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COMBATING GANG-PERPETRATED WITNESS INTIMIDATION WITH FORFEITURE BY WRONGDOING

*By: Katie M. McDonough**

"*[T]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.*"[1]

INTRODUCTION

Gangs are an extreme threat to the communities in which they operate and to the criminal justice system.[2] Central to gang culture is strong loyalty among gang members coupled with "no snitching" policies enforced through intimidation and retaliation.[3] Witnesses to crime, gang members who have knowledge of misdeeds, and even entire neighborhoods are fearful about cooperating with law enforcement in gang-controlled communities.[4] The risk run by cooperating with law enforcement is real: many witnesses are attacked or killed, and residents in gang-controlled communities who report crimes to law enforcement face the prospect of retaliatory crimes against their person, property, and family members.[5] Criminal gangs benefit from enforcing "no snitching" policies with intimidation and retribution.[6] Successful witness intimidation or murder renders a witness unavailable, which means that the witness's information is likely to be inadmissible in court.[7] This often forces prosecutors to delay trial, reduce charges, or drop cases altogether, bringing the wheels of justice to a grinding halt.[8] The common law doctrine of

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1 Reynolds v. United States, 98 U.S. 145, 158 (1878).

2 *See* Part I *infra*.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 FED. R. EVID. 802 (restyled).

8 *See infra* note 100 and accompanying text.

"forfeiture by wrongdoing" provides a means to overcome the hurdle of an unavailable witness where the government can show that the defendant, by his own conduct, caused the unavailability of the witness and concurrently intended to silence him.[9]

The prosecutor's challenge is greater if the defendant is not the party who silenced the witness. While a defendant is awaiting trial, especially if he is in jail, his fellow gang members may be able and willing to act on his behalf and carry out his gang's "no snitching" policy by intimidating or harming adverse witnesses while avoiding contact with the defendant that might invite an inference of consultation.[10] If a witness is silenced, her prior statements may be inadmissible and the defendant granted a windfall unless the prosecution can make the showing necessary to invoke forfeiture by wrongdoing. To do so in federal court, the prosecution has to prove, at the very least, that the defendant "acquiesced" in the intimidation.[11] If the statements of the absent declarant contain "testimonial" statements,[12] the prosecution will have to take the extra

[9] *See generally* Giles v. California, 554 U.S. 353 (2008).

[10] *E.g.*, David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES, Mar. 1, 2007, http://www.nytimes.com/2007/03/01/nyregion/01witness.html?pagewanted=all&_r=2& (describing how prolific witness intimidation in New Jersey turns "slam-dunk cases" into failed prosecutions, like the case of one particular gang member, who witnessed a murder but "quickly announced he would never testify for fear he would be ostracized for helping the police—or wind up murdered himself") [hereinafter *Witnesses At Risk*]; *see also, e.g.*, Urias v. Horel, No. CV 07-7155-JVS (RNB), 2008 WL 4363064, at *2–3 (C.D. Cal. Sept. 23, 2008) (civilian bystander to gang shooting was instructed not to attend court and then shot to death); David Kocieniewski, *A Little Girl Shot, and a Crowd that Didn't See*, N.Y. TIMES, July 9, 2007, http://www.nytimes.com/2007/07/09/nyregion/09taj.html?pagewanted=all (relating how the grandmother of a seven-year-old girl shot in the crossfire of a gang fight would not talk to the police for fear she would "have to move out of the country[,]" and that at least twenty other eyewitnesses remain unwilling to testify about this unsolved crime).

[11] FED. R. EVID. 804(b) (6) (restyled).

[12] In this Comment, the word "testimonial" is short-hand for "testimonial in the *Crawford* sense" to account a new definition employed by the Supreme Court since *Crawford v. Washington*. 541 U.S. 36 (2004). In that case, the Court changed the usage of the phrase "testimonial statements" from "statements of fact or value" subject to an "assertion" requirement to a phrase meaning "statements made under circumstances objectively indicating some contemplation of later use at trial." Michael J. Zydney Mannheimer, *Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments*, 80 TEMP. L. REV. 1135, 1135 (2007) (attempting to harmonize the two usages). For an example of the former usage, *see, e.g.*, Schmerber v. California, which notes that Wigmore used the word "testimonial" to mean "communicative." 384 U.S. 757, 774 (1966) (citing 8 WIGMORE 378) (McNaughton rev. 1961) (noting that Wigmore used the word "testimonial" to mean "communicative.").

step of showing that the defendant had the *purpose* of silencing the declarant—i.e., had "specific intent"—a concept which, if too narrowly construed by courts, will allow the defendant to benefit from witness intimidation carried out by his peers as long as he did not specifically take part in or authorize the intimidation.[13]

This Comment addresses the specific challenges of invoking forfeiture by wrongdoing against a gang member-defendant whose gang silences adverse witnesses on his behalf. Part I establishes that gang culture inspires loyalty in its members, who willingly intimidate and silence witnesses in accordance with a gang's "no snitching" policy. It explains that gangs can subdue an entire community using terror, threats, and violence to ensure that citizens do not cooperate with the police, and it demonstrates that gangs' "no snitching" policies, when enforced through intimidation and retaliation, hinder the criminal justice process. Part II examines the jurisprudence surrounding the Confrontation Clause and forfeiture by wrongdoing. It asks whether, after *Giles v. California*, forfeiture by wrongdoing is applicable to instances of gang-perpetrated intimidation on behalf of (but without the specific knowledge of and direct participation by) the defendant. This Comment argues that a gang member-defendant should forfeit his confrontation rights if he (1) joined or remained a member of a gang (2) with knowledge that the gang enforces a "no snitching" policy using intimidation or retaliation and (3) other gang members cause a witness's unavailability in the defendant's trial. This Comment ultimately concludes that these circumstances should satisfy the *Giles* "specific intent" requirement.

I. LOST TESTIMONY: GANG-ENFORCED "NO SNITCHING" POLICIES SILENCE WITNESSES

Organized street gangs are not new phenomena, and street-gang culture is not a contemporary invention. Gang culture is found in many urban communities, new immigrant groups, and poverty-stricken neighborhoods with few social controls.[14] Poverty, heterogeneity of race or ethnicity (which gives rise to homogenous "subcultures"), and residential mobility, together, correlate with of a

[13] *See infra* text accompanying note 152.

[14] Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence, and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 189 (2008) ("[C]onditions of structural poverty strain a community's ability to develop informal social controls. Socially organized or cohesive communities are better able to engage in informal social control that can lead to lower levels of crime than communities that are not cohesive.").

high degree of delinquency in a community[15] and render a community ripe for the development of street gangs. Frederic M. Thrasher, an early twentieth-century criminologist, described the development of gangs in this way:

> The gang is an interstitial group originally formed spontaneously, and then integrated through conflict. It is characterized by the following types of behavior: meeting face to face, milling, movement through space as a unit, conflict, and planning. The result of this collective behavior is the development of tradition, unreflective internal structure, *esprit de corps*, solidarity, morale, group awareness, and attachment to a local territory.[16]

Gang members, even if organized informally, share experiences that foster loyalty and form them into a cohesive unit.[17] A dramatic 1928 chronicle of the rise of mid-nineteenth-century gangs in New York City explained that poverty, instability at home, lack of direction, and community disorganization fostered the development of gangsters in those urban slums.[18] Even then, welfare agencies and religious leaders faced seemingly insurmountable challenges in combating the petty crime, violence, gambling, widespread alcohol abuse, starvation, and squalor among which the gangs proliferated.[19]

Gangs manifest their own norms comprising unique rules and customs.[20] Such culture is not new: gangs in the early nineteenth and

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[15] SOPHIE BODY-GENDROT, THE SOCIAL CONTROL OF CITIES?: A COMPARATIVE PERSPECTIVE 7 (2000) (referencing the observation of criminologists Shaw and McKay that it is difficult to free a neighborhood from these conditions).

[16] FREDERIC M. THRASHER, THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO 46 (1927) (emphasis in original).

[17] ALBERT K. COHEN, DELINQUENT BOYS: THE CULTURE OF THE GANG 13, 35 (The Free Press 1955). Gangs share a "delinquent subculture" that "is itself a positive code with a definite if unconventional moral flavor." *Id.*

[18] HERBERT ASBURY, THE GANGS OF NEW YORK xvi – xvii (Alfred A. Knopf, Inc. 1928).

[19] *Id.* at 15–16.

[20] *E.g.*, Ray Rivera, *In Newburgh, Gangs and Violence Reign*, N.Y. TIMES, May 11, 2010, http://www.nytimes.com/2010/05/12/nyregion/12newburgh.html?sq=gang%20culture&st=nyt&adxnnl=1&scp=3&adxnnlx=1329195879-V9JrNbOnzk7fWHmncqs8CA&pagewanted=1 (describing growth of local street gangs in Newburgh, New York and referencing gang flags, clothing, and the concept of "respect"); Serge F. Kovaleski, *Wanted: A Band of Men and Boys*, N.Y. TIMES, Aug. 15, 2007, http://query.nytimes.com/gst/fullpage.html?res=9B02E4D71539F936A2575BC0A9619C8B63&scp=10&sq=gang%20culture&st=nyt&pagewanted=1 (describing the recruiting tactics of MS-13 in New Jersey, its origins as a Salvadoran gang, and its

early twentieth centuries possessed their own names, clothing styles, codes, reputations, and lore.[21] The unique style and identifying characteristics of those early American street gangs lives on today in the gang colors, graffiti signs, and other symbols that contemporary street gangs have adopted. Today, gang members are tattooed with gang identifiers, wear certain styles of dress adopted by their gang, and display gang insignia on jackets, hats, and pants.[22] For instance, in southern California, Hispanic gangs often wear white tee shirts and a black or blue knit cap,[23] while Blood and Crip sets[24] dress individually but accessorize in gang colors (red and blue, respectively).[25] Graffiti are utilized to mark gang turf, indicate gang status, make threats against a rival gang, or declare participation in a particular crime that was committed.[26]

Gangs set themselves apart from the communities that they seek to control.[27] A 1950s examination of delinquent youth gangs concluded that gang members recognize only the authority of their own leaders, have relations of intense solidarity with each other, and have "indifferent, hostile and rebellious" relations with non-gang members and authority figures.[28] This view of the delinquent youth gang—articulated before the proliferation of guns and drugs that

colors).

[21] THRASHER, *supra* note 16, at 190–93; ASBURY, *supra* note 18, at 28. For instance, in New York, the Daybreak Boys operated as an organized criminal enterprise committing heinous crimes on the riverfront, and the Molasses Gang would systematically rob stores and pick pockets. *Id.* at 66. The Dead Rabbits wore a red stripe on their pants, while the Plug Uglies, wearing plug hats, were feared for inflicting terrible violence on their victims with bludgeons and pistols. *Id.* at 22.

[22] *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Gang Characteristics*), L.A. DAILY NEWS, Sept. 29, 2004, http://lang.dailynews.com /socal/gangs/articles/dnp4_gcharacter.asp [hereinafter *Gang Characteristics*].

[23] *Gang Characteristics*, *supra* note 22.

[24] Large gangs may be comprised of local sub-groups, or "sets," which operate independently and may be in competition with neighboring sets of the gang. *See, e.g.*, NEW JERSEY DEPT. OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE, INTELLIGENCE SECTION, GANGS IN NEW JERSEY: MUNICIPAL LAW ENFORCEMENT RESPONSE TO THE 2010 NJSP GANG SURVEY 12, *available at* http://www.njsp.org /info/pdf/gangs_in_nj_2010.pdf.

[25] *Gang Characteristics*, *supra* note 22.

[26] *Id.*

[27] Joseph Goldstein, *43 in Two Warring Gangs are Indicted in Brooklyn*, N.Y. TIMES, Jan. 19, 2012, http://www.nytimes.com/2012/01/20/nyregion/43-in-warring-brooklyn-gangs-are-indicted.html?scp=1&sq=gang+culture+kelly+respect&st=nyt (quoting a Brooklyn district attorney's statement that street gang members in Brooklyn "'band together to control their turf, their block or their building, and terrorize those who fail to recognize their control and fail to pay them respect'").

[28] COHEN, *supra* note 17, at 30–31.

characterize street gangs today—reinforces the assertion that the fundamental characteristics of gangs remain unchanged. Today, contemporary gang members set themselves apart by characterizing their activity as a war between themselves and other segments of society, even going as far as attacking rivals and police officers to develop fearsome reputations as forces with which to be reckoned.[29] Gang members act outside of the law and traditional norms of their own communities, actively seeking to intimidate residents and law enforcement in (often successful) attempts to establish control and instill fear.[30]

While street gangs are not necessarily criminal,[31] the gangs with which this Comment (and law enforcement) is concerned are those that engage in crime regularly. Although each law-enforcement organization has its own definition of what constitutes a "gang," nearly all list group criminality as the most important defining characteristic.[32] Local street gangs may be driven by the desire to

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[29] Tracy Manzer, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*From His Own Words*), L.A. DAILY NEWS, Sept. 27, 2004, http://lang.dailynews.com/socal/gangs/articles/lbp2_james.asp.

