Crawford and the Forfeiture by Wrongdoing Exception

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I. INTRODUCTION

Last year, in *Crawford v. Washington*,[1] the U.S. Supreme Court overruled precedent,[2] and held the standard for the admissibility of testimonial hearsay evidence under the Confrontation Clause[3] is determined not by assessing its reliability, but by whether the witness is unavailable and whether the accused had a prior opportunity for cross-examination.[4] However, the Court noted that there is one exception to the requirement of confrontation—the equitable doctrine of forfeiture by wrongdoing.[5] Succinctly stated,[6] that doctrine provides when the defendant has wrongfully caused the absence of a prosecution witness to prevent that witness from testifying at his trial, he cannot object to the admission of that witness's extrajudicial statements because his confrontation objections to that evidence have been extinguished as a result of the his wrongful conduct.[7]

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1. 541 U.S. 36 (2004).

2. Ohio v. Roberts, 448 U.S. 56 (1980). *Roberts* held the Confrontation Clause does not bar the admission of an unavailable witness's extrajudicial statement if the statement bears adequate indicia of reliability. That means the statement must either come within a firmly rooted hearsay objection or have particular guarantees of trustworthiness. *Id.* at 66.

3. The Sixth Amendment to the United States Constitution provides, in relevant part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . . ." U.S. CONST. amend. VI.

4. *Crawford*, 541 U.S. at 68-69. "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

5. *Id.* at 62. "In this respect, [the *Roberts* test of reliability] is very different from *exceptions* to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) *extinguishes confrontation claims on essentially equitable grounds*; it does not purport to be an alternative means of determining reliability." *Id.* (emphasis added).

6. For a thorough discussion of the doctrine of forfeiture by wrongdoing, see Judge Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The Waiver Doctrine After* Alvarado, 39 SAN DIEGO L. REV., 1165, 1217-43 (2002).

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

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

Following *Crawford*, the Second District and the Fourth District of the California Courts of Appeal applied the doctrine of forfeiture by wrongdoing to cases before them.[8] Each case involved charges of murder and there was no evidence that the decedent was murdered specifically to prevent the person from testifying at the accused's trial. Nevertheless, the Second District court in *Giles* opined that there is "no reason why the doctrine should be limited to such cases," because the end result is the same, the exclusion of the prosecution witness's inculpatory hearsay statements.[9]

The California Supreme Court has granted review in both cases.[10] The issues to be addressed are:

1. "Did defendant forfeit his Confrontation Clause claim regarding admission of the victim's prior statements . . . under the doctrine of 'forfeiture by wrongdoing' because defendant killed the victim, thus rendering her unavailable to testify at trial?"[11]

> cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Id.

8. People v. Giles, 19 Cal. Rptr. 3d 843, 847 (Ct. App. 2004), *review granted*, 102 P.3d 930 (Cal. 2004); People v. Jiles, 18 Cal. Rptr. 3d 790, 796 (Ct. App. 2004), *review granted*, 103 P.3d 270 (Cal. 2004).

9. *Giles*, 19 Cal. Rptr. 3d at 848 (explaining disagreement with the limitation suggested in *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996)).

> Although the opinion contains language suggesting that a killing must be motivated by a desire to silence the victim to trigger a forfeiture of the right of confrontation, we see no reason why the doctrine should be limited to such cases. Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness' unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.

Id. Discussion will center on the *Giles* opinion since the Court in *Jiles* did not discuss and analyze the reason for its conclusion that forfeiture applied. *Jiles*, 18 Cal. Rptr. 3d at 795-96.

10. Review was granted on December 22, 2004. *Giles*, 19 Cal. Rptr. 3d 843 (Ct. App. 2004), *review granted*, 102 P.3d 930 (Cal. 2004); *Jiles*, 18 Cal. Rptr. 3d 790 (Ct. App. 2004), *review granted*, 103 P.3d 270 (Cal. 2004).

11. *Giles,* 102 P.3d 930, 930 (Cal. 2004).

2. "Does the doctrine apply where the alleged 'wrongdoing' is the same as the offense for which defendant was on trial?"[12]

The simple answer to both questions, as will be shown, is a qualified "no." The more complex answer to the first question is unless there is evidence that the murder of the decedent by the accused was motivated in part by a desire to silence the witness with the intent to deprive the prosecution of that witness's testimony, the accused did not forfeit his Confrontation Clause objections.[13]

As to the second question, there must be some "wrongdoing" over and above, and other than the underlying crime in order for the doctrine to apply. That wrongdoing requires a certain intent and a specific mental state or mens rea.

In order to explain these answers, it will be necessary to explain the forfeiture doctrine, the equitable nature of the doctrine, and the relationship of the accused's wrongdoing to the application of the doctrine. This is an important doctrine, which has a significant role to play in criminal prosecution, but should not be extended when that extension would nullify its equitable nature. Nor should it be extended such that the application of the doctrine would improperly extinguish a defendant's constitutional right of confrontation.

