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 AMICUS CURIAE THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide. This case is of importance because it will define the law of forfeiture by wrongdoing as an exception to the Confrontation Clause.[1]

SUMMARY OF ARGUMENT

The elements required for forfeiture by wrongdoing are voluntary act and causation. Voluntary act

[1] The parties have consented to the filing of this brief. No counsel for any party authored the brief in whole or part, or made any monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

and causation are the only historical elements set out in *Reynolds v. United States*, 98 U.S. 145 (1878). *Reynolds* should be followed because none of the historical cases require any additional elements. Proximate cause, and its inherent foreseeability inquiry, limits forfeiture by wrongdoing.

ARGUMENT

I. THIS COURT RECOGNIZES AN EXCEPTION TO THE CONFRONTATION CLAUSE WHERE THE DEFENDANT VOLUNTARILY ACTS TO CAUSE THE UNAVAILABILITY OF A WITNESS.

A. *REYNOLDS* CLEARLY IDENTIFIED FORFEITURE BY WRONGDOING AS REQUIRING AN "ACT" WITH A "VOLUNTARY" MENTAL STATE THAT CAUSES WITNESS UNAVAILABILITY.

This Court in *Reynolds v. United States* held that:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own *wrongful procurement*, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own *wrongful acts*. It grants him the

> privilege of being confronted with the witnesses against him; but if he *voluntarily keeps the witness away*, he cannot insist on his privilege.

98 U.S. at 158 (emphasis added).

Reynolds is clear that "procurement" of the absence of a witness results in forfeiture of the accused's Confrontation Clause right. In the second sentence, above, the Court replaced "procurement" with "acts." *Id.* Plainly the Court intended procurement to be the *act*s of procuring. If there were any lingering doubt about this, it is resolved by the sentences immediately following, where "wrongful act" is rephrased as "voluntarily keeping the witness away." *Id.* Thus, the mental state expressly required by *Reynolds* for the forfeiture by wrongdoing exception to the Confrontation Clause is a "voluntary" mental state accompanied by the act of keeping the witness away. Nowhere in *Reynolds* is specific intent required as an element of forfeiture by wrongdoing.

The *Reynolds* court was well aware of the difference between the mental states of "voluntary" and "specific intent." Only one term before *Reynolds*, in a case alleging a violation of United States law, this Court drew the distinction between voluntary and willful intent:

> Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word 'wilfully,' says Chief Justice Shaw, 'in

> the ordinary sense in which it is used in statutes, means not merely 'voluntary,' but with a bad purpose' 20 Pick. (Mass.) 220. 'It is frequently understood.' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. i. sec. 428.

Felton v. United States, 96 U.S. 699, 702 (1877) (punctuated as in original).

Clearly understanding the distinction between "voluntary" and "wilful" mental states, this Court in *Reynolds* described "wrongful" as a "voluntary" mental state, without any requirement of specific intent. Thus, the plain meaning and precedent of *Reynolds* are that "voluntary" is the only mental state constitutionally required under the forfeiture by wrongdoing exception to the Confrontation Clause.

B. THE *REYNOLDS* "VOLUNTARY" MENTAL STATE STANDARD IS UNCONTRADICTED BY PRIOR CASES OF ENGLISH OR AMERICAN COURTS.

This Court, in *Crawford v. Washington*, abrogated Confrontation Clause precedent only where precedent conflicted with the history of the Confrontation Clause and its exceptions. 541 U.S. 36, 62-65 (2004) (abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980)). In abrogating *Roberts*, *Crawford* cited *Reynolds* with approval, stating, " . . . the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining

reliability." 541 U.S. at 62 (parenthetical in original). Thus, unless in 1879 *Reynolds* misread the history of the exception, the clearly delineated "voluntary" mental state standard in *Reynolds* should not now be overruled.

Reynolds did not mistake the common law history. No express specific intent requirement is required in the historical common law cases involving forfeiture by wrongdoing. None of the prior English or American cases mention any specific intent (or wilfulness) requirement for the forfeiture by wrongdoing exception. Absent plain historical contradiction, *Reynolds'* express "voluntary" mental state requirement should not be overruled.

Despite *Reynolds'* expressly articulated standard of "voluntary," Petitioner hopes to add a modern specific intent requirement. Finding no express specific intent requirement in *Reynolds*, or any prior common law case, Petitioner urges that the use of the term "procure" *implies* a specific intent requirement. In essence, Petitioner argues that because there is a possibility that the definition of "procure" may involve specific intent, specific intent is required. Not only is the argument weak, it is eliminated by *Reynolds* where "procurement" is identified as "acts." 98 U.S. at 158.