[30] Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Gangster Menace*), L.A. DAILY NEWS, Sept. 30, 2004, http://lang.dailynews.com/socal/gangs/articles/dnp5_main.asp [hereinafter *Gangster Menace*].

[31] For example, debates can be had over the dominantly criminal nature of some civil rights-era gangs. *E.g.*, James Alan McPherson, *Chicago's Blackstone Rangers (I)*, ATLANTIC MAGAZINE (May 1969) (detailing the often-violent history of Ranger Nation and the fact that it was "alternately praised and condemned by the national press, their community, the United States Senate, the local police, and Chicago youth organizations" such that "it is almost impossible to maintain a consistent opinion of the Blackstone Rangers"); Jennifer 8. Lee, The Young Lords Legacy of Puerto Rican Activism, N.Y. TIMES, City Room (Aug. 24, 2009, 11:07 a.m.), http://cityroom.blogs.nytimes.com/2009/08/24/ the-young-lords-legacy-of-puerto-rican-activism/ (describing the "confrontational tactics" of the short-lived New York chapter of the Young Lords, which successfully launched a "Garbage Offensive" to obtain municipal services for local residents).

[32] National Youth Gang Survey Analysis: Defining Gangs and Designating Gang Membership, *NAT'L GANG CTR.*, available at *http://www.nationalgangcenter.gov/Survey-Analysis/Defining-Gangs#anchordcog (last visited Dec. 18, 2011).* There are six characteristics that are common to most definitions of "gang": (1) whether the group engages in criminality; (2) whether leadership is present; (3) whether the group has a name; (4) whether it displays colors or symbols; (5) whether the group hangs out together; and (6) whether the group has a turf or territory. *Id.* "Gang" in the school setting may be defined as "a somewhat organized group, sometimes having turf concerns, symbols, special dress or colors. . . . [that has] a special interest in violence for status-providing purposes and is recognized as a gang by its members and by others," or a group that "has a name and engages in fighting, stealing, or selling drugs." GARY D. GOTTFREDSON & DENISE C. GOTTFREDSON, GANG PROBLEMS AND GANG

control a neighborhood, such as the "Goodfellas," "'one of Central Harlem's most violent and destructive street gangs,'" which allegedly obtained firearms for the purpose of intimidating rivals and keeping them off Goodfella turf.[33] Gang activity is often conducted for reputational gain, both for the individual (as in the case of a Fairfax, Virginia man associated with a local MS-13 set, sentenced to life in prison for offering young girls "free of charge to full-fledged gang members to improve his own standing"[34]) and for the gang (as in the case of an officer shot purposely to demonstrate to a rival gang that the shooter's gang was tough[35]). Some gangs make group criminality their primary purpose.[36] Large-scale organizations not only mastermind racketeering and narcotics trafficking for commercial gain, but "a slew of gangs, including the Bloods, Crips, Gangster Disciples, Vice Lords, and Latin Kings are branching out into mortgage fraud, identity theft, the manufacturing of counterfeit checks, and bank fraud."[37] Today, gangs are active in all fifty states and, in some communities, are responsible for up to eighty percent of crime.[38] They are the main retail distributors of illegal drugs across

PROGRAMS IN A NATIONAL SAMPLE OF SCHOOLS 4 (2001), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/194607NCJRS.pdf.

[33] Colin Moynihan, *Prosecutors Target Gang in Harlem; 19 Charged*, N.Y. TIMES, Nov. 4, 2011, http://www.nytimes.com/2011/11/05/nyregion/19-arrested-as-prosecutors-target-goodfellas-gang-in-harlem.html?_r=1 (quoting Manhattan District Attorney Cyrus R. Vance, Jr.).

[34] Andrea McCarren, *MS13 Street Gang and Others Tied to Child Prostitution*, 9 NEWS NOW, Nov. 4, 2011, http://www.wusa9.com/news/article/173540/187/Feds-Prosecute-Gang-Related-Child-Sex-Traffickers; *see, e.g.*, Beth Barrett, *Grieving Mothers: None Wounded More Deeply by Gang Violence*, L.A. DAILY NEWS, Oct. 1, 2004, http://lang.dailynews.com/socal/gangs/printpage.asp?REF=/socal/gangs/articles/dnp6_main.asp [hereinafter *Grieving Mothers*] (explaining that the murderer of Roy Brian Marino, an innocent teen, was motivated by the desire for "status" in a Pacioma, California gang).

[35] David Kocieniewski, *Gang Rivalry Cited in Police Captain's Shooting*, N.Y. TIMES, Dec. 22, 1996, http://www.nytimes.com/1996/12/22/nyregion/gang-rivalry-cited-in-police-captain-s-shooting.html?ref=davidkocieniewski.

[36] For a colorful example, see ASBURY, *supra* note 18, at 227–28 (describing gangs like the Whyos, a pre-Civil War New York City gang that committed crimes, including murder, mayhem, breaking bones, or even chewing off a victim's ear, for money).

[37] Loren Berlin, *Street Gangs Clean Up on White Collar Crime*, DAILY FIN., Oct. 28, 2011, http://www.dailyfinance.com/2011/10/28/street-gangs-new-dirty-moneymaker-white-collar-crime/.

[38] *Key Findings*: *National Gang Threat Assessment 2009*, NAT'L GANG INTEL. CTR. (Jan. 2009),at iii, http://www.fbi.gov/stats-services/publications/national-gang-threat-assessment-2009-pdf. There are nearly one million active gang members in the United States participating in the criminal activity of approximately 33,000 street gangs, motorcycle gangs, and prison gangs. *Gangs*, FED. BUREAU OF INVESTIGATION (Nov. 6, 2011), http://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs

the country and are increasingly involved in wholesale distribution.[39] Alien-smuggling, armed robbery, auto theft, extortion, identity theft, and murder are among gangs' typical criminal activities today.[40]

Gangs increase their power by defending their turf and fighting rivals. Today's much-publicized enmity between the Bloods and the Crips serves as just one example.[41] At its worst, gang street fighting—whether with knives and bludgeons 150 years ago or handguns and rifles today—can hold an entire neighborhood hostage.[42] The presence of rival groups brings potential threats to an existing gang.[43] This increases gang unity and "fosters beliefs that protection comes from gang cohesion and the preparation for violence."[44] Gang violence is cyclical, strengthening the perception that gang membership is necessary for protection from future gang violence, which increases membership and perpetrates violence against rivals.[45] Gangs may even operate together to combat a common enemy; for instance, members and associates of some gangs in southern California operate independently but, if in jail, join together as the

/gangs.

[39] *Key Findings*: *National Gang Threat Assessment 2009*, *supra* note 38.

[40] National Youth Gang Survey Analysis, *supra* note 32.

[41] *E.g.*, *Grieving Mothers*, *supra* note 34 (explaining the origins of the war between the Bloods and the Crips and noting that, for decades, the majority of gang murders in Los Angeles have been attributable to it).

[42] Keith Donoghue, Note, *Casualties of War: Criminal Drug Law Enforcement and its Special Costs for the Poor*, 77 N.Y.U. L. REV. 1778, 1786–87 (2002) (explaining that poor urban communities are the locus for drug transactions, which bring with them violence aimed to protect contested territory and intimidate potential informants.); ASBURY, *supra* note 18, at 29 ("Sometimes the battles raged for two or three days without cessation, while the streets of the gang area were barricaded with carts and paving stones, and the gangsters blazed away at each other with musket and pistol . . . ."); *see also* Videtta A. Brown, *Gang Member Perpetrated Domestic Violence: A New Conversation*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 395, 409 (2007) ("When gang members are present, the atmosphere in neighborhoods is riddled with fear.").

[43] GOTTFREDSON, *supra* note 32, at 7 (focusing on the rise of youth gangs in schools).

[44] *Id.*

[45] *Id.* ("[F]ear of violence leads to participation in the instigation of violence against sources of perceived threat."). It is difficult not to be reminded of the scene set by Thomas Hobbes as he portrayed the state of nature:

> During the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man . . . . In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently . . . no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.

THOMAS HOBBES, LEVIATHAN 86 (Forgotten Books 2008).

Eme, the so-called "Mexican Mafia."[46]

Perhaps the most fundamental aspect of gang culture is the strong loyalty it both inspires and demands. The gang becomes, to members, "a separate, distinct and often irresistible focus of attraction, loyalty and solidarity."[47] By and large, whether a gang is made up of mere delinquents or hardened criminals willing to engage in gun violence, drug sales, and turf wars, all gangs retain cultural codes to which members adhere.[48] These codes generally mandate solidarity and loyalty to fellow gang members,[49] sometimes mimicking family ties.[50] Many gangs have elaborate initiation procedures that can include getting "jumped in"—beat up by admitted members—to demonstrate total dedication to the gang.[51]

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[46] People v. Sisneros, 94 Cal. Rptr. 3d 98, 104 (Cal. Ct. App. 2009). The Mexican Mafia, or *Eme*, is a particularly fearsome gang that raises money by committing crimes, including murder, and employing various local neighborhood gangs to collect "taxes" from drug dealers. *Id.* A member of a street gang may become an *Eme* associate by earning money for the gang and assaulting inmates as instructed, and an associate may become one of its few members by gaining a sponsor and executing a killing on behalf of the gang. *Id.* The price of leaving the gang is death, and members and associates are permitted neither to admit their affiliation with the Mexican Mafia nor cooperate with law enforcement and inform on other affiliates. *Id.* at 103. Cooperation among rival gangs is not new: feuding gangs in nineteenth-century New York City at times joined to fight a common rival gang, ASBURY, *supra* note 18, at 29, or attack police to render law enforcement ineffective on their turf. *Id.* at 24, 44, 235.

[47] COHEN, *supra* note 17, at 31.

[48] *See, e.g.*, Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*L.A. Gang History Runs Deep*), L.A. DAILY NEWS, Oct. 1, 2004, http://lang.dailnews.com/social/gangs/articles/dnp6_main.asp [hereinafter *L.A. Gang History*] ("Loyalty remains across geographic boundaries, with gang members keeping their affiliations as they change addresses across town or across the country.").

[49] Ellen Liang Yee, *Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 777 (2008) (observing that in gangs, "loyalty to the organization and hierarchy within the organization are strong forces that impact the relationships of the members of the organization," causing members to be reluctant to accuse one another and unwilling to cooperate with law enforcement out of fear of "serious harm to the accuser's welfare").

[50] *E.g.*, 1 ENCYCLOPEDIA OF ASIAN AMERICAN ISSUES TODAY 859 (Edith Wen-Chu Chen & Grace J. Yoo eds., ABC-CLIO, LLC 2010) (explicating that at-risk Asian American youths find camaraderie, security, and cultural pride in joining street gangs, but with these benefits comes the need to retain the respect of this new "family" by witnessing or committing violent crimes).

[51] *E.g.*, State v. McCoy, 928 P.2d 647, 650 (Ariz. 1996) (holding as evidence supporting conviction for participating in a criminal street gang that the defendant participated in his gang's "aggravated assaults on an ongoing basis as part of their ritual for initiating new members and ousting disloyal members," called "jumping

Another common ritual for admittance is commission of a violent crime[52]; for instance, some violent gangs require members to commit murder to show their loyalty and gain full membership.[53] Women who wish to join may be "sexed in," or required to have sex with multiple gang members.[54]

Street gangs vigorously enforce a ban on assisting the police.[55] Specifically, gangs discourage giving information to police—called "snitching"[56]—even if doing so would incriminate members of other gangs.[57] With legal recourse unavailable to enforce contracts and

in").

[52] *See, e.g.*, People v. Garcia, 64 Cal. Rptr. 3d 104, 108 (Cal. Ct. App. 2007) (recounting expert opinion that "respect is 'everything' to a gang member" and that both gangs and gang members earn respect by committing crimes, "especially violent crimes"); AUGUSTINE E. COSTELLO, HISTORY OF THE POLICE DEPARTMENT OF JERSEY CITY 229 (The Police Relief Assoc. Publ'n Co. 1891) (stating that membership in the Lavas gang required a robbery, burglary, a single-handed assault on a police officer, or going to jail as a recruit); Maureen Graham, et al., *6 Indicted in 5 N.J. Killings The Suspects Are Members of the Camden Gang Sons of Malcolm X*, PHILLY.COM, Apr. 9, 1993, http://articles.philly.com/1993-04-09/news/ 25980283_1_gang-member-murder-rate-law-enforcement.