II. THE DOCTRINE OF FORFEITURE BY WRONGDOING IS BASED ON PRINCIPLES OF EQUITY

A. The Original Formulation of the Forfeiture Doctrine

1. Forfeiture Requires an Intentional Act Committed with the Intent to Prevent a Witness from Testifying at Trial

The first discussion of the forfeiture doctrine by the U.S. Supreme Court was in *Reynolds*.[14] That case involved a man who was charged with bigamy.[15] An officer attempted to serve a subpoena on a wife of the accused to testify at his trial for the prosecution. However, the defendant secreted her and refused to tell anyone where she was located, thus preventing service of the subpoena.[16] After being informed of the accused's actions, the trial court ruled that the unavailable witness's former trial testimony would be admitted into evidence.[17] On review,

12. *Id.*
13. United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990); *see* United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996).
14. Reynolds v. United States, 98 U.S. 145 (1878).
15. *Id.* at 153.
16. *Id.* at 159-60.
17. *Id.* at 160.

the Court affirmed the trial court's judgment and justified the ruling on the basis of the doctrine of forfeiture by wrongdoing.

> The Constitution gives the accused the right to a trial at which he should beconfronted with the witnesses against him; but if a witness is absent by *his own wrongful procurement*, he cannot complain if competent evidence is admitted *to supply the place of that which he has kept away*. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.[18]

It is clear from this statement that one requirement for the application of forfeiture is that it must be the defendant who is the cause of the witness's non-attendance at trial. The court's use of the phrases "by his own wrongful procurement" and "he voluntarily keeps the [witness] away," and the additional phrase "absent by his procurement," support that conclusion.[19]

It is also clear that the defendant must intentionally, not accidentally or inadvertently, prevent the witness from attending the trial. This conclusion follows from the Court's language that the defendant "voluntarily keeps the [witness] away."[20] Impliedly, the Court requires that the defendant intentionally and freely chose to prevent the witness from attending and testifying at his trial, and directly caused the witness's non-appearance.

In addition, the language that competent evidence may be "admitted to supply the place of that which [the defendant] has kept away" indicates that the defendant has deliberately prevented the prosecution's witness from attending trial with the specific intent that the prosecution be deprived of that witness's inculpatory evidence.[21]

It is also the case that *Reynolds* characterizes the act which the defendant commits as one of "wrongful procurement" and "wrongful acts."[22] In *Reynolds*, that act was not telling the authorities the location of the witness so that the witness could be served with a subpoena to attend trial. This is not criminal conduct, and the fact that the term used to describe that conduct is a word that has ethical overtones leads one to

18. *Id.* at 158 (emphasis added).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

conclude that the type of conduct at issue for application of forfeiture need not be criminal.[23] It is also the case that it is the wrongful procurement of the witness's non-attendance that triggers application of the forfeiture doctrine, not the underlying crime. Therefore, in order for the doctrine to apply, there must be an intentional act that is committed by the defendant that is other than the underlying criminal charge, and is committed with the specific intent to prevent the witness from testifying at trial.

Finally, the Court concludes as a "consequence" of that wrongful act, the trial court may allow the prosecution to introduce other evidence in place of the live testimony of that witness, and the accused, by his conduct of preventing the witness's attendance at trial, is precluded from objecting to the evidence on the basis of his constitutional right of confrontation.[24] Therefore, it would appear that the Court has concluded that the accused is foreclosed from making a hearsay objection to the evidence offered to replace the live in-court testimony which is no longer available. This conclusion necessarily follows from the language that "he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." It also follows that the Court finds a relinquishment of his right to confront and cross-examine the witness, since the Court uses the plural description when it states that "he cannot insist on his privilege" of being confronted with the witnesses against him since "he is in no condition to assert that his constitutional *rights* have been violated."[25] It appears that *Reynolds* concludes that one who has, by some wrongful conduct, intentionally and voluntarily procured a prosecution witness's absence with the intent to prevent the appearance and testimony of the witness at trial, is precluded from raising an objection to the introduction of competent evidence meant to fill that void, because he has thereby lost the myriad rights included in the Sixth Amendment. Thus, a defendant who procures a witness's absence waives the right of confrontation for all purposes with regard to that witness.

The Sixth Amendment Confrontation Clause provides an accused with the right to confront at trial those witnesses who will offer testimony against him. Witnesses must come to court, appear before the trier of fact, swear under oath to tell the truth, and submit their testimony to cross-examination.[26] The Clause thus provides a mechanism for obtaining reliable evidence.[27]

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23. Wrongful is defined as injurious, unjust, unfair, not rightful. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2642 (Philip Babcock Gove ed. 1993).

24. *Reynolds*, 98 U.S. at 158.

25. *Id*. (emphasis added).

26. "The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the

The Confrontation Clause's goal is to promote both the integrity of the fact finding process by ensuring the defendant an effective means to test adverse evidence, and a means to evaluate the truth of that testimony.[28] In this way, the Confrontation Clause simultaneously protects the accused by providing him with certain constitutional rights and also provides a procedure promotive of the ascertainment of truth.[29]

However, as *Reynolds* notes, when an accused voluntarily prevents the attendance of a prosecution witness at his trial he has deprived the prosecution of that live in-court testimony, prevented the trier of fact from seeing the witness and thus having a basis to judge his or her credibility, prevented the testing of that testimony by cross-examination, and affected the truth seeking function of the trial.[30] His conduct is the direct cause of the prosecution having to resort to secondary evidence, extrajudicial statements, hearsay evidence, and prior testimony to replace that which the accused kept away.

As *Reynolds* observes, because it is the defendant who has directly converted the probative damaging prosecution evidence into some form of hearsay evidence, he may not, cannot, and should not be allowed to object to the admission of that evidence on confrontation grounds.[31] The relationship between the defendant's wrongdoing to the hearsay status of the evidence is a direct causal relationship, not incidental, and is independent of the pending criminal charges.[32] Indeed, the defendant's

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purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable . . . ." Maryland v. Craig, 497 U.S. 836, 846 (1990).