Far from inevitably implying a specific intent requirement, the term "procure" can properly be used solely to reference the act of procuring. Petitioner concedes this point. Petitioner's Brief, at 27. Thus, while specific intent *might* be implied from the term

"procure," it is not a necessary implication. Moreover, the term "procurement," the precise term used in *Reynolds*, was defined at the time as "[t]he *act* of procuring or obtaining; obtainment 2. A *causing* to be effected." Noah Webster, *An American Dictionary of the English Language* (1st ed. 1828) (emphasis added). While act and causation are present, notably missing is any intent requirement.

"Procurement" is not the only act and cause that suffices to establish forfeiture by wrongdoing. *Lord Morley's Case*, as cited with approval in *Reynolds*, provides two categories of act and cause: "means or procurement." 98 U.S. at 158. While not defined in the first edition of Webster's Dictionary, the second edition defines "means" as "[i]nstrument for gaining an end; as, by this *means*." Noah Webster, *American Dictionary of the English Language* 702 (2d ed. 1869) (italics in original). Just 12 years after the *Reynolds* decision "means" was defined in Black's Law Dictionary, as "[t]he instrument or agency through which an end or purpose is accomplished." (1st ed. 1891). "Means" describes act and causation, but not a specific intent mental state. Nor is a specific intent element readily implied. Within Black's definition of "means," "purpose" is a distinct concept. *Id.* Even if "means" could be defined as sometimes including the notion of "purpose," it would be but one possible definition, thus an insufficient basis to overrule *Reynolds'* expressed mental state of "voluntary."

A specific intent requirement is unsupported by the historical cases.[2] First, are the cases that provide insufficient facts upon which to make any assessment that specific intent was present and which do not articulate any specific intent requirement. For instance, in *Lord Morley's Case*, 6 How. St. Tr. 769, 777 (HL 1666), a witness who did not appear at trial told others that the Lord Morley's trial was to be shortly, but that he would not be there. "The court not thinking this evidence sufficient, the deposition was not read." *Id.* It is far from clear that any absence of intent ultimately denied the admissibility of evidence, as no act of the accused was shown to have caused the witness' absence. Moreover, no specific intent requirement was mentioned. In *Williams v. Georgia*, 19 Ga. 402, 1856 WL 1804 (Ga. 1856), the state court cited favorably to the rule as set out in *Lord Morley's Case*. No facts were recited in that case sufficient to determine whether the defendant was involved in the act of keeping the witness away, much less that he intended to do so. Nor is any specific intent requirement mentioned in the case. Similarly, in *Queen v. Scaife*, 17 Q.B. 237 (1851), the appellate court, in conclusory fashion, stated that: "There was evidence also that [the witness] was kept away by the procurement of Smith." *Id*.

[2] Petitioner declares these cases "plainly require" a specific intent requirement. Petitioner's Brief, 20 (" . . . the doctrine of procurement . . . that originated in *Lord Morley's Case* – plainly required that the defendant act with a specific intent to prevent the witness from testifying."). To the contrary, one searches the cases in vain for any "plain require[ment]" of specific intent.

While the trial court concluded there was "procurement," there are no facts recited on which to base a present day conclusion that specific intent was present or that the court meant anything more than the act of procuring. Furthermore, there is no specific intent requirement articulated in the opinion. Finally, in *Drayton v. Wells*, 1 Nott & McC 409, 10 S.C.L. 1819 WL 692, 693 (S.C. 1819), the court, in *dicta*, recited those circumstances in which testimony could be admitted when the witness was unavailable, including where the court was satisfied that the witness had been "kept away by a contrivance of the party." Notably, no specific intent requirement is mentioned.

Second, are the cases providing some facts with which to make a modern day assessment of the presence of a mental state, but where the courts do not articulate any specific intent requirement. In *Rex v. Barber*, 1 Root 76, 1775 WL 8 (Conn. Super. 1775), a witness "was sent away by one Bullock, a friend of [defendant's], and by his instigation; so that he could not be had to testify before the grand jury." *Id*. Rex is a four sentence opinion and there is no content to suggest that more than a voluntary act and causation is required. The term "instigation" establishes "voluntariness" as readily as "specific intent," and the term "sent away" describes an act. Similarly, in the *Harrison's Case*, 4 William and Mary 833 (1692), the court stated "there has been evidence given of ill practice to take him out of the way, and therefor his affidavit is read as evidence." *Id*. at 868. The facts recited in that case reveal the use of agents to render the witness

unavailable. No mention was made of any specific intent requirement. The term "ill" cannot readily be transformed into a "wilful" (i.e. specific intent) standard.