[53] Alan Jackson, *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, 42-JUN PROSECUTOR 32, 33–34 (Nat'l Dist. Attorneys Ass'n 2008); Brown, *supra* note 42, at 408. This initiation procedure is not unique to contemporary street gang culture. *E.g.*, ASBURY, *supra* note 18, at 227 (relating tales of the Whyo gang, which accepted members only after they committed a murder or other crime serious enough to demonstrate dedication to the gang).

[54] Brown, *supra* note 42.

[55] *E.g.*, David Kocieniewski, *So Many Crimes, and Reasons to Not Cooperate*, N.Y. TIMES, Dec. 30, 2007, http://www.nytimes.com/2007/12/30/nyregion /30witness.html?ref=davidkocieniewski ("[T]he Whitman Park section of Camden is on the front lines of the struggle with witness intimidation. An array of powerful forces converge here to discourage people from cooperating with the investigation of crimes—crimes committed against their own homes, their own neighbors, their own children. Drugs are sold openly from street corners and abandoned row houses. Gunfire is a neighborhood soundtrack. And the competing gangs that control Whitman Park have made it clear that the price for defying them is death.").

[56] *See* ALEXANDRA NATAPOFF, SNITCHING 3 (2009). Snitching was originally a word reserved for criminals who ratted out their associates in exchange for a lighter sentence or reduced charges, *id.*, but a "mentality has started to seep into the neighborhood where ordinary, upstanding people who would come forward because a crime occurred are now being told they are snitches." Brendan L. Smith, *Keeping A 'Snitch' from Being Scratched: Witness Intimidation Is Gaining Even As the Murder Rate Declines*, 94-DEC A.B.A. J. 20, 21 (2008) (internal quotation marks omitted).

[57] *E.g.*, People v. Sisneros, 94 Cal. Rptr. 3d 98, 103 (Cal. Ct. App. 2009). In *Sisneros*, a shooting was perpetrated by an alleged associate of the Mexican Mafia, and an innocent witness—who was a member of a separate Hispanic street gang—knew the identity of the shooter. *Id.* Not only did the witness refuse to "snitch" to the police, he would not return to the neighborhood where the shooting took place, nor was he safe in police custody from the possibility of being beaten or killed because he

regulate underground commerce, gangs—particularly those involved in the drug trade—resort to intimidation and murder to protect their businesses.[58] Gang members make it no secret that "ratting out" fellow members can have dire consequences.[59] In 2004, a much-circulated DVD titled "Stop Snitching" featured Baltimore gangsters who named snitches "in the game" and threatened that snitches might "get a hole in their head."[60] In a Colorado case,[61] a defendant was found guilty of charges including first-degree murder for paying his friend and two members of an ethnic Cambodian gang a total of $20,000 to shoot and kill a cooperating witness after the witness implicated the defendant in the sale and distribution of drugs.[62] "No Snitching" is now a popular refrain that summarizes gang culture's ban on police cooperation.[63] The producer of the "No Snitching" DVD insisted that the DVD was directed at criminal associates, not "civilian witnesses,"[64] but it became a popular symbol that extended beyond the world of gangsters.[65] "Stop Snitching" tee shirts began to appear in courtrooms to intimidate witnesses unaffiliated with gangs,[66] celebrity rappers publicly refused to share information about shootings they witnessed,[67] and commentators began to cover the "No Snitching" phenomenon in mainstream media.[68]

Today, justice goes unserved in some communities in significant part because the perpetrators of violent witness intimidation target not only gang members but also the innocent residents of gang-

witnessed the crime. *Id.*

[58] Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons From Economics*, 1994 U. CHI. LEGAL F. 207, 220 (1994).

[59] *See* Kocieniewski, *supra* note 10.

[60] NATAPOFF, *supra* note 56, at 122.

[61] *See generally* People v. Hagos, 250 P.3d 596 (Colo. App. 2009).

[62] *Id.* at 606–07.

[63] *See* NATAPOFF, *supra* note 56.

[64] *Id.*

[65] Tom Farrey, *'Snitching' Controversy Goes Well Beyond 'Melo*, ESPN The Magazine, January 18, 2006, *available at* http://sports.espn.go.com/nba/columns/story?columnist=farrey_tom&id=2296590.

[66] *See* Fox Butterfield, *Guns and Jeers Used by Gangs to Buy Silence*, N.Y. TIMES, Jan. 16, 2005, http://www.nytimes.com/2005/01/16/national/16gangs.html (relating that gang members were in the courtroom wearing tee-shirts that said "Stop Snitching" when two other gang members were on trial for murdering a ten-year-old).

[67] Rick Hampson, *Anti-Snitch Campaign Riles Police, Prosecutors*, USA TODAY, Mar. 28, 2006, http://www.usatoday.com/news/nation/2006-03-28-stop-snitching_x.htm (explaining how rappers Lil' Kim and Busta Rhymes refused to cooperate with police in order to remain "credible rappers" in accordance with the "code of the street").

[68] NATAPOFF, *supra* note 56, at 122–24.

controlled communities.[69] While "No Snitching" used to be a policy reserved for gang members, regular citizens in some communities are treated as "snitches" simply for talking to or cooperating with law enforcement.[70] The 2000 National Youth Gang Survey stated that gang-related witness intimidation was reported as "common" by sixty-six percent of responding law-enforcement agencies.[71] In that same survey, eighty-two percent of respondents stated that their agencies were taking action to correct the problem.[72] A general sense of fear is not uncommon in a gang-controlled locale marred by a history of violent retaliation against witnesses and a community-wide distrust of the criminal justice system.[73]

To compound the problem, the communities in which gangs proliferate tend to have a history of poor relations with local law enforcement on which gangs capitalize.[74] Increased policing in violent neighborhoods, if ineffective, can generate the ire and distrust of the innocent civilians who reside there.[75] In some urban communities, the sentiment persists that the police fail to protect racial and ethnic minorities and thus cause the epidemic of drugs and violence to be concentrated in those neighborhoods.[76] Police

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[69] *Id.* at 124 (Gang culture's "no snitching" code "melded with the long-standing problem of witness intimidation, and the related reluctance of civilian witnesses to come forward when they observe violent crime").

[70] IMAGINING LEGALITY: WHERE LAW MEETS POPULAR CULTURE 59 (Austin Sarat ed., Univ. of Ala. Press 2011).

[71] John Anderson, *Gang-Related Witness Intimidation*, NATIONAL GANG CENTER BULLETIN (Feb. 2007), at 1.

[72] *Id.*

[73] PETER FINN & KERRY MURPHY HEALEY, PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION: ISSUES AND PRACTICES 1–2 (Nat'l Inst. of Justice 1996). This fear is not new: a history of the Jersey City police describes street gangs that were "composed of young rowdies" who would regularly insult or spit on women, but women would refuse to file formal complaints and "thus hinder the wheels of justice." COSTELLO, *supra* note 52, at 330.

[74] NATAPOFF, *supra* note 56, at 126; *see also* PAUL B. WICE, CHAOS IN THE COURTROOM: THE INNER WORKINGS OF URBAN CRIMINAL COURTS 170–71 (1985) (observing that, in urban courts, defendants are often of lower socio-economic status which can affect their treatment by the court, including increasing the court's willingness to incarcerate poor uneducated defendants who have been through the criminal justice system before).

[75] Diana Nelson Jones, *Don't Shoot: Stopping Urban Violence with Sweet Reason*, PITTSBURGH POST-GAZETTE, Dec. 18, 2011, http://www.post-gazette.com/pg/11352/1197140-148.stm; *e.g.* Julie Dressner & Edwin Martinez, *The Scars of Stop & Frisk*, N.Y. TIMES, Jun. 12, 2012, http://www.nytimes.com/2012/06/12/opinion/the-scars-of-stop-and-frisk.html?_r=0 (relating the impact of "stop and frisk" on one young man who was "unjustifiably stopped by police more than 60 times" before he turned 18).

[76] RANDALL KENNEDY, RACE, CRIME AND THE LAW 71 (Random House 1998); *see,*

brutality and racially discriminatory enforcement practices in some communities have led to distrust, actual and perceived injustice, and even rioting.[77] Such a history can contribute to the acquiescence of entire communities to gang culture's code of silence.

Intimidation and retaliation against citizens in gang-controlled communities necessitates willful blindness to gang crimes by everyday citizens,[78] which increases the frequency of unreported criminality and lessens the likelihood of convicting violent perpetrators. People who live in gang-controlled communities live in fear caused by calculated intimidation. For instance, an innocent citizen may, as a matter of course, be subject to demands for money whenever he leaves his home and forced to witness continual public drug transactions and loitering by gang members.[79] If he speaks to the police about these crimes, he risks retaliatory physical attacks on his person and property.[80] In a recent Michigan case, an innocent witness who had information about the shooter in a gang-related attack refused to tell the police anything until the police threatened to investigate him.[81] He explained that the code of the street is

e.g., Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Bratton's Challenge: LAPD's New Chief Believes Gang Problem Can Be Solved*), L.A. DAILY NEWS, Oct. 2, 2004, http://lang.dailynews.com/socal/gangs/articles/ALL_p1side1.asp [hereinafter *Bratton's Challenge*] (explaining that history of poor community relations with the LAPD increases the challenge of reducing crime, and the solution is increased investment in police officers who can become experts on particular neighborhoods).

[77] *See* KENNEDY, *supra* note 76, at 115–20 (describing instances of police brutality, questionable acquittals of police officers by all-white juries, and the race riots that subsequently ensued).

[78] *See* FINN, *supra* note 73, at 4.

> Many of the communities in which gangs operate are worlds unto themselves—places where people live, attend school, and work all within a radius of only a few blocks beyond which they rarely venture. As a result, victims and witnesses are often the children of a defendant's friends or relatives, members of the same church as the defendant, or classmates or neighbors. Furthermore, community residents may regard many of the crimes for which witnesses are sought as "business matters" among gang members or drug dealers, rather than as offenses against the community which should inspire willing civic participation in the process of law enforcement.

Id.

[79] Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Living in Fear: Gangs Keep Stranglehold on Southland Cities*), L.A. DAILY NEWS, Sept. 28, 2004, http://lang.dailynews.com/socal/gangs/articles/dnp3_gang3.asp [hereinafter *Living in Fear*].

[80] *Id.*

[81] Jones v. Warren, No. 1:07-cv-894, 2010 WL 3779277, at *6 (W.D. Mich. Aug. 20, 2010).

"[don't] snitch," which he had to obey out of fear for his life, even though he was not a gang member.[82] Moreover, this "[f]ear of gang retaliation among honest citizens in gang-dominated neighborhoods" forces prosecutors to rely on unwilling or tainted witnesses, such as co-defendants, for testimony in gang cases because innocent witnesses refuse to cooperate or take the stand.[83]

A prosecutor from Suffolk County, Massachusetts has said that witness intimidation not only "results from the tight-knit geography of poor neighborhoods where witnesses and gang members often know one another," but also from the fact that "gang members have become more brazen."[84] In California, a drug addict named Bobby Singleton was purchasing crack cocaine in an apartment building controlled by a gang known as The Mob Crew when a rival gang member opened fire.[85] Singleton, injured in the cross-fire, told police he could identify the shooter, a member of the Primera Flats gang.[86] When the shooter was released on bail, he appeared at Singleton's residence, instructed Singleton not to appear in court, stated, "I will look for you and kill you," and flashed a gun.[87] Two days later, the shooter returned in a van with his associates and took Singleton away.[88] Singleton was found later that night on a bench, shot to death.[89] Such violent endings for innocent bystanders to, and victims of, violent crime are not rare in gang-infested communities. Rather, they serve as frequent, stark reminders that all citizens—not just gang members—are subject to punishment for violating the "no snitching" code.

Even where a witness is safe from direct intimidation by a defendant, other gang members will enforce the "no snitching" policy on the defendant's behalf. Gangs' emphasis on loyalty coupled with their willingness to intimidate and retaliate renders it unsurprising when gangs interfere with a witness on behalf of a member who is on trial. Gang members will appear in court as observers because their mere presence can frighten witnesses into not

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[82] *Id.*

[83] FINN, *supra* note 73, at 4.

[84] Butterfield, *supra* note 66.

[85] Urias v. Horel, No. CV 07-7155-JVS (RNB), 2008 WL 4363064, at *2–3 (C.D. Cal. Aug. 25, 2008).

[86] *Id.* at *3.

[87] *Id.*

[88] *Id.* at *4.

[89] *Id.*

testifying.[90] Such intimidation can go undetected.[91] Moreover, even if a judge was aware of such a tactic and considered closing the courtroom, the defendant's constitutional right to a public trial is generally paramount.[92] Incarcerated witnesses are also in great danger of gang-related intimidation[93] because gangs have associates in prisons that will carry out "hits" and beatings as ordered.[94] Gangs will target civilian witnesses (such as Martha Puebla, who testified for the prosecution in a gang-related double-murder case and was shot multiple times in retaliation one week later[95]) and even police officers (such as Richard Elizondo, who in 1998 was shot and paralyzed in an attempted assassination days before he was to testify about a gang-related homicide[96]).