27. "To be sure, the Clause's ultimate goal is to ensure reliability of evidence . . . ." Crawford v. Washington, 541 U.S. 36, 61 (2004); "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials . . . ." *Id.* at 67.

28. "[T]he Confrontation Clause has as a basic purpose the promotion of the 'integrity of the fact finding process.'" White v. Illinois, 502 U.S. 346 (1992) (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988)). "[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" Dutton v. Evans, 400 U.S. 74, 89 (1970) (quoting California v. Green, 399 U.S. 149, 161 (1970)).

29. "The Confrontation Clause guarantees not only what it explicitly provides for—face to face confrontation—but also implied and collateral rights . . . ." *Maryland*, 497 U.S. at 862 (Scalia, J., dissenting).

30. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Lilly v. Virginia, 527 U.S. 116, (1999) (quoting *Maryland*, 497 U.S. at 845).

31. *See supra* note 24 and accompanying text.

32. For further discussion, see Part C.

wrongdoing is the instrumentality for the prosecution's need to use replacement evidence. To allow a defendant to then challenge the admissibility of that evidence on the ground that his constitutional right to confront the witness has been violated would be to permit the accused to use his wrongdoing to gain a legal advantage, namely, to prevent the introduction of the prosecution's damaging evidence.[33]

Of course, it is a legal fiction to say that one who interferes with a witness's attendance at trial thereby knowingly, intelligently, and deliberately forfeits his right to exclude hearsay evidence.[34] He simply does a wrongful act that has legal consequences that he may or may not foresee. The connection between the defendant's conduct and its legal consequences under the Confrontation Clause is supplied by the law and not by a purposeful decision by the defendant to forego a known constitutional right.[35] A defendant's actions that make it necessary for the government to use out-of-court statements is thus construed as a forfeiture of the protections afforded under the Confrontation Clause.[36]

Cross-examination has been described as the heart and core of the Sixth Amendment.[37] However, when one wrongly procures the witness's absence at trial, he has also prevented an opportunity to test the witness's testimony by cross-examination. As *Reynolds* explains, these rights have been forfeited as a result of the accused's wrongdoing.

2. The Forfeiture Doctrine is Based on the Equitable Principle That No One Shall Profit From His Wrongful Conduct

The *Reynolds* Court explained that the basis for the application of the forfeiture doctrine is the equitable maxim that no one shall be allowed to take advantage of his own wrongful conduct.[38]

> The [forfeiture doctrine] has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, *if there has not been, in legal contemplation, a wrong committed*, the way has not been

33. *See* Reynolds v. United States, 98 U.S. 145, 158 (1878).
34. Steele v. Taylor, 684 F.2d 1193, 1201 n.8 (6th Cir. 1982).
35. *Id.*
36. *See* United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997).
37. "Where testimonial evidence is at issue, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 68 (2004). In *Crawford*, admittance of a testimonial statement against the petitioner despite the lack of prior opportunity for cross-examination "alone [was] sufficient to make out a violation of the Sixth Amendment." *Id*. "Confrontation: (1) insures that the witness will give his statements under oath . . . ; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth' . . . ." California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore § 1367).
38. *See also* CAL. CIV. CODE § 3517 (1997) ("No one can take advantage of his own wrong.").

> opened for the introduction of the testimony. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.[39]

As the Court clearly states, the condition precedent, or the necessary event that must occur before the doctrine may be invoked, is that a wrong must have been committed.[40] Unless a wrong has been committed according to *Reynolds*, there is no legal foundation which would allow one to introduce secondary evidence. First, there must be a wrongful act, and that act must have been performed with a certain motive or intent, namely, to remove an adverse witness from the prosecution's case. Second, one must look at the result of that act. If, as a result of that wrongful conduct, one would gain a legal advantage that otherwise would not be available, then the forfeiture doctrine applies. Otherwise, one would be allowed to gain an advantage by dishonesty or chicanery, or by some other unethical conduct. Moreover, because the criminal law does not, generally speaking, involve itself in ethics, one must look to equitable jurisdiction to resolve the issue.

Equity is a system of jurisprudence independent of, and collateral to civil and criminal law.[41] It is concerned with doing what is just, fair, and right according to its rules and principles.[42] Equity is concerned with

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39. Reynolds v. United States, 98 U.S. 145, 159 (1878) (emphasis added).

40. Diaz v. United States, 223 U.S. 442, 458 (1912).

> The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal law nor in civil cases will the law allow a person to take advantage of his own wrong.

Id. (quoting Falk v. United States, 15 App. D.C. 446, 460 (1899)).

41. BLACK'S LAW DICTIONARY 484 (5th ed. 1979) ("A system of jurisprudence collateral to, and in some respects independent of, 'law'; the object of which is to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it. . . .").

