial.[18] Particularly with young children, prosecutors

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[17] This is a serious concern. Victims have been attacked even in the highly secured settings of courtrooms. *See, e.g., State v. Min Sen Shiue,* 326 N.W.2d 648, 651 (Minn. 1982) (indicating defendant stabbed victim in the face as she testified, requiring 62 sutures to close wound).

[18] Child trauma increases as the number of times the child is interviewed increases. *See* 1 John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* § 301 at 137 n.12 (2005). Having the accused present at the deposition would be extremely frightening, perhaps traumatizing, for the child, *see id.* at § 302. [A] at 141 n.30, but would be necessary if the defendant did not waive his confrontation rights. If it was

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do not know whether the victim will be able to testify until the victim actually does so, or "freezes up." Some defense counsel will demand pre-trial depositions not so much to protect their client's confrontation rights, but as a tactic to intimidate, unsettle, and "wear down" domestic and child abuse victims.

Requiring such pre-trial depositions based on a guess as to whether the declarant will be available to testify will also require further strains on scarce judicial resources as judges will be required to "umpire" the taking of such depositions. Currently, courts will not consider a witness unavailable, dying or not, unless a prosecutor makes a good faith effort to have the witness available to testify at trial. *See, e.g., Barber v. Page,* 390 U.S. 719, 724-25 (1968). The current rule is a good one; there is no need to change it.

Amicus Friedman also argues that it would be misguided for the Court to hold that some dying declarations are not testimonial even when made to private persons. Friedman brief at 11-12. He argues that a dying person makes a statement to "increase the probability that her killer will be brought to justice." Friedman brief at 12 n.5. Accordingly, these statements should be considered testimonial.

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reasonably foreseeable, at the time the accused committed the acts resulting in forfeiture, that the child could be so traumatized by the accused's actions that she would be unavailable to testify – that should be sufficient to constitute causation under forfeiture doctrine.

Amicus Friedman's arguments are farfetched. Most dying declarations are made when the victim is simply trying to explain or describe what happened. Most dying declarations are made, as he acknowledges, "under great stress." Friedman brief at 12. Most persons who make dying declarations do not know that any statements they make are admissible as an exception to rules of evidence and the Confrontation Clause. They are not deliberating on how their statements might be used in court. Their immediate concern is to get medical attention, to get help, or perhaps to have their suffering relieved. Dying declarations to private persons simply do not meet *Crawford's* criteria or rationale to be considered testimonial. *See Crawford,* 541 U.S. at 53, 68 (indicating Founders were concerned about statements to law enforcement or government officials).

CONCLUSION

In *Crawford* this Court indicated it was applying an analysis based on the original meaning of the Confrontation Clause and its exceptions in 1791. *See Crawford,* 541 U.S. at 43, 53-54, 61. If this Court is not to stray from the original meaning of the Confrontation Clause and its exceptions in this case, the Court should follow the Founders' understanding of forfeiture by wrongdoing and allow such out-of-court statements to be admissible without confrontation and cross-examination and without a showing of

purpose or specific intent to make the witness unavailable to testify at the time of trial. This is the original meaning of the doctrine, as the Founders understood it. The decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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