While sometimes a defendant is directly involved in ordering or causing witness intimidation,[97] it is often difficult to prove that a gang member-defendant directly ordered or perpetrated the intimidation himself.[98] Moreover, fear of a gang's retaliation can silence a witness

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[90] FINN, *supra* note 73, at xi.

[91] *See id.*

[92] *See* Rachel G. Piven-Kehrle, Annotation, *Basis for Exclusion of Public from State Criminal Trial in Order to Preserve Safety, Confidentiality, or Well-Being of Witness Who Is Not Undercover Police Officer*, 33 A.L.R.6th 1 (2008).

[93] FINN, *supra* note 73, at xi–xii; *e.g.*, David Kocieniewski, *Not Scared, or Scalded, Into Silence, Ex-Gang Leader Takes Stand in Trenton Murder*, N.Y. TIMES, Sept. 28, 2007, http://www.nytimes.com/2007/09/28/nyregion/28gang.html?ref=davidkocieniewski (describing how Roberto "Bam Bam Rodriguez," a former leader of the Latin Kings in Trenton, New Jersey, took the stand in a murder trial despite an attack by another inmate intended to silence him after he was labeled a "snitch").

[94] *Gangster Menace*, *supra* note 30 (explaining that today, much of the violence is dictated by prison gangs that order killings and other crimes from within prison).

[95] Beth Barrett, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Agony of Victims: Behind Each Tragedy Lie Grief and Heartache of Friends, Family*), L.A. DAILY NEWS, Sept. 29, 2004 http://lang.dailynews.com/socal/gangs/articles/dnp4_gang4.asp [hereinafter *Agony of Victims*].

[96] Dana Bartholomew, *Terror in Our Streets: A Special Report on Gang Violence in Southern California* (*Targets of Gang Violence*), L.A. DAILY NEWS, Sept. 29, 2004, http://lang.dailynews.com/socal/gangs/articles/dnp5_main.asp.

[97] *E.g.*, United States v. Baskerville, Nos. 07-2927 & 11-1175, 2011 U.S. App. LEXIS 20869, at *2–3 (3d Cir. Oct. 13, 2011). Just before William Baskerville, a Newark, New Jersey drug kingpin, was to go to trial on drug charges, the key witness against Baskerville, Kemo McCray, was shot and killed by members of Baskerville's "crew." *Id.* Federal prosecutors employed forfeiture by wrongdoing to admit McCray's prior statements, even though McCray was shot by an associate of Baskerville, not by Baskerville himself. *Id.* They were able to do so with evidence that Baskerville actually ordered the member of his "crew" to kill McCray. *Id.* Baskerville was sentenced to life in prison for conspiring to murder a witness, retaliating against a federal informant, and distributing drugs. *Id*

[98] Smith, *supra* note 56, at 21 (explaining that witness intimidation is perpetrated

even if the defendant takes no action. That defendant benefits from his gang's "no snitching" policy without any specific request or participation on his part.[99] The result is that a gang member-defendant may enjoy stalled prosecutions, dropped charges, or no charges at all by virtue of his membership in a gang that intimidates, retaliates against, or murders witnesses who may otherwise be willing to cooperate with police.[100] For instance, in the trial of two men charged with the drive-by shooting of an eight-year-old boy, one of the defendants profited from a deadlocked jury because some witnesses recanted their testimony and others refused to speak at all out of fear of gang retaliation.[101] As a result, the convicted defendant received a life sentence, while the other smiled as he pleaded no contest to the reduced charge of voluntary manslaughter.[102] When a gang enforces a "no snitching" policy against its own members and civilian witnesses, it substantially interferes with the criminal justice process, terrorizes neighborhoods, and grants a windfall to the defendant by virtue of his membership in a criminal enterprise.

The echoes of witness intimidation reverberate far beyond the courtroom. Urban communities have different conviction rates than suburban communities, depending on the type of crime.[103] In urban areas, drug felony convictions are highest, particularly when compared to suburban communities, resulting in a high rate of imprisonment of the urban population.[104] In contrast, violent felonies are successfully prosecuted at a significantly lower rate in urban neighborhoods than in suburban neighborhoods.[105] This is partly due to "the economics of law enforcement," which aims "to

not only by defendants but also by their friends or associates, who may employ tactics such as packing the courtroom and staring down everyone in it).

[99] *See id.*

[100] *E.g.*, David Kocieniewski, *Few Choices in Shielding of Witnesses*, N.Y. TIMES (Oct. 28, 2007), http://www.nytimes.com/2007/10/28/nyregion/28witness.html?ref=davidkocieniewski (detailing how, in a quadruple homicide, prosecutors were forced to drop all charges due to the intimidation and murder of witnesses); David Kocieniewski, *Keeping Witnesses Off Stand to Keep Them Safe*, N.Y. TIMES (Nov. 19, 2007), http://www.nytimes.com/2007/11/19/nyregion/19witness.html?ref=davidkocieniewski.

[101] *Grieving Mothers*, *supra* note 34. Five witnesses recanted their statements to police and others refused to testify, which is a common problem among witnesses from the community, according to Deputy District Attorney Anthony J. Falangetti. *Id.*

[102] *Id.*

[103] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 55 (2011).

[104] *Id.*

[105] *Id.*

punish as many crimes as budgets allow."[106] Drug convictions are easy and cheap to obtain,[107] while violent crime prosecutions are pricey and convictions are rare. Another key factor is that gangs—which operate primarily in urban communities—are incredibly effective at eliminating the witnesses necessary to prove violent felonies in a court of law.[108] Because violence goes largely unpunished in areas blighted with widespread witness silence, similar crimes are punished differently depending on a community's demographics.[109] William Stuntz referred to this as "discriminatory justice" that "runs headlong into the moral argument for treating criminals and crime victims from different demographic groups the same."[110] Witness intimidation by gangs, then, has not only a local effect on crime rates, but a broad impact on the administration of criminal justice and its sociological effects.

The heart of the problem resides within the four walls of the courtroom. American trial courts rely heavily on live witness testimony, which means that living, willing witnesses are crucial to the administration of justice.[111] Without witness statements as evidence, violent crimes will go unpunished. One way to combat this problem is to admit into evidence the prior statements of witnesses who were intimidated or killed by gang members before trial.[112] Combatting gang-perpetrated witness intimidation in this way will increase the possibility of successfully prosecuting violent gang member-defendants and thereby decrease the payoff of intimidation. Admission of the prior statements of a silenced witness—presented to a jury only after proof of murder or intimidation by gang members—will promote equal justice and combat the reigns of terror imposed by street gangs.

II. Forfeiture by Wrongdoing and *Giles v. California*

Successful intimidation or murder of government witnesses by members of a defendant's gang weakens the government's case and can force a prosecutor to drop all charges because statements by the

[106] *Id.* (considering the effects of retributivism in poor black neighborhoods).
[107] *Id.*
[108] *Id.* at 79–80.
[109] Stuntz, *supra* note 103, at 55.
[110] *Id.*
[111] *See id.* at 79.
[112] This can be done by a sworn deposition, but one may not be admitted as evidence until a defendant is charged, which limits its effectiveness against the threat of witness tampering.

now-unavailable witness may be inadmissible in court for two independent, but somewhat similar, reasons: (1) the statements satisfy no exception to the hearsay rule,[113] or (2) even if they do satisfy an exception to the hearsay rule, the statements do not satisfy an exception to the constitutional right to confront adverse witnesses at trial.[114] The doctrine of forfeiture by wrongdoing operates as an exception to both grounds of exclusion, and it should be utilized to admit at trial the prior statements of witnesses who are silenced by a defendant's gang associates.

A. Bars to Admission of Prior Statements by Witnesses

1. The Evidentiary Bar to Admission: The Hearsay Rule

Each jurisdiction creates its own rules of evidence, which includes the hearsay rule. The hearsay rule strictly prohibits admission of out-of-court statements by absent declarants unless exceptions[115] listed in a jurisdiction's rules of evidence apply, even if the witness is unavailable[116] to testify. In a criminal case, if a witness refuses to take the stand, flees the jurisdiction, or dies, it is likely that a jury will not hear the information that the unavailable witness previously communicated because, commonly, no exception to the hearsay rule applies to such circumstances.

One exception to the hearsay rule is the doctrine of "forfeiture by wrongdoing."[117] It operates to allow the admission of hearsay where the defendant, by his wrongdoing, caused the declarant to be

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[113] *E.g.*, FED. R. EVID. 802 (setting forth the exclusionary rule that hearsay is inadmissible unless a federal statute, the Federal Rules of Evidence, or Supreme Court rules explicitly allow it). Hearsay is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c)(1)–(2).

[114] U.S. CONST. amend. VI.

[115] *See, e.g.*, FED. R. EVID. 804(b)(1)–(6). Five exceptions to the hearsay rule in the case of witness unavailability are included in the Federal Rules of Evidence: prior testimony subject to cross-examination, a statement made under belief of impending death, a statement against interest, a statement about the declarant's personal or family history, and, last but not least, forfeiture by wrongdoing. *Id.*

[116] The Federal Rules set forth examples of unavailability including exemption from testifying due to a privilege, refusal to testify despite a court order, lack of memory of the declarant's statement, inability to testify due to death or infirmity, or absence from the proceedings despite reasonable attempts by the proponent of the statement. FED. R. EVID. 804(a). This list is not exhaustive. STEVEN GOODE & OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK: 2011–2012 STUDENT EDITION 333 (West 2011) ("The listed grounds [in 804(a)] are illustrative, not exclusive.").

[117] Giles v. California, 554 U.S. 353, 354–60 (2008).

unavailable to testify.[118] The federal version of forfeiture by wrongdoing is codified in Federal Rule of Evidence 804(b)(6).[119] It permits admission of otherwise inadmissible testimony if the witness is unavailable due to the wrongdoing of the adverse party.[120] Congress adopted the Rule in 1997, and, subsequently, a number of states adopted various versions of it.[121] It is applicable to both parties, not just the defendant, and typically requires that "the party against whom the statement is offered (1) directly, or through others (2) engaged in conduct that is wrongful (3) with the intent of producing the declarant's unavailability, (4) which was thereby procured."[122] In most jurisdictions, the question of whether forfeiture occurred is determined by a preponderance of the evidence[123] at a Rule 104(a)

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[118] *E.g.*, FED. R. EVID. 804(b)(6).

[119] *Id.*

[120] *Id.*

[121] KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 442 (6th ed. West 2006); *see, e.g.*, ARIZ. R. EVID. 804(b)(6) ("A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result."); CAL. EVID. CODE § 1390(a) (West 2012) ("Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."); DEL. R. EVID. 804(b)(6) (2001) ("A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."); FLA. STAT. ANN. § 90.804(2)(f) (West 2012) ("A statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result."); ILL. EVID. R. 804(b)(5) (2011) ("A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."); MASS. GEN. LAWS ANN. 804(b)(6) (West 2012) ("A statement offered against a party who forfeits, by virtue of wrongdoing, the right to object to its admission based on findings by the court that (A) the witness is unavailable; (B) the party was involved in, or responsible for, procuring the unavailability of the witness; and (C) the party acted with the intent to procure the witness's unavailability."); N.J. R. EVID. 804(b)(9) (2011) ("A statement offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."); PA. R. EVID. 804(b)(6) (2013) ("A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.").

[122] *See* BROUN, *supra* note 121, at 442.

[123] *Id.* Some states, however, have adopted a heightened "clear and convincing" standard of proof instead. *E.g.*, State v. Mason, 162 P.3d 396, 404–05 (Wash. 2007) (en banc), *cert. denied*, 553 U.S. 1035 (2008) ("[T]he trial court must decide whether the witness has been made unavailable by the wrongdoing of the accused based upon evidence that is clear, cogent, and convincing. We recognize that this is not an easy standard to meet, but the right of confrontation should not be easily deemed forfeited by an accused."); People v. Geraci, 85 N.Y.2d 359, 367 (N.Y. 1995) (opining that "a defendant's loss of the valued Sixth Amendment confrontation right

proceeding.[124]

A gang member-defendant who knows that his associates are willing to intimidate adverse witnesses can expect that his gang will intimidate any witness that may be adverse to *him*. If the gang associates meet the defendant's expectation by following through with intimidating the adverse witness, the forfeiture exception should apply against the defendant because his wrongdoing—remaining in the gang with the expectation of witness tampering on his behalf—caused the unavailability of the declarant. The hearsay rule should be no bar to juries hearing the statements of the unavailable declarant because, had the defendant not joined or remained in the gang, its members would not have acted to protect him. Application of forfeiture by wrongdoing to scenarios of gang-perpetrated intimidation may lessen the incentive to silence witnesses who could testify against gang member-defendants because intimidating or killing the witness would not prevent admission of his testimony. This could increase the safety of witnesses and would help persuade reluctant witnesses to testify.