42. BLACK'S LAW DICTIONARY 484 (5th ed. 1979).

> Justice administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles which originated in England as an alternative to the harsh rules of common law and which were based on what was fair in a particular situation. One sought relief under this system in courts of equity rather than in courts of law. The term "equity" denotes the spirit and habit of fairness, justness and right dealing which would regulate the intercourse of men with men. (citation

what ought to be the case according to what is ethically and morally correct.[43]

Courts of equity historically are concerned with enforcing the requirements of conscience and good faith.[44] Equity requires that litigants "shall have acted fairly and without fraud or deceit as to the controversy in issue."[45] Courts of equity thus have a wide range of discretion in refusing to aid those who have by their acts, violated that which is right or just.[46] Indeed, the U.S. Supreme Court's comments about the equitable doctrine of clean hands are relevant.[47]

> Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim . . . .[48]

Equity has as its object "to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it."[49]

> "[E]quity" in its "broadest and most general signification . . . denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men. . . . [I]n this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law." . . . "In a restricted sense, the word denotes equal and impartial justice . . .; justice that is ascertained by natural reason or ethical insight, but independent of the formulated body of law."[50]

In other words, equity comes into play and offers relief when there is none available in a court of law. The corollary to this rule is that "there is no right to equitable relief when there is an adequate remedy at law."[51]

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omitted.) Equity is a body of jurisprudence . . . differing in its origin, theory, and methods from the common law; though procedurally . . . equitable and legal rights and remedies are administered in the same court.

Id.

43. *See supra* note 38 and accompanying text.

44. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945).

45. *Id.* at 814-15.

46. *Id.* at 815 ("This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant.").

47. The doctrine is relevant because "[t]he [forfeiture doctrine] is also based on a principle of reciprocity similar to the equitable doctrine of clean hands." Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982).

48. *Precision Instrument Mfg.*, 324 U.S. at 815.

49. BLACK'S LAW DICTIONARY 484 (5th ed. 1979).

50. Gilles v. Dep't of Human Res. Dev., 521 P.2d 110, 116 n.10 (Cal. 1974) (quoting BLACK'S LAW DICTIONARY 634 (4th ed. 1957)).

51. 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW 681 (1990).

> Equity jurisdiction is the power to . . . decide [causes] in accordance with the doctrines and rules of equity jurisprudence. . . . In order that a cause may come within the scope of the equity jurisdiction . . . the remedy granted must be in its nature purely equitable, or . . . it must be one which under the facts and circumstances of the case, can only be made complete and adequate through the equitable modes of procedure.[52]

Equity acts specifically in that it grants specific relief directed against the person.[53] When a party to a proceeding or action has behaved in a way that violates the common sense notions of honesty and fair dealing, then relief may be obtained that is characteristic of a court of equity.[54]

> "[W]henever a party who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."[55]

The "very foundation of an equity forum is good conscience," and "any really unconscientious conduct connected with the controversy to which he is a party is sufficient justification for the court to close its doors to him."[56]

Thus, the forfeiture doctrine is an equitable punishment, a reprimand, and an equitable penalty.[57] Because equity requires that parties "shall have acted fairly and without fraud or deceit as to the controversy in issue," when a party to an action willfully "transgress[es] the equitable

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52. BLACK'S LAW DICTIONARY 485 (5th ed. 1979).

53. 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW 680 (1990).

54. "[I]t is the duty of a court of equity, upon any suggestion that a plaintiff has not acted in good faith concerning the matters upon which he bases his suit, to inquire into the facts in that regard. For it is not only fraud or illegality which will prevent a suitor from obtaining equitable relief. Any unconscientious conduct . . . will repel him from the forum whose very foundation is good conscience." DeGarmo v. Goldman, 123 P.2d 1, 6 (Cal. 1942).

55. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933) (quoting POMEROY, EQUITY JURISPRUDENCE, 4th ed. 1905, § 397); *DeGarmo*, 123 P.2d at 6 (quoting Allstead v. Laumeister, 116 P. 296, 297 (1911)).

56. *DeGarmo*, 123 P.2d at 6.

57. A court of equity, historically, is "a vehicle for affirmatively enforcing the requirements of conscience and good faith." Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945). Natural equity is "used as equivalent to justice, honesty, or morality . . . , or man's innate sense of right dealing and fair play. . . . [It] may be understood to denote . . . that which strikes the ordinary conscience and sense of justice as being fair, right, and equitable . . . ." BLACK'S LAW DICTIONARY 484 (5th ed. 1979).

standards of conduct" a court of equity will prevent the "wrongdoer from enjoying the fruits of his transgression."[58]

If an accused uses either threats, intimidation, persuasion, fear or murder to prevent a prosecution witness from appearing in court and testifying before a jury, he has prevented the prosecution from presenting live testimony, which is favored under the law.[59] The accused himself has prevented a setting where he can exercise his Sixth Amendment right to cross-examine the witness. Instead, because of his conduct, the government is forced to resort to out-of-court statements as proof of the underlying charges.

Under the rules of evidence, because the replacement statement was made out of court, and therefore is hearsay, and because the defendant cannot cross-examine the witness because he or she is unavailable, the accused would normally have the right under the law to raise those objections to the admission of that extrajudicial evidence. However, if the accused's objections to the hearsay evidence would be allowed, he would have used his Confrontation Clause rights as a sword to cut away the heart of the prosecution's case. The accused would have used those safeguards put in place for his protection to achieve a legal advantage which would be available to him only because of his wrongful conduct. He would have kept out damaging inculpatory evidence, compromised the truth seeking function of the trial court, and used the constitutional rights meant for his protection to slice away the heart of the prosecution's case. It is at this point that the equitable doctrine of forfeiture comes into play to prevent the accused from profiting from his miscreant conduct.