Thus, the historical cases do not provide material for anything but tenuous speculation that "procurement" implies specific intent. These cases provide no basis to overrule the "voluntary" mental state standard expressly articulated in *Reynolds*. Indeed, the clearest historical case law about the meaning of "procurement" in the context of forfeiture by wrongdoing is within *Reynolds* itself where "procurement" is reiterated as "acts." 98 U.S. at 158.

Finally, it may be that Petitioner is confusing the use of agents to keep the witness away with proof of a specific intent requirement. The use of agents is present in some of the historic cases. When an agent is directed to do something, there may be evidence of a different quality or quantity than if the accused acted alone. This evidence may consist of the communication from the accused to the agent and the actions of the agent. It may well be that the mere use of an agent provides persuasive evidence of the presence of specific intent. This observation is not, however, to be confused with relying upon the existence of agents to prove a *requirement* of specific intent. Indeed, the use of an agent provides similarly persuasive evidence that the "voluntary" mental state articulated in *Reynolds* is present. Thus, the presence of agents in the historical cases does not provide historical evidence

to overrule *Reynolds'* "voluntary" intent requirement and replace it with a specific intent requirement.

II. PROXIMATE CAUSE ALSO DELINEATES THE BOUNDARIES OF FORFEITURE BY WRONGDOING.

In addition to the "voluntary" mental state requirement, proximate cause bounds the forfeiture by wrongdoing exception. This Court in *Crawford* recently identified forfeiture by wrongdoing as based in equity. 541 U.S. at 62 ("The rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds.") (citing *Reynolds*, 98 U.S. at 158-59).

Proximate (or legal) cause is a requirement of causation in equity.[3] Determining the boundaries of

[3] *See, e.g., Allen v. Lewis*, 255 F.3d 798, 800-01 (9th Cir. 2001) (equitable tolling of statute of limitations for filing habeas corpus claim requires the existence of circumstances that were the proximate cause of a petitioner's untimeliness); *Woolard v. JLG Industries Inc.*, 210 F.3d 1158 (10th Cir. 2000) (applying state law, where A was proximate cause of 40% of B's losses, A is barred from equitable indemnity claim); *Trytko v. Hubbell, Inc.*, 28 F.3d 715 (7th Cir. 1994) (constructive fraud is "an equitable theory of relief" requiring "injury to the complaining party as a proximate cause thereof"); *Kelly v. Fahrney*, 242 Ill. 240, 89 N.E. 984, 989 (1909) (no standing in a court of equity unless the action complained of "was the proximate cause" of the loss); *First Nat. Bank v. Blewett*, 89 S.W. 2d 487, 489 (Tex. Civ. App. 1935) (equitable estoppel where plaintiffs are negligent and are the "proximate cause" of their loss); *Noland v. Law*, 170 S.C. 345, 170 S.E. 439, 440 (1933) (equitable rights not to be preferred

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proximate cause has historically been, and is today, a judicial endeavor. *See Wyoming v. Oklahoma*, 502 U.S. 437, 473 (1992) (Scalia, J., dissenting) ("The 'zone of interests' test performs the same role as many other judge-made rules circumscribing the availability of damages in tort and contract litigation-doctrines such as foreseeability and proximate cause . . . ").

Relevant to the issue of how a proximate cause standard bounds the forfeiture by wrongdoing exception is foreseeability as an element of proximate cause. Just one term before *Reynolds*, this Court stated: "In order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been *foreseen* in light of the attending circumstances. *Milwaukee & St. P.R. Co. v. Kellogg*, 94 U.S. 469, 475 (1877) (emphasis added). Thus, the constitutional boundary of forfeiture by wrongdoing can be drawn consistently with *Reynolds* by requiring proximate cause, including foreseeability.

As an exception to the Confrontation Clause, forfeiture by wrongdoing is unique because its nature and scope define constitutional parameters. In the forfeiture by wrongdoing context there is no historical

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over rights at law where equitable plaintiff contributes as a "proximate cause" to her loss).

or Supreme Court precedent expressly discussing proximate cause. Because of the constitutional context there is no concern that this Court's development of a unique proximate cause doctrine in forfeiture by wrongdoing will adversely affect proximate cause doctrine developed outside the Confrontation Clause context. Thus, the proximate cause requirement provides this Court with a considerable judicial tool for limiting forfeiture by wrongdoing.

In sum, forfeiture by wrongdoing is essentially equitable; proximate cause is an element of equity; the boundaries of proximate cause are traditionally drawn by courts; proximate cause may be uniquely crafted to fit the constitutional exception context of forfeiture by wrongdoing; foreseeability is an element of proximate cause; and factual differences among cases will determine the presence of foreseeability. The "voluntary" mental state requirement provides yet another boundary. The judicial tools provided in *Reynolds* of voluntary act and proximate cause bound the forfeiture by wrongdoing exception to the Confrontation Clause.

CONCLUSION

The decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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