2. The Constitutional Bar to Admission: The Right of Confrontation

Even if a hearsay exception—such as forfeiture by wrongdoing—could be interpreted to allow the admission of statements by a declarant silenced by a defendant's gang associates, the second hurdle to admission remains: would such an exception violate the right to confrontation?

The Founders preserved this right in the Sixth Amendment's Confrontation Clause, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[125] This requirement applies to the states through incorporation by the Fourteenth Amendment.[126] Requiring live witness testimony not only protects the accuracy of the evidence presented to jurors, but it also "ensures a specific trial court process that has unique social value, insisting, with limited exceptions, upon the accused's right to cross-examine witnesses in

constitutes a substantial deprivation").

[124] GOODE, *supra* note 116, at 341; *see* FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether . . . evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.").

[125] U.S. CONST. amend. VI.

[126] Pointer v. Texas, 380 U.S. 400 (1965); BROUN, *supra* note 121, at 434.

court."[127] At common law, if a witness was unavailable to testify in court, and if the defendant did not have a meaningful opportunity to cross-examine the witness's statements, then that witness's prior statements were inadmissible unless one of two exceptions applied.[128] The first was declarations made by a speaker "on the brink of death and aware that he was dying,"[129] and the second was forfeiture by wrongdoing.[130]

While the right of confrontation was included in the Bill of Rights as a protection for criminal defendants, it was never understood to be absolute: forfeiture by wrongdoing as an exception to the right to confrontation is rooted in English common law,[131] specifically a 1666 case wherein the fact that the witness was "detained by the means or procurement of the prisoner" constituted a basis on which to admit the witness's prior testimony.[132] By the time of the Founding, forfeiture by wrongdoing was one "species of unavailability," such as death and inability to travel, which were grounds on which to admit prior formal statements.[133]

The doctrine of forfeiture by wrongdoing is not based on principles of agency or waiver, but equity: a man shall not profit from his wrongdoing.[134] Application of forfeiture by wrongdoing does not

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[127] ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 414 (3d ed. 2004).

[128] Giles v. California, 554 U.S. 353, 358 (2008).

[129] *Id.*

[130] *Id.* at 359. Note that the common law rules were codified in FED. R. EVID. 804(b), discussed *supra* note 115.

[131] *Giles*, 554 U.S. at 359 (referencing Lord Morley's Case, 6 How. St. Tr. 769, 771 (H.L. 1666)); Harrison's Case, 12 How. St. Tr. 833, 851 (H.L.1692); *Queen v. Scaife*, 117 Q.B. 238, 242, 117 Eng. Rep. 1271, 1273 (Q.B. 1851); 2 W. Hawkins, Pleas of the Crown 425 (4th ed. 1762); T. PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 62 (2d ed. 1804); 1 G. GILBERT, LAW OF EVIDENCE 214 (1791)).

[132] *Giles*, 554 U.S. at 359 (quoting Lord Morley's Case, at which judges concluded that a witness's having been "detained by the means or procurement of the prisoner" provided a basis to read testimony previously given at a coroner's inquest. 6 How. St. Tr., at 770–71).

[133] Rebecca Sims Talbott, Note, *What Remains of the "Forfeited" Right to Confrontation? Restoring Sixth Amendment Values to the Forfeiture-by-Wrongdoing Rule in Light of* Crawford v. Washington *and* Giles v. California, 85 N.Y.U. L. REV. 1291, 1310–11 (2010).

[134] *Giles*, 554 U.S. at 379–80 (Souter, J., concurring) (asserting that in the case of a defendant who murdered an adverse witness, "[e]quity demands" a "showing [of] intent to prevent the witness from testifying" and that the majority opinion supplies the conclusion that "equity requires"); *id.* at 388 (Breyer, J., dissenting) ("The inequity consists of [Giles] being able to *use* the killing to keep out of court her statements against him. That inequity exists whether the defendant's state of mind is purposeful, intentional (*i.e.*, with knowledge), or simply probabilistic."); PARK, *supra*

require a defendant to knowingly and voluntarily waive his right to confrontation; rather, "the Rule withdraws the right" in response to the defendant's behavior.[135]

A careful analysis of forfeiture by wrongdoing as a common law exception to the right of confrontation—and of the Supreme Court's recent treatment of forfeiture as such—suggests that its use as a basis to admit the prior statements[136] of witnesses silenced by a defendant's gang associates is constitutional, not barred by relevant Supreme Court jurisprudence, and in harmony with the equitable spirit of the doctrine.

3. The Relationship Between the Evidentiary and Constitutional Bars

While the application of forfeiture by wrongdoing (as either an evidentiary or constitutional exception) may appear straight-forward, the requisite analysis is not. The Supreme Court recently held that, for purposes of a criminal defendant's constitutional confrontation rights, hearsay proffered by the prosecution comprises two subsets: "testimonial" statements and "non-testimonial" statements.[137] Non-testimonial statements are subject only to rules of evidence, so movants need only overcome the hearsay rule and other evidentiary hurdles to admit a non-testimonial statement. A showing that the defendant "acquiesced" in making the witness unavailable satisfies the federal forfeiture by wrongdoing hearsay exception.[138] Defendants are protected from the admission of prior testimonial statements, however, by the Confrontation Clause.[139] Forfeiture by wrongdoing is an exception to the constitutional right of confrontation. The Supreme Court stated in *Reynolds v. United States*, the case in which it first recognized forfeiture by wrongdoing, that:

> [t]he constitutional right of a prisoner to confront the

note 127, at 378 ("The forfeiture-by-wrongdoing exception arises not "from a belief that such statements are reliable, but rather from an equitable principle that parties should not be able to benefit from the absence of a declarant whom they made unavailable.").

[135] PARK, *supra* note 127, at 378.

[136] Both "non-testimonial" and "testimonial."

[137] Crawford v. Washington, 541 U.S. 36, 51–53 (2004). I will omit quotation marks throughout the remainder of this note, but see note 12 *supra* regarding the Supreme Court's usage of the word "testimonial."

[138] FED. R. EVID. 804(b)(6); *see, e.g.*, United States v. Thompson, 286 F.3d 950, 964 (7th Cir. 2002) (explaining that "acquiescence itself is an act" and adopting the dictionary definition of "acquiescence": "to accept or comply passively or tacitly").

[139] U.S. CONST. amend. VI.

> witness and cross-examine him is not to be abrogated, unless it be shown that the witness is dead, or out of the jurisdiction of the court; or that having been summoned, he appears to have been kept away by the adverse party on the trial.[140]

The *Reynolds* court thus recognized forfeiture by wrongdoing as an exception to the right of confrontation where the defendant engaged in "wrongful conduct designed to prevent a witness's testimony."[141]

Until recently, the Supreme Court required only that an out-of-court statement by an unavailable declarant bore "adequate 'indicia of reliability'" stemming from a "firmly rooted hearsay exception" or "particularized guarantees of trustworthiness" for its admission to pass constitutional muster.[142] The effect was that satisfaction of the hearsay rules generally indicated that the Confrontation Clause requirements were satisfied.[143] In 2004, however, the Supreme Court dispensed with the "indicia of reliability" scheme when it decided *Crawford v. Washington*.[144] Observing that the Confrontation Clause was intended to combat the use of *ex parte* examinations in favor of English common law's preferred practice of live testimony in an adversarial process,[145] the Court held, after an historical analysis, that lower courts should employ a categorical framework: testimonial statements may be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[146] Conversely, non-testimonial statements by an out-of-court witness are no longer subject to Confrontation Clause exclusion at all.[147]

The Court interpreted the defendant's Sixth Amendment right "to be confronted with the witnesses against him"[148] to apply only to

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[140] Reynolds v. United States, 98 U.S. 145, 151–52 (1878) (emphasis omitted); *see* Giles v. California, 554 U.S. 353, 366 (2008) (explaining *Reynolds* is first case in which the Supreme Court recognized forfeiture by wrongdoing).

[141] *Giles*, 554 U.S. at 366.

[142] Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

[143] Park, *supra* note 127, at 415.

[144] *See generally* 541 U.S. 36 (2004).

[145] BROUN, *supra* note 121, at 437.

[146] *Crawford*, 541 U.S. at 59.

[147] *Id.* at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . .").

[148] U.S. CONST. amend. VI.

"those who 'bear testimony,'"[149] which meant, historically, to make a "solemn declaration."[150] The Court set forth a new "primary purpose" test to determine whether a statement is testimonial, explaining "[w]ithout attempting to produce an exhaustive classification of all conceivable statements" that testimonial statements are those made with the intent to establish facts relevant to a future prosecution when there is no ongoing emergency.[151] In contrast, the Court defined non-testimonial statements as those made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[152] So, in accordance with the Court's interpretation, the right of confrontation requires that testimonial statements—those made outside of emergency circumstances and that establish facts relevant to future prosecution[153]—are inadmissible unless offered by the declarant's live testimony or unless an exception, like forfeiture by wrongdoing, applies.

B. Giles v. California*'s Limited Scope Does Not Encompass Gang-perpetrated Witness Intimidation*

The Supreme Court most recently treated forfeiture by wrongdoing in *Giles v. California*,[154] in which the Court set forth an

[149] *Crawford*, 541 U.S. at 51.

[150] *Id.* (quoting 1 N. Webster, An American Dictionary of the English Language (1828)).

[151] Davis v. Washington, 547 U.S. 813, 822 (2006) (Testimonial statements include those "taken by police officers in the course of interrogation . . . when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."); *Crawford*, 541 U.S. at 68 (explaining that statements made in a police interrogation are testimonial, as in the facts of *Crawford*, as well as those made at a preliminary hearing, a grand jury, or a former trial).

[152] *Davis*, 574 U.S. at 822; *Crawford*, 541 U.S. at 51, 56 (including in its description of non-testimonial statements "an off-hand, overheard remark," "a casual remark to an acquaintance," and "business records or statements in furtherance of a conspiracy").

[153] *See supra* note 151 and accompanying text. For specific applications of the test set forth in *Crawford* by the Supreme Court, *see, e.g.*, Williams v. Illinois, 132 S. Ct. 2221 (2012) (expert testimony declaring a DNA profile matches other evidence); Michigan v. Bryant, 131 S. Ct. 1143 (2011) (victim's statements to police); Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011) (blood-alcohol analysis report admitted through testimony of non-testing, non-certifying analyst); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (government analysts' certificates of analysis identifying substance); Davis v. Washington, 547 U.S. 813 (2006) (statements made during police interrogation conducted during emergency).

[154] 554 U.S. 353 (2008).

intent requirement[155] grounded in the right to confront adverse witnesses. Prior to *Giles*, two distinct lines of cases had developed concerning the doctrine of forfeiture by wrongdoing.[156] In the first line, courts required that the prosecution prove that the defendant performed some act with the specific intent to render a particular witness unavailable at trial in order to invoke the exception, while, in the other, the courts were willing to admit the statements even where proof of specific intent was lacking.[157] The Supreme Court in *Giles* approved the former approach in a case where the defendant was on trial for murdering the declarant.[158]

A "specific intent" requirement may seem, at first glance, to foreclose the application of forfeiture by wrongdoing to testimonial statements by witnesses who are unavailable due to the action of a defendant's gang because evidence of the defendant's intent to silence an adverse witness (such as, for example, a recorded phone conversation during which the defendant instructs his cohorts to kill the witness to eliminate her testimony) is usually prohibitively difficult to obtain. A close reading of *Giles*, however, reveals that the specific intent requirement may not apply to gang-perpetrated witness intimidation at all.

1. Facts & Procedural History

In *Giles v. California*, Dwayne Giles was tried and convicted for the murder of his girlfriend, Avie.[159] During trial, the prosecution offered and the trial court admitted statements Avie had made to her sister describing how Giles harmed her, including by choking and

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[155] *Id.* at 367 ("[T]he exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.") (internal quotation marks and citation omitted). For more on specific intent, see *infra* note 198.

[156] Marc McAllister, *Down But Not Out: Why* Giles *Leaves Forfeiture by Wrongdoing Still Standing*, 59 CASE W. RES. L. REV. 393, 397 (2009).