The defendant who has removed an adverse witness from trial through the use of threats, violence, or murder is in a weak position to complain about losing the chance to cross-examine the witness.[60] In addition, where a defendant has silenced a prosecution witness through the use of threats, violence, or murder, admission of the witness's prior statement "at least partially offsets the perpetrator's rewards for his misconduct."[61] Therefore, one who wrongfully procures the absence of a witness may not assert any confrontation rights as to that witness.[62]

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58. *Precision Instrument Mfg.*, 324 U.S. at 814-15.

59. Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982); United States v. White, 116 F.3d. 903, 911-12 (D.C. Cir. 1997).

60. United States v. Dhinsa, 243 F.3d 635, 652 (2d Cir. 2001); *White*, 116 F.3d at 911.

61. *White*, 116 F.3d at 911.

62. *Id*. "[A] defendant should not be afforded the protection of the [C]onfrontation [C]lause if he achieves his objective of silencing a witness . . . ." United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976).

"The right of confrontation is so fundamental to our concept of a fair trial that it is a privilege specifically guaranteed by the Constitution. When confrontation becomes impossible due to the actions of the very person who would assert the right logic dictates that the right has been waived."[63] The law simply cannot countenance a defendant deriving benefits from silencing the chief witness against him.[64] "To permit such subversion of a criminal prosecution 'would be contrary to public policy, common sense, and the underlying purpose of the [C]onfrontation [C]lause,' and make a mockery of the system of justice that the right was designed to protect."[65] Therefore, in that instance the equitable doctrine of forfeiture penalizes the accused and declares that "he cannot insist on his privilege" under the Confrontation Clause.[66]

B. The Doctrine Has Been Followed and Extended in the Federal Courts

Since *Reynolds*, a number of federal courts have applied the forfeiture by wrongdoing doctrine in cases where the defendant has wrongfully procured a witness's silence through murder, intimidation, threats, violence, kidnapping, or other means to prevent the witness's testimony at trial.[67]

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63. United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982).

64. *Id.*

65. *Id*. (quoting United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976)); *accord* United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985).

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

67. Cotto v. Herbert, 331 F.3d 217, 231-36, 249-53 (2d Cir. 2003) (intimidation); Magouirk v. Warden, Winn Corr. Ctr., 237 F.3d 549, 552-54 (5th Cir. 2001) (threats); United States v. Johnson, 219 F.3d 349, 355 (4th Cir. 2000) (murder); United States v. Cherry, 217 F.3d 811, 814-21 (10th Cir. 2000) (threatening a witness's life); Geraci v. Senkowski, 211 F.3d 6, 9-10 (2d Cir. 2000) (threats against witness and witness's family made on behalf of defendant); United States v. Emery, 186 F.3d 921, 925-27 (8th Cir. 1999) (murder); Magouirk v. Phillips, 144 F.3d 348, 361-62 (5th Cir. 1998) (threats); United States v. White, 116 F.3d. 903, 911-16 (D.C. Cir. 1997) (witness absence procured by murder); United States v. Miller, 116 F.3d 641, 667-69 (2d Cir. 1997) (murder); United States v. Houlihan, 92 F.3d 1271, 1278-81 (1st Cir. 1996) (murder of a potential witness); United States v. Thai, 29 F.3d 785, 798, 814-15 (2d Cir. 1994) (murder); United States v. Aguiar, 975 F.2d 45, 47-48 (2d Cir. 1992) (threatening letters); Bagby v. Kuhlman, 932 F.2d 131, 135-37 (2d Cir. 1991) (threats and acts of violence); *Rouco*, 765 F.2d at 983, 995 (murder); United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir. 1984) (threats); United States v. Mastrangelo, 693 F.2d 269, 270-73 (2d Cir. 1982) (murder); Steele v. Taylor, 684 F.2d 1193, 1200-03 (6th Cir. 1982) (use of influence and control to silence witness); United States v. Thevis, 665 F.2d 616, 621, 630-32 (5th Cir. 1982) (murder); United States v. Balano 618 F.2d 624, 625-30 (10th Cir. 1979)

Courts who have employed the forfeiture doctrine have also found that a defendant's "misconduct waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous."[68] In fact, once the confrontation right is extinguished by operation of the defendant's forfeiture of that right, the balance tips in favor of the need for that evidence.[69]

The doctrine has also been expanded to allow extrajudicial statements other than prior trial testimony, such as statements made to the police by the unavailable witness,[70] statements made to a third party by the slain witness,[71] and grand jury testimony.[72]

Additionally, the forfeiture doctrine has been codified into a Federal Rule of Evidence. Rule 804, subdivision (b), of the Federal Rules of Evidence provides:

> Rule 804. Hearsay Exceptions; Declarant Unavailable
> . . . .
>
> (b) Hearsay exceptions: The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> . . . .
>
> (6) Forfeiture by wrongdoing. 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.[73]

The Advisory Committee Notes provide that the rule was promulgated in response to the prophylactic need "to deal with abhorrent behavior

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(threatening witness's life); United States v. Carlson, 547 F.2d 1346, 1355-60 (8th Cir. 1976) (intimidation); United States v. Lentz, 282 F. Supp. 2d 399, 426-27 (E.D. Va. 2002) (murder). Wrongful conduct includes the use of force, coercion, threats, persuasion, and control of a witness by a defendant, the willful nondisclosure of information, a defendant's direction to a witness to exercise the Fifth Amendment privilege and murder. *Steele*, 684 F.2d at 1201. *But see* United States v. Ochoa, 229 F.3d 631, 639 (7th Cir. 2000) (permitting witness to use phone alone is not sufficient and conduct is not wrongful if did not know was helping procure unavailability).