[157] *Id.* For courts that did not, prior to *Giles*, require specific intent to silence a witness as a predicate to forfeiture by wrongdoing, *see, e.g.*, United States v. Garcia-Meza, 403 F.3d 364, 370–71 (6th Cir. 2005); United States v. Mayhew, 380 F. Supp. 2d 961, 967–68 (S.D. Ohio 2005); State v. Meeks, 88 P.3d 789, 793–95 (Kan. 2004), *overruled in part by* State v. Davis, 158 P.3d 317 (Kan. 2006); State v. Jensen, 727 N.W.2d 518, 534 (Wis. 2007). For courts that did, prior to *Giles*, require a showing of specific intent, *see, e.g.*, People v. Moreno, 160 P.3d 242, 245–46 (Colo. 2007); Commonwealth v. Edwards, 830 N.E.2d 158, 170 (Mass. 2005); State v. Romero, 133 P.3d 842, 855–56 (N.M. Ct. App. 2006), *aff'd*, 156 P.3d 694 (N.M. 2007).

[158] *See generally Giles*, 544 U.S. 353 (2008); *e.g.*, Hunt v. State, 218 P.3d 516, 518 (Okla. Crim. App. 2009).

[159] *Giles*, 544 U.S. at 357.

hitting her.[160] While the case was on appeal, the Supreme Court decided *Crawford*.[161] Subsequently, Giles argued that his right to confrontation had been violated by the admission of Avie's statements, which were unconfronted.[162] The California Court of Appeal and the California Supreme Court upheld the conviction,[163] and the Supreme Court granted certiorari.[164]

After assuming that the statements of Avie in question were testimonial,[165] the Supreme Court, in its main opinion, "ask[ed] whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right."[166] It summarized the reasoning of the California Supreme Court as follows: "Giles had forfeited his right to confront Avie because he had committed the murder for which he was on trial, and because his intentional criminal act made Avie unavailable to testify."[167] The Supreme Court ultimately disapproved of this reasoning and opined that Avie's prior statements should not have been admitted into evidence without a showing that the defendant specifically intended to prevent her in-court testimony.[168] Accordingly, the Supreme Court remanded the case for a decision consistent with its opinion.[169]

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[160] *Id.* at 356.

[161] *Id.* at 357.

[162] *See id.*

[163] *Id.*

[164] *Id.*

[165] *Giles*, 544 U.S. at 358.

[166] *Id.* at 358. The majority opinion also states in its introduction that it will "consider" the broader question of "whether a defendant forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial." *Id.* at 355.

[167] *Id.* at 357. This framing of the certified question is similar to the question as characterized in the parties' briefs. The Petitioner posed the question: "[d]oes a criminal defendant 'forfeit' his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?" Giles v. California, 544 U.S. 353, Brief of Petitioner i, Feb. 20, 2008, 2008 WL 494948. The State of California characterized the question on appeal as "[w]hether a defendant who murders a witness may complain that the witness is unavailable for cross-examination." Giles v. California, 544 U.S. 353, Respondent's Brief on the Merits i, March 19, 2008, 2008 WL 904073.

[168] *Giles*, 554 U.S. at 377.

[169] *Id.* On remand, the California Court of Appeals found that Avie's statements were testimonial and the prosecution failed to present evidence that Giles killed her with the "intent to prevent her from testifying or cooperating in a criminal

2. The Court's Fractured Opinion

Splintered Supreme Court opinions seem increasingly common, and *Giles* is no exception. Justice Scalia wrote for a fractured majority. He was joined in full by Justices Thomas and Alito (each filed separate concurrences) and in part by Justices Souter and Ginsburg (Justice Ginsburg joined a concurrence by Justice Souter). Justice Breyer, joined by Justices Stevens and Kennedy, dissented. The result is five separate opinions, three of which are concurrences.[170] Justice Scalia's opinion is in this Comment termed the "main opinion" because the preponderance of it claims the support of a majority (six justices), while one portion of it, part D-2, claims the support of a plurality (four justices). With a bench so riven, determining which of its statements are binding declarations and which are dicta is no simple feat.

3. The Holding Controls Only When Defendants Are on Trial for Murdering the Declarant

Following a recapitulation the facts and procedural history of the case, Scalia, author of the main opinion in *Giles*, quickly dispensed with the dying declaration doctrine as inapplicable to the facts.[171] He next stated that forfeiture by wrongdoing is a second common law exception to the right of confrontation recognized by the Supreme Court[172] and commenced an examination of the words and definitions used to define forfeiture by wrongdoing at common law.[173] Scalia, citing various English cases, observed that "the terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct

investigation." People v. Giles, No. B166937, 2009 WL 457832 (Cal. Ct. App. Feb. 25, 2009). Upon retrial, Giles was convicted of first degree murder. People v. Giles, B224629, 2012 WL 130659, 1 (Cal. Ct. App. Jan. 18, 2012), *unpublished/noncitable* (Jan. 18, 2012), *review denied* (Apr. 11, 2012), *reh'g denied* (Feb. 17, 2012).

[170] In their concurrences, Justices Thomas and Alito each concurred fully in the reasoning of the opinion as it pertains to the application of forfeiture by wrongdoing. *Giles*, 554 U.S. at 377–78. They wrote separately to emphasize their view that Avie's statements were outside the ambit of the Confrontation Clause. *Id.*

[171] *Id.* at 358–59 (noting that the statements in question were not made under belief of impending death).

[172] *Id.*

[173] The dissent accepts this method of analysis to determine the scope of the exception at the time of the Founding but reaches a different conclusion. *Giles*, 554 U.S. at 381–83 (Breyer, J., dissenting) ("Like the majority, I believe it is important to recognize the relevant history . . . . The remaining question concerns the precise metes and bounds of the forfeiture by wrongdoing exception.").

designed to prevent the witness from testifying."[174] Scalia concluded that "[t]he manner in which the rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying."[175] Next addressing U.S. post-Founding precedent, Scalia observed that *Reynolds* was "never" invoked in murder prosecutions to support admission of a victim's prior inculpatory statements,[176] and the *Reynolds* holding relied upon the common law precedent set forth in the main *Giles* opinion as well as the equitable roots of the doctrine.[177] Scalia noted that the earliest case identified by the parties and *amici* wherein the unconfronted statements of a declarant-victim were admitted against a defendant-attacker via forfeiture by wrongdoing was decided as recently as 1985 (there, the defendant was convicted

[174] *Giles*, 554 U.S. at 359–60. These include "means," "contrivance," "procurement," etc.

[175] *Id.* at 361. According to Scalia, the forfeiture exception did not apply where a defendant merely caused the absence without doing so to prevent testimony. Scalia noted that, where defendants were charged with the death of the declarant, forfeiture was not argued by lawyers who either had precarious proof of a dying declaration or were patently unable to prove a dying declaration. *Id.* at 362, 364. Moreover, he noted that cases in which the dying declaration exception did apply still lacked theories of forfeiture, which (if causation were sufficient) could be shown simply by putting on the case in chief. *Id.* at 364. As noted in the opinion, the State of California argued that, in those cases, the commission of wrongdoing caused the forfeiture of confrontation rights, not of hearsay rights. *Id.* at 364–65. Scalia countered by arguing that no treatise supports the State's view, and it would be "surprising" if correct because, at common law, courts excluded hearsay "*because* it was unconfronted," *id.* at 365, suggesting that a defendant who forfeited his confrontation rights would not enjoy the benefit of the hearsay rule.

[176] *Giles*, 544 U.S. at 367. In *Reynolds v. United States*, a defendant kept his wife away from authorities, rendering her unavailable, so her prior statements were admitted in her absence. 98 U.S. 145, 149–50 (1878). The Supreme Court, in affirming the trial court's decision, invoked forfeiture by wrongdoing as an exception to confrontation. *Id.* at 158 (explaining that "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts"). In doing so, it purported to adopt a rule of "long-established usage" which "is the outgrowth of a maxim based on the principles of common honesty." *Id.* at 159. The court relied on common law cases including *Lord Morley's Case* (6 State Trials, 770) (1666) (resolving that "if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the [prior] examination [of the witness] might be read"); *Harrison's Case*, and Regina v. Scaife (17 Ad. & El. N.S. 242) ("all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read.").

[177] *Giles*, 554 U.S. at 366–67 (explaining that the *Reynolds* court relied on equitable maxims and cited the leading common-law cases).

of the murder of the declarant),[178] and the Supreme Court has never recognized such an application of the doctrine.[179]

The main opinion concludes that the exception that the California court endorsed—forfeiture of confrontation rights where the alleged murderer killed a declarant-victim without specific intent to silence the victim—is not an exception to the Confrontation Clause.[180] The main opinion contains a summary of the majority's rationales. It designates as "highly persuasive" (1) "the most natural reading of the common law," (2) the absence of common-law cases *admitting* prior statements on a forfeiture theory when the defendant had not engaged in conduct designed to prevent a witness from testifying," and (3) "a subsequent history in which the dissent's broad forfeiture theory has not been applied."[181] It then designates as "*conclusive* . . . the common law's uniform exclusion of unconfronted inculpatory *testimony by murder victims* . . . *in* the innumerable *cases in which the defendant was on trial for killing the victim*, but was not shown to have done so for the purpose of preventing testimony."[182] This ultimate rationale is as narrow as the question originally presented[183] and suggests that the Court's holding—requiring specific intent by the defendant to silence the witness—controls only a subset of cases: those in which the defendant is on trial for the murder of the declarant.

The focus of the main opinion is almost exclusively on cases wherein the defendant is on trial for the murder of a victim, admission of whose statements are sought by means other than forfeiture by wrongdoing or denied under a theory of forfeiture by wrongdoing.[184] The Court does reference cases wherein third parties

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[178] *Giles*, 455 U.S. at 367 (citing United States v. Rouco, 765 F.2d 983 (1985)).

[179] *Id.*

[180] *Id.* at 368.

[181] *Id.*

[182] *Id.* (emphasis added).

[183] *See supra* notes 166 & 167 and accompanying text.

[184] *See Smith v. State*, 28 Tenn. 9, 23 (1848) (statements of victim inadmissible as forfeiture by wrongdoing and therefore excluded); *Lewis v. State*, 17 Miss. 115, 120 (1847) (statements of victim inadmissible as forfeiture by wrongdoing and therefore excluded); *Nelson v. State,* 26 Tenn. 542, 543 (1847) (statements of victim inadmissible as forfeiture by wrongdoing and therefore excluded); *Montgomery v. State,* 11 Ohio 424, 425–26 (1842) (statements of victim inadmissible as forfeiture by wrongdoing and therefore excluded); *United States v. Woods,* 28 F. Cas. 762, 763 (No. 16,760) (C.C. D.C. 1834) (statements of victim inadmissible as forfeiture by wrongdoing and therefore excluded); King v. Commonwealth, 4 Va. 78 (Gen. Ct. 1817) (admission of victim's statements sought only on dying declaration basis); Gibson v. Commonwealth, 4 Va. 111 (Gen. Ct. 1817) (admission of victim's

silence a witness on a defendant's behalf—in those cases, forfeiture is invoked successfully.[185]

Justice Souter's concurrence,[186] joined by Justice Ginsburg, similarly indicates the narrow scope of *Giles*. Souter agreed that Scalia's "historical analysis is sound" but noted that Justice Breyer, in dissent, engaged in a similar methodology and reached a different result.[187] The "contrast" of Scalia and Breyer's "careful examinations of the historical record" persuaded Souter that the record is inconclusive.[188] Unlike the main opinion, the reasoning of this critical concurrence (which speaks for two of the six majority votes) rests on the "rationale" that "equity demands" a specific intent requirement to avoid the "near circularity" that results where a judge presiding over a murder trial may find, by a preponderance of the evidence, that a defendant is guilty of the murder of a declarant before a jury finds that same defendant guilty of that same murder beyond a reasonable doubt.[189] In other words, the "rationale" that "persuades [Souter, and presumably Ginsburg also,] that the Court's conclusion is the right one"[190] is one that only makes sense in cases where a defendant is on trial for the murder of a declarant, and it is a

statements sought only on dying declaration basis); Anthony v. State, 19 Tenn. 265 (1838) (admission of victim's statements sought only on dying declaration basis); King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (1791) (unconfronted statements of victim inadmissible as dying declarations, under Marian statute, and as best evidence and therefore excluded); Thomas John's Case, 1 East 357, 358 (P.C. 1790) (statements of victim inadmissible as forfeiture by wrongdoing and therefore excluded); Welbourn's Case, 1 East 358, 360 (P.C. 1792) (statements of victim inadmissible as forfeiture by wrongdoing and therefore excluded); King v. Woodcock, 1 Leach 500, 168 Eng. Rep. 352 (1789) (unconfronted statements of victim admitted as dying declaration but inadmissible under Marian statute).

[185] Rex v. Barber, 1 Root 76 (Conn. Super. Ct. 1775) (admitting hearsay evidencing statements of a witness who had previously testified against the defendant but was "sent away" by a friend of the defendant, "and by his instigation," prior to testifying before the petit-jury); *Harrison's Case*, 12 How. St. Tr., at 851 (hearsay admitted where "[a]n agent of the defendant had attempted to bribe [the declarant], who later disappeared under mysterious circumstances": "Mr. Harrison's agents or friends . . . made or conveyed away a young man that was a principal evidence against him") (cited in *Giles*, 554 U.S. at 370).

[186] *See generally Giles*, 554 U.S. 353, 379–80 (Souter, J., concurring).

[187] *Id.* ("The contrast between the Court's and Justice Breyer's careful examinations of the historical record tells me that the early cases on the exception were not calibrated finely enough to answer the narrow question here.").

[188] Justice Breyer seemed to agree, *id.* at 396 ("I also recognize the possibility that there are too few old records available for us to draw firm conclusions."), rendering a majority of the court in agreement that the historical record is inconclusive.

[189] *Giles*, 554 U.S. at 379.

[190] *Id.* at 380.

prior testimonial statement of that declarant that the prosecution seeks to admit through forfeiture by wrongdoing. This rationale, the outcome of which requires a showing of specific intent as a matter of constitutional law, simply cannot apply to situations wherein a gang, acting on behalf of a gang member-defendant, silences a witness to his crime because the defendant is not on trial for the witness's murder: no such "near circularity" would result.

Where there is a set of fractured opinions that do not reflect a coherent majority statement of legal doctrine, it is appropriate to treat the holding as the narrowest principle that supports the outcome on the facts.[191] In this case, the facts are that the defendant, Giles, was on trial for the murder of the declarant, Avie, whose testimonial statements were admitted without a showing that Giles murdered Avie with the specific intent to silence her. The narrowest ground shared by the main and concurring opinions that is necessary to support the outcome of the decision—the requirement of specific intent—is that such specific intent is a necessary requisite only where the defendant is on trial for the declarant's murder.

In short, Scalia, joined by Thomas, Alito, and Chief Justice Roberts, asserted that the common law allowed forfeiture only where there was specific intent to tamper with witnesses. Souter, joined by Ginsburg, was not fully persuaded by the historical record but nonetheless concurred on the basis of a policy rationale, opining that equity would doubtlessly abhor forfeiture where a judge deems a murder defendant guilty by a preponderance standard before a jury has the chance to agree beyond a reasonable doubt. In light of this, the holding of *Giles* is reasonably stated as follows: if the defendant is on trial for the murder of a declarant whose unconfronted testimonial statements the prosecution seeks to admit, then the prosecution must show the defendant committed murder with the specific intent to prevent the victim from testifying. Given this narrow scope, *Giles* does not directly apply to those cases wherein gang members take it upon themselves to silence witnesses to gang crime pursuant to a "no snitching" policy on behalf of a defendant. The holding only applies to cases in which the prosecution seeks to use forfeiture by wrongdoing to admit the statements of a victim whose alleged murderer is on trial for that crime. In all other cases, the necessity of specific intent to silence a particular witness is yet to be determined, and there are good arguments for why the specific

[191] *See generally* Tristan C. Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 695–96 (2009).

intent requirement should not apply in the gang cases just described.

C. *Even if* Giles *is Applied to Cases of Gang-perpetrated Witness Intimidation, a Three-part Test Should be Used for Application of Forfeiture by Wrongdoing.*

The question remains: what standard will satisfy the constitutional demands of the Confrontation Clause and the equitable demands of forfeiture by wrongdoing in the case of gang-perpetrated witness tampering? In *Giles*, the dissent and majority differed over the question of whether a "knowledge" standard—that is, knowledge by the defendant that the witness would be unable to testify because of the defendant's act of killing her—should suffice (as the dissent argued) or whether "specific intent to silence" must be proved (as a majority held). The main concern shared by a majority of the court in *Giles* was that, without the specific intent requirement, a judge may on his own find a defendant "guilty as charged."[192] This concern is not present in the typical case of gang-perpetrated witness intimidation because the defendant is not typically on trial for making a witness unavailable, but for committing some other crime about which the witness had material information. Nonetheless, even if the Supreme Court requires "specific intent" to be shown in such cases, the main opinion did not define what suffices to demonstrate a sufficient showing of specific intent in all cases. It mentioned a consensus among commentators that "intent" is "the particular purpose of making the witness unavailable,"[193] and it decried the dissent's claim that "knowledge is sufficient to show intent."[194] In the case of gang-perpetrated witness intimidation, if a gang member-defendant sees his gang protect other members through witness intimidation yet remains an active gang member, then, assuming he benefits from that enforcement policy when adverse witnesses in *his* trial are so silenced, his specific intent may be shown by a

[192] *See Giles*, 554 U.S. at 365 (Scalia, J.) ("The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury."); *id.*, at 379 (Souter, J., concurring in part) ("If the victim's prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim's statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; evidence that the defendant killed would come in because the defendant probably killed.").

[193] *Id.* at 367 (citations omitted) (internal quotation marks omitted).

[194] *Id.* at 368.

preponderance of the evidence.[195] The "knowledge" versus "intent" debate in *Giles* was, arguably, about a distinction without a practical difference because in many cases the same evidence would be offered (and sufficient) to prove either knowledge or intent.[196] Similarly,

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[195] Recall Wigmore's "doctrine of chances" as a means to prove intent, which he explained as "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all." JOHN H. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS 133 (Little, Brown, and Co. 1913). By way of example, he described two hunters in the woods, with hunter A walking ahead of hunter B. *Id.* If hunter A hears a bullet whistle past his head once, he is willing to assume hunter B accidently pulled the trigger or aimed poorly. *Id.* But if, soon after, a second bullet goes by, and then a third, which strikes him, hunter A may well assume hunter B intended the shot [to do what?]. *Id.*

[196] In recognizing the challenge of proving specific intent, specifically in domestic violence scenarios, the Court sanctioned allowing an "inference of intent" from the facts and circumstances surrounding the case, even though none may directly bear on the state of mind of the defendant in the culminating act of abuse. Justice Scalia in the main opinion said that intent may be inferred in the case of an abuser who kills his victim if there is a history of abuse and intimidation intended to prevent his victim from seeking assistance or testifying against him. *Giles*, 554 U.S. at 377. His oft-cited treatment of domestic violence states outright that intent can be inferred from a history of violence and intimidation:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Id. In short, Justice Scalia acknowledged that in the case of domestic violence, evidence of a history of abuse or threats of abuse by the abuser is relevant to whether the act of killing his victim was intended to silence her. *Id.*

Justice Souter agreed that a history of domestic abuse or threats intended to dissuade a victim from speaking to authorities can give rise to an inference that, in the alleged murder, the defendant intended to silence the witness, even if there is no evidence of the defendant's state of mind at the time of the murder. *E.g.*, *id.* at 380 (Souter, J., concurring). In his concurrence, Justice Souter observed that a historical examination reveals a dearth of "any reason to doubt that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process." *Id.* In other words, a history of isolation from law enforcement imposed by the abusive defendant can give rise to the inference of specific intent to prevent testimony. Justice Souter made the case by suggesting that "[i]f the evidence for admissibility shows a

whether a knowledge- or intent-based standard is applied to gang-perpetrated witness intimidation, the test ought not to involve such specificity as to require that the defendant knew of and intended particular acts against a particular witness. Instead, "wrongdoing" ought to be provable by a preponderance of the evidence that the defendant (1) joined or remained a member of a gang, (2) with knowledge that the gang silences witnesses by intimidation or retaliation, and (3) members of the defendant's gang caused the unavailability of a declarant. In such a case, the gang member-defendant should forfeit his right to confront that declarant.

Direct evidence[197] of intent[198] is rarely available, so circumstantial evidence is generally relied upon in proving intent. In gang cases, circumstantial evidence of intent to silence witnesses would include evidence supporting the defendant's voluntary entrance and continued membership in a gang plus evidence supporting the defendant's knowledge that the gang intimidates witnesses. The prosecution may call on a variety of sources for the necessary proof,

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continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say, in a fit of anger." *Id.* at 380.

While Scalia emphasizes that the standard is not "knowledge-based intent," he suggests that the treatment of domestic violence should be the same under *Giles* as any other serious crime. *Id.* at 376 ("In any event, we are puzzled by the dissent's decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means-from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.").

[197] Direct evidence is defined as "[p]roof which speaks directly to the issue, requiring no support by other evidence; proof in testimony out of the witness' own knowledge, as distinguished from evidence of circumstances from which inferences must be drawn if it is to have probative effect." BALLENTINE'S LAW DICTIONARY (2010).

[198] Intent is generally divided into two categories: "general intent" and "specific intent." Historically, "specific intent" meant a "particular mental state" expressly required by the offense, as opposed to "general intent," which meant the "blameworthy state of mind" required for most offenses that did not otherwise require a specified *mens rea*. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 138 (6th ed., LexisNexis 2012). Today, "specific intent" can mean the purpose of causing "the social harm set out in the definition of the offense." Alternatively, "specific intent" may mean (1) the "purpose to do some future act, or to achieve some further consequence . . . beyond the conduct or result that constitutes the *actus reus* of the offense"; or (2) the state of being "aware of a statutory attendant circumstance." *Id.*

including former gang members, incarcerated gang members and other cooperating witnesses, confidential informants, innocent observers, police officers, and gang experts to testify that the gang has intimidated witnesses in the past, that it does so as a regular practice, that the defendant was a member of the gang, and that he would have known about the intimidation tactics employed by the gang.[199] This—in conjunction with evidence supporting the finding that a declarant was made unavailable to testify by intimidation, threats of retaliation, or physical harm perpetrated by gang associates of the defendant—shows not only knowledge of the intimidation by the defendant, but also an expectation that it would occur, giving rise to an inference of intent sufficiently specific to satisfy any reasonable construction of *Giles*.

Suppose person A enters into an arrangement with friend B such that if A commits a crime in the future and is caught, friend B agrees to unilaterally and without further consultation take measures, including such witness tampering as may be necessary, up to and including murder, to prevent A's conviction. Suppose then that A commits a crime, and a single witness, whose existence and identity is unknown to A, makes an incriminating statement to the police. Finally, suppose that before the witness is called to testify in court, B kills the witness, and that the agreement can be proved circumstantially before A is tried.

In this hypothetical and absent evidence to the contrary, defendant A must be said to have at least "acquiesced" in the wrongful act of silencing the witness, even though he himself never knew the particular witness's name, or even his existence as a witness. This would satisfy the hearsay hurdle set forth in the Federal Rules of Evidence. Evidence of the pre-arrangement proves that the defendant had knowledge that the witness was in danger of being forcefully silenced, since the defendant could not be prosecuted without some witness, even though the defendant did not know the name of the witness or his particular testimony. And, even applying

[199] If she is alive, willing, and able, the prosecution may even call the unavailable witness herself, who, although unwilling to testify as to the commission of the underlying crime in open court, may be willing to testify at a 104(a) hearing as to why she is unavailable and other pertinent information about the defendant's gang activities to which she is privy. Additionally, if the prosecution has in custody the gang members who actually acted to make the declarant unavailable, it might consider bargaining with them to testify in exchange for leniency. This, of course, is a difficult decision for a prosecutor, who may not be willing to make a deal with gang members who tampered with, intimidated, or even killed a witness.

some form of specific intent requirement, there is little doubt that sufficiently specific intent to tamper with a witness exists even though the defendant did not instruct the friend to kill the witness, or tell the friend after the defendant was charged to do anything; it is reasonable to infer from evidence of such a pre-arrangement that A expects that should he commit a crime, he will benefit from the wrongdoing of friend B.

Similarly, forfeiture by wrongdoing is applicable to a scenario in which a gang member-defendant's associates tamper with witnesses to the defendant's crime. Suppose the following: X joined a gang and subsequently learned that during his tenure as a member, gang members repeatedly beat up witnesses to crimes committed by other members, causing those witnesses to recant their inculpatory statements made to police. This knowledge reasonably gives rise to X's belief that his fellow gang members would be willing to intimidate witnesses on his behalf, if the occasion arose. Suppose X committed armed robbery of a convenience store, murdering the cashier but inadvertently leaving unharmed a young boy hidden in the back room who saw the entire crime unfold. Suppose the boy was the only eyewitness able to describe the crime and identify X, who was taken into custody and charged based solely on the young boy's statements made to authorities in the days following the crime. Now, suppose that, in an overt act of witness tampering, X's gang associates take it upon themselves—without X's knowledge—to murder the young boy before the trial.