68. *Miller*, 116 F.3d at 668; *Houlihan*, 92 F.3d at 1281; *Thai*, 29 F.3d at 814; *see also* United States v. Dhinsa, 243 F.3d 635, 652 (2d Cir. 2001).

69. *Houlihan*, 92 F.3d at 1281.

70. *Emery*, 186 F.3d at 925-27; *White*, 116 F.3d at 910-11; *Houlihan*, 92 F.3d at 1278; *Thai*, 29 F.3d at 814; *Aguiar*, 975 F.2d at 46-47; *Rouco*, 765 F.2d at 994-95; *Steele*, 684 F.2d at 1199-1202.

71. *Dhinsa*, 243 F.3d at 650-52; United States v. Johnson, 219 F.3d 349, 355 (4th Cir. 2000); United States v. Miller, 116 F.3d 641, 667-68 (2d Cir. 1997).

72. Geraci v. Senkowski, 211 F.3d 6, 9-10 (2d Cir. 2000); United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir. 1984); United States v. Thevis, 665 F.2d 616, 627-30 (5th Cir. 1982); United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982); United States v. Balano, 618 F.2d 624, 630 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976).

73. FED. R. EVID. 804(b)(6).

'which strikes at the heart of the system of justice itself.'"[74] The Committee also observed that the act of wrongdoing need not be a criminal act.[75] Additionally, the statute has been interpreted to require a finding that the defendant committed the wrongful act with the intention of making the declarant unavailable as a witness.[76]

Some courts have applied the forfeiture doctrine when the unavailable witness is also the victim of one of the criminal charges.[77] The prosecution is not required to show that the defendant's sole motivation in murdering the witness was to procure the declarant's absence at trial. Rather, it need only show that the defendant was motivated at least in part by a desire to silence the witness.[78]

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74. FED. R. EVID. 804(b)(6) advisory committee's note (quoting *Mastrangelo*, 693 F.2d at 273).

75. *Id*.; *see also* United States v. Ochoa, 229 F.3d 631, 639 n.3 (7th Cir. 2000).

76. *Dhinsa*, 243 F.3d at 652 ("By its plain terms, Rule 804(b)(6) refers to the *intent* of a party to procure the unavailability of the *witness*, and does not . . . limit the subject matter of the witness' testimony . . . ." (first emphasis added)); Magouirk v. Warden, Winn Corr. Ctr., 237 F.3d 549, 554 (5th Cir. 2001) ("It is not so much the severity of the behavior [murdering a witness] but rather the intent underlying it and its effect that constitutes a waiver."); *Johnson*, 219 F.3d at 355-56 ("The district court appears to have admitted Thomas' hearsay because, *inter alia*, Raheem forfeited his hearsay objections, under Fed.R.Evid. 804(b)(6) by having caused the unavailability of Thomas as a witness. . . . Here, Raheem murdered Thomas at least in part to procure the unavailability of the only witness to his murder of Antonio Stevens."); United States v. Emery, 186 F.3d 926 (8th Cir. 1999) ("Instead, [FED. R. EVID. 804(b)(6)] establishes the general proposition that a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness.").

77. *Dhinsa*, 243 F.3d at 651-52; *Johnson*, 219 F.3d at 355; *Emery*, 186 F.3d at 926; United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996); United States v. Thai, 29 F.3d 785, 814-15 (2d Cir. 1994); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Thevis, 665 F.2d 616, 627, 630 (5th Cir. 1982); *see* United States v. Miller, 116 F.3d 641, 667-68 (2d Cir. 1997); United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985).

78. *Dhinsa*, 243 F.3d at 654 (quoting *Houlihan*, 92 F.3d at 1279) ("The government need not, however, show that the defendant's sole motivation was to procure the declarant's absence; rather it need only show that the defendant 'was motivated *in part* by a desire to silence the witness.'"); *Johnson*, 219 F.3d at 356 ("Here, Raheem murdered Thomas at least in part to procure the unavailability of the only witness to his murder of Antonio Stevens."); *Houlihan*, 92 F.3d at 1279 ("Thus, a defendant who wrongfully procures a witness's absence for the purpose of denying the government that witness's testimony waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements. . . . Moreover, it is sufficient in this regard to show that the evildoer was motivated *in part* by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor's *sole* motivation."); *Thai*, 29 F.3d at 815 ("In the present case, the district court held such a hearing and found . . . that Thai and Lan Tran 'caused the unavailability of the witness

Courts have also extended the forfeiture doctrine to cases where at the time of the murder of the individual there were no criminal charges pending. Although this time period would be pretrial, courts have nevertheless applied the doctrine even though confrontation is a trial right.[79] The rationale for this extension is well explained in *Houlihan*:

> When a defendant murders an individual who is a percipient witness to acts of criminality (or procures his demise) in order to prevent him from appearing at an upcoming trial, he denies the government the benefit of the witness's live testimony. In much the same way, when a defendant murders such a witness (or procures his demise) in order to prevent him from assisting an ongoing criminal investigation, he is denying the government the benefit of the witness's live testimony at a future trial. . . . [A]s long as it is reasonably foreseeable that the investigation will culminate in the bringing of charges, the mere fact that the homicide occurs at an earlier step in the pavane should not affect the operation of the waiver-by-misconduct doctrine. Indeed, adopting the contrary position . . . would serve as a prod to the unscrupulous to accelerate the timetable and murder suspected snitches sooner rather than later. We see no justification for creating such a perverse incentive, or for distinguishing between a defendant who assassinates a witness on the eve of trial and a potential defendant who assassinates a potential witness before charges officially have been brought. In either case, it is the intent to silence that provides notice.[80]