In this gruesome scenario, the prosecution would be left without a case—and justice undone—unless an exception to the hearsay rule *and* the Confrontation Clause permitted the admission of the boy's statements in his absence. The criteria of forfeiture by wrongdoing—which only need be proved by a preponderance of the evidence—is met here: the defendant's *wrongful conduct* was to join and remain an active member of a gang *knowing* it enforced a "no snitching" policy and *expecting* to benefit from such enforcement should the occasion arise; his continued membership *caused* his fellow gang members to enforce the policy on his behalf; and, of course, he would *profit* from the tampering that he expected the other members of his gang to undertake because the only eyewitness to his crime is now dead. Even if *Giles* controls, proof of these elements would surpass what is necessary to meet a knowledge-based standard and give rise to an inference of intent by a preponderance of the evidence.

It is possible that an individual defendant specifically intends

that his gang associates do *not* undertake to silence a witness, perhaps for moral reasons, to prevent harm to the particular witness, or for any other reason. In that case, forfeiture should not apply, even if the gang associates tamper with and successfully silence the witness. This Comment proposes a standard that is a sufficient safeguard against such inequitable forfeiture. Evidence giving rise to an inference of intent to silence the witness can be countered with evidence such as testimony by the defendant or other witnesses that, if believed, will render an inference of the requisite intent impossible. In this way, the mere fact that the gang unilaterally tampered with or killed a witness would not automatically subject the defendant to forfeiture; rather, the prosecution must show evidence giving rise to an inference of intent to silence witnesses, and the defendant would have the opportunity to rebut the evidence if he so chose.

The standard suggested here puts the defendant at no greater disadvantage than other doctrines that operate similarly. Most notably, forfeiture by wrongdoing shares its method of proof with conspiracy.[200] Like proving forfeiture by wrongdoing, proving that a

[200] The co-conspirator exception to hearsay is an evidentiary rule that treats "a statement by a co-conspirator of a party during the course and in furtherance of [a] conspiracy" as an admission by a party-opponent. FED. R. EVID. 801(d)(2)(E). Forfeiture by wrongdoing and the co-conspirator exception to hearsay are "analytically and functionally identical." United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996) (citing United States v. Sepulveda, 15 F.3d 1161, 1180 (1st Cir. 1993), *cert. denied* 512 U.S. 1223 (1994)). They are similar in two ways: procedurally, the requirements necessary to invoke forfeiture by wrongdoing and the co-conspirator exception to hearsay are by and large the same, and substantively, they are both doctrines that can involve an inference that a defendant is responsible for the actions or words of another person. Both require a showing of specific intent, and, for both, an affirmative finding can rest upon circumstantial evidence. The same degree of evidentiary support that is sufficient to support a conspiracy for the purposes of the co-conspirator exception to hearsay is applicable to forfeiture by wrongdoing. These stark similarities suggest that a gang member-defendant who—in the terminology of conspiracy—"consciously participated" in an organization with a policy of enforcing a "no snitching" policy thereby forfeited his right to cross-examine any adverse witness silenced by his gang on his behalf.

To invoke forfeiture by wrongdoing, the proponent must show that the declarant is unavailable due to wrongdoing that the defendant procured or to which he acquiesced, by, in most circuits, a preponderance of the evidence. *See Cotto v. Herbert*, 331 F.3d 217, 235 (2d Cir. 2003); *United States v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001); *United States v. Scott*, 284 F.3d 77 F.3d 811, 820 (10th Cir. 2000); *see also Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) (applying preponderance standard for preliminary findings in forfeiture by misconduct cases). If testimonial statements are in question, the proponent must also show that the defendant possessed specific intent to silence the declarant. The proponent of a co-conspirator's statement under FED. R. EVID. 801(d)(2)(E) must show that a conspiracy existed, the declarant and the defendant were both parties to the

defendant is party to a conspiracy requires a showing of specific intent.[201] Circumstantial evidence can give rise to a defendant's "conscious participation" in a conspiracy, even if the defendant merely "had some idea of its criminal objectives" without knowing all the details of the crimes involved or the existence of other co-conspirators.[202] Neither knowledge of a conspiracy, nor association with conspirators, nor the defendant's presence at the scene of a criminal act can alone constitute sufficient evidence of intent to participate in the conspiracy,[203] just as neither knowledge of witness tampering nor membership in a gang can each alone constitute sufficient evidence of intent to silence a witness. At the same time, a person need not expressly agree to participate in a conspiracy to be a guilty party to it—actions can imply consent.[204] Further, knowledge of

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conspiracy, and the declarant made the statement in furtherance of the conspiracy. *Houlihan*, 92 F.3d at 1281. Like forfeiture by wrongdoing, all this must be shown under Rule 104(a) by a preponderance of the evidence. Bourjaily v. United States, 483 U.S. 171, 175 (1987).

For both the co-conspirator exception and forfeiture by wrongdoing, the threshold to meet the standard of proof is low, and direct evidence is not required, both for practical as well as policy reasons. In the case of forfeiture of confrontation rights:

> [i]t seems almost certain that, in a case involving coercion or threats, a witness who refuses to testify at trial will not testify to the actions procuring his or her unavailability. It would not serve the goal of Rule 804(b)(6) to hold that circumstantial evidence cannot support a finding of coercion. Were we to hold otherwise, defendants would have a perverse incentive to cover up wrongdoing with still more wrongdoing, to the loss of probative evidence at trial.

Scott, 284 F.3d at 764.

Similarly, the co-conspirator exception to hearsay is supported by both practical and equitable rationales. Conspiracies tend to be clandestine in nature such that criminal activity is difficult to prove, often rendering statements by co-conspirators crucial evidence for the prosecution. RONALD J. ALLEN, ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 484 (4th ed. 2006). Further, it is appropriate to burden a conspirator with the "risk that false or inaccurate co-conspirators' statements will be used against that person" once it has been proven by a preponderance of the evidence that he participated in a criminal conspiracy. *See id.* Another rationale is that co-conspirators are deemed to have authorized statements made by co-conspirators, but it is largely an artificial explanation, *id.*, that rests on principles of agency, which are not implicated in the forfeiture by wrongdoing analysis.

[201] Palmer v. People, 964 P.2d 524, 527 (Colo. 1998) ("The crime of conspiracy requires two mental states . . . the specific intent to agree to commit a particular crime . . . [and] the specific intent to cause the result of the crime that is the subject of the agreement."); Julia N. Sarnoff, *Federal Criminal Conspiracy*, 48 AM. CRIM. L. REV. 663, 671 (2011).

[202] Sarnoff, *supra* note 201, at 671–72.

[203] *Id.*

[204] United States v. Klein, 515 F.2d 751, 753 (3d Cir. 1975) (citing Direct Sales

an ongoing conspiracy, while insufficient in itself to constitute intent, can nonetheless serve as the basis for an inference of specific intent.[205] (In fact, some courts have gone further, allowing conspiracy to serve as an underlying rationale for invocation of forfeiture by wrongdoing, even where a defendant was not formally charged with a conspiracy.[206]).

According to the *Giles* Court, without the forfeiture rule, there would exist "an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them."[207] This incentive applies with particular force where gangs are involved. While procedural safeguards such as permitting depositions and cross-examination by the defense prior to trial may help safeguard against

Co. v. United States, 319 U.S. 703, 709 (1943)); United States v. Lester, 282 F.2d 750, 753 (3d Cir. 1960).

[205] *Direct Sales Co.*, 319 U.S. at 711 ("Without the knowledge, the intent cannot exist."); *Klein*, 515 F.2d at 753 ("Knowledge of the illicit purpose will also serve as the foundation for the required proof of specific intent.").

[206] The Tenth Circuit first addressed the question of whether forfeiture can be enacted by the actions of another person. It held in the affirmative, establishing what is now known as the *Cherry* doctrine. The *Cherry* doctrine relies on the assertion that both the Confrontation Clause and evidence exceptions are met if "the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy." United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000). Since then, some circuits have held that "acquiescence" is co-extensive with co-conspirator liability under *Pinkerton* liability. *See* Pinkerton v. United States, 328 U.S. 640 (1948), for the purposes of forfeiture by wrongdoing. *See* United States v. Thompson, 286 F.3d 950 (7th Cir. 2002) (adopting the *Cherry* doctrine).

In *Cherry*, the court allowed forfeiture by wrongdoing even while admitting that there was "absolutely no evidence [the defendant] had actual knowledge of, agreed to or participated in the murder of" the declarant. *Cherry* 217 F.3d at 814 (quoting *United States v. Price*, No. CR-98-10-S, order at 17 (E.D. Okla. Jan. 14, 1999). It reasoned that the requirements of conspiracy were met because it was reasonably foreseeable to the defendant that his co-conspirator might silence the witness in furtherance of the conspiracy. *Id.* at 820 (holding that a defendant waives his hearsay objection and confrontation rights if the wrongful procurement of a witness's silence "was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy"). Similar to the inference of intent to silence in domestic violence murders, the court in *Cherry* stated that imputed waiver of confrontation rights under the *Cherry* doctrine may be used to admit hearsay even though the defendant is not convicted of the underlying crime. This is because the standard for showing forfeiture by wrongdoing is preponderance of the evidence, while the standard for conviction of the substantive offense is proof beyond a reasonable doubt. Moreover, a prosecutor need not even charge a defendant with a conspiracy in order to utilize the *Cherry* doctrine to admit hearsay. Adrienne Rose, Note, *Forfeiture of Confrontation Rights Post-*Giles*: Whether a Co-conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 300 (2011).

[207] Giles v. California, 455 U.S. 353, 365.

intimidation by the defendant,[208] the threat of witness intimidation by other gang members would remain, particularly in cases where entire communities are silenced by gang terrorization and control.[209] Given the high occurrence of witness intimidation by gangs and the broad influence of gangs' "code of silence" over the communities under gang control, forfeiture by wrongdoing would lessen the incentive for gangs to intimidate witnesses on behalf of a gang member-defendant to prevent admission of testimony.

Just three years after the adoption of the Sixth Amendment, courts recognized that the confrontation right was "founded on natural justice,"[210] notions of which are violated when a gang member-defendant is granted a windfall resulting from the terror that his gang inflicts on adverse witnesses and the community at large. Where a defendant's associates act independently to prevent witness testimony, the defendant may benefit and even escape prosecution altogether.[211] Where the defendant expects this benefit yet continues his gang membership, he should forfeit his right to confrontation.[212]

III. CONCLUSION

The problem of witness intimidation by street and prison gangs is a serious impediment to justice, not only because it can undermine the prosecution of crime but also because it fosters a dynamic of fear and isolation in gang-controlled communities. Gangs have an incentive to silence witnesses because, unless the prosecution can

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[208] *See* D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence Into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 907 (2012) (arguing that a defendant's motive to intimidate would be reduced by a procedure allowing for deposition of prosecution witnesses followed by a reasonable opportunity for cross-examination by the defense, "coupled with the understanding that if anything happens to the witness before trial that results in unavailability or substantial change in position, the deposition will be available for use by the jury"). In fact, Marian statutes "directed justices of the peace to take the statements of felony suspects and the persons bringing the suspects before the magistrate, and to certify those statements to the court," and these "confronted statements" were admissible even if the declarant died or was unable to travel to court. *Giles*, 544 U.S. at 359 (citing Crawford v. Washington, 541 U.S. 36, 43–44; J. Langbein, *Prosecuting Crime in the Renaissance* 10–12, 16–20 (1974)).

[209] *See, e.g.*, Kocieniewski, *supra* note 10; *Witnesses at Risk*, *supra* note 10.

[210] *E.g.*, State v. Webb, 2. N.C. (1 Hayw.) 103 (1794).

[211] *See, e.g.*, *Witnesses at Risk*, *supra* note 10 (describing examples of gang crimes that remain unsolved or unprosecuted because witnesses are scared to testify).

[212] "[T]he rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." *Crawford*, 541 U.S. at 62; *see also Reynolds v. United States,* 98 U.S. 145, 158 (1879); PARK, *supra* note 134.

trace the conduct back to the defendant, statements by the unavailable witness are generally inadmissible at trial. To combat gang-perpetrated intimidation, legislatures should ensure forfeiture by wrongdoing is a hearsay exception in each jurisdiction. Prosecutors should, where gangs successfully make declarants unavailable, utilize the forfeiture doctrine by providing evidence that a gang member-defendant both had knowledge of his gang "no snitching" policy and had a reasonable expectation of profiting from enforcement. Finally, courts should, where the evidence sufficiently satisfies the preponderance standard, treat such defendants as if they specifically intended the witness to be made unavailable. This would preserve the right to confrontation—and its exceptions—as it existed at common law and as it endures as a constitutional safeguard; moreover, it would meet the *Giles* standard insofar as it might apply. Witness intimidation "strikes at the heart of justice,"[213] but courts and legislatures have it within their power to strike back at the gangs that terrorize their communities. By maximizing the effect of the doctrine of forfeiture by wrongdoing, the incentive to intimidate witnesses will diminish, and the statements of witnesses made silent by gangs will nonetheless be heard in a court of law.

[213] United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).