Finally, the forfeiture doctrine has also been applied when one of the members of a conspiracy has wrongfully procured a witness's unavailability.[81] The forfeiture doctrine applied to a defendant who acquiesced in the wrongful procurement of the witness's unavailability, but did not actually engage in the wrongdoing apart from the conspiracy itself based on an agency theory of responsibility.[82]

C. The Giles *Extension Ignores the Equitable Basis of the Forfeiture Doctrine and Violates Confrontation Clause Guarantees*

1. Application of the Forfeiture Doctrine Requires an Intentional Act and a Mens Rea

In *Giles*, the defendant was convicted of the murder of his ex-girlfriend.[83] A couple of weeks before the murder, the police were called out to

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[Sen Van Ta] and that he was made unavailable to prevent him from being a potential witness.'").

79. *Dhinsa*, 243 F.3d at 652 (quoting *Miller*, 116 F.3d at 1279-80); United States v. Cherry, 217 F.3d 811, 813-15 (10th Cir. 2000); *White*, 116 F.3d at 911; *Miller*, 116 F.3d at 667-68; *Houlihan*, 92 F.3d at 1279-80 .

80. *Houlihan*, 92 F.3d at 1279-80.

81. *Thai*, 29 F.3d at 815.

82. *Id.* at 816.

83. People v. Giles, 19 Cal Rptr. 3d 843, 845 (Ct. App. 2004), *review granted*, 102 P.3d 930 (Cal. 2004).

investigate a report of domestic violence between the same two people.[84] At trial, the prosecution was permitted to introduce into evidence prior statements the murder victim made to the police during the domestic violence investigation. The decedent had told the police that the defendant had threatened to kill her.[85] The trial court ruled the statement admissible under Evidence Code section 1370.[86]

After *Giles* was decided, the U.S. Supreme Court issued the decision in *Crawford* which held that testimonial evidence, which includes "statements taken by police officers in the course of interrogations"[87] is inadmissible unless the declarant was unavailable and the defendant had

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84. *Id*. at 846.

85. *Id*. ("After [the decedent] broke free again, appellant opened a folding knife, held it about three feet away from her, and said, 'If I catch you fucking around I'll kill you.'").

86. *Id*. Section 1370 of the California Evidence Code provides:

> (a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:
> (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
> (2) The declarant is unavailable as a witness pursuant to Section 240.
> (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
> (4) The statement was made under circumstances that would indicate its trustworthiness.
> (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.
>
> (b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:
> (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
> (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
> (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.
>
> (c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

CAL. EVID. CODE § 1370 (1995).

87. Crawford v. Washington, 541 U.S. 36, 52 (2004).

an opportunity to cross-examine him.[88] On appeal in California, the defendant in *Giles* claimed that the admission of the decedent's extrajudicial statement violated his right of confrontation under *Crawford*.[89] However, the court of appeal decided that whether the statement was testimonial was irrelevant since the statement was admissible within the dictates of *Crawford* pursuant to the forfeiture doctrine.[90] The defendant objected to the application of the doctrine on the grounds that there was no evidence that he wrongfully procured the decedent's "absence from trial with the intent of preventing testimony about that crime." The court disagreed that the absence of that evidence prevented application of the forfeiture doctrine.[91]

> Although [*Houlihan*] contains language suggesting that a killing must be motivated by a desire to silence the victim to trigger a forfeiture of the right of confrontation, we see no reason why the doctrine should be limited to such cases. Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.[92]

The appellate court concluded that in a case where the murder victim is the declarant of the extrajudicial statement, it is irrelevant whether the murder was committed for the purpose of preventing that witness's live testimony in court because the end result is the same without that intent in that the prosecution is deprived of that witness's live testimony.[93]

The *Giles* court bolstered this conclusion by adding certain safeguards to narrow the holding.[94] First, the statement must come within a recognized hearsay exception;[95] second, the act must be an intentional criminal act;[96] third, the trial court should not apply the doctrine if it would be inequitable to do so;[97] fourth, the fact of forfeiture must be proved by clear and convincing evidence;[98] and fifth, the jury shall not be advised of the forfeiture finding.[99]

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88. *Id*. at 53-54.
89. *Giles*, 19 Cal Rptr. 3d at 846-47.
90. *Id.* at 847.
91. *Id.* at 848.
92. *Id*.
93. *Id.* at 849.
94. *Id.* at 850-51.
95. *Id.* at 850
96. *Id*.
97. *Id.*
98. *Id*. at 851.
99. *Id.*

The *Giles* court's attempt to limit the application of the forfeiture doctrine was ineffective.[100] First, whether an extrajudicial statement comes within a hearsay exception is irrelevant.[101] As stated earlier, forfeiture is an equitable reprimand. Application of that doctrine extinguishes all Confrontation Clause rights.[102] Ergo, a hearsay objection is not available once the forfeiture doctrine applies.[103] Second, the requirement that the wrongful act be an intentional criminal act[104] is inconsistent with *Reynolds*,[105] the Federal Rules of Evidence,[106] federal precedent,[107] and the equitable foundation for the doctrine.[108]

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100. *Id.* at 850.

101. *Id*.

102. Crawford v. Washington, 541 U.S. 36, 62 (2004); United States v. Thai, 29 F.3d 785, 814 (2d Cir. 1994); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982); United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979); *see also* United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992) ("A defendant who procures a witness's absence waives the right of confrontation *for all purposes* with regard to that witness, not just to the admission of sworn hearsay statements." (emphasis added)).

103. United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (quoting FED. R. EVID. 804(b)(6)) ("Hearsay objections are similarly forfeited under Fed. R. Evid. 804(b)(6), which excludes from the prohibition on hearsay any '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.'"); United States v. Houlihan, 92 F.3d 1271, 1281 (1st Cir. 1996) ("On the facts of this case, we agree with the district court that Houlihan's and Nardone's misconduct waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous."); *Aguiar*, 975 F.2d at 47 ("A defendant who procures a witness's absence waives the right of confrontation *for all purposes* with regard to that witness, not just to the admission of sworn hearsay statements." (emphasis added)); *Thevis*, 665 F.2d at 632 ("[W]aiver of one's right to confrontation [is] *a fortiori* a waiver of one's right to raise a hearsay objection."); *Balano*, 618 F.2d at 626 ("However the [trial] court held that Balano had effectively waived his right to confront Carillo by threatening his life. . . . A valid waiver of the constitutional right is *a fortiori* a valid waiver of an objection under the rules of evidence."); *accord* United States v. Dhinsa, 243 F.3d 635, 655 (2d Cir. 2001) (quoting *Houlihan*, 92 F.3d at 1281); *Thai*, 29 F.3d at 814; United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982).

104. *Giles*, 19 Cal. Rptr. 3d at 850.

105. Reynolds v. United States, 98 U.S. 145, 158 (1878) ("The Constitution does not guarantee an accused person against the legitimate consequences of his own *wrongful acts*." (emphasis added)).

106. *See supra* notes 73-75 and accompanying text.

107. "Accordingly one's misconduct need not necessarily have been of such nature as to be punishable as a crime. . . ." Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945) (discussing the doctrine of clean hands); *Mastrangelo*, 693 F.2d at 273-74 (bare knowledge of a plot to kill a prosecution witness and a failure to give warning to appropriate authorities found to be a waiver); *accord* United States v. Cherry, 217 F.3d 811, 819 (10th Cir. 2000).

108. *Reynolds*, 98 U.S. at 159 ("[The forfeiture doctrine] is the outgrowth of a maxim based on the [principle] of common honesty. . . .").

Clearly, one may procure a witness's unavailability by means other than a criminal act. For example, forfeiture should apply if an accused, or one at his behest, convinces a prosecution witness not to testify and buys the witness an out-of-country plane ticket. Even though such conduct is not criminal, it certainly comes within the purview of the forfeiture doctrine. Likewise, the defendant in *Reynolds*, who refused to divulge the whereabouts of the prosecution witness, did not commit a criminal act, but nevertheless committed a wrongful act.[109] In fact, the great weight of authority finds that wrongful conduct may include noncriminal conduct such as chicanery, intimidation, threats, persuasion, dominance, or control by defendant, as well as criminal conduct.[110]

> Wrongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant, the wrongful nondisclosure of information, and a defendant's direction of a witness to exercise the [F]ifth [A]mendment privilege.[111]

As one Court has said, "[i]t is not so much the severity of the behavior, but rather the *intent* underlying it and its effectiveness, that constitutes a waiver."[112]

Third, the limitation that "the trial court cannot apply the doctrine when it would be unjust to do so" is an inherent and intrinsic aspect of the equitable doctrine of forfeiture and thus fails to limit its application.[113] Fourth, the requirement that forfeiture be proven by clear and convincing evidence deals only with the burden of proof and thus is irrelevant as to whether the doctrine ought to apply.[114] Moreover, this requirement conflicts with the Federal Rules of Evidence[115] and federal precedent which requires proof by preponderance of the evidence.[116] Finally, the requirement that the jury not be advised of a forfeiture finding does not limit its application.[117] In all hearings held outside the

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109. *Id.* at 159-60.

110. United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir. 2001); United States v. Ochoa, 229 F.3d 631, 639 n.3 (7th Cir. 2000); United States v. White, 116 F.3d 903, 911 (D.C. Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996); *Mastrangelo*, 693 F.2d at 272-73; Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982); United States v. Balano, 618 F.2d 624, 628-29 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346,1358 (8th Cir. 1976).

111. *Steele*, 684 F.2d at 1201.

112. Magouirk v. Warden, Winn Corr. Ctr., 237 F.3d 549, 554 (5th Cir. 2001) (emphasis added).

113. People v. Giles, 19 Cal Rptr. 3d 843, 850 (Ct. App. 2004), *review granted*, 102 P.3d 930 (Cal. 2004).

114. *Id.* at 851.

115. *See supra* notes 73, 74 and accompanying text.

116. *See* United States v. Cherry, 217 F.3d 811, 815 (10th Cir. 2000); Comparet-Cassani, *supra* note 6, at 1221, 1221 n.360.

117. *Giles*, 19 Cal Rptr. 3d at 851.

presence of a jury, the trial court does not inform the jury of the legal ruling, but simply either admits or does not admit the item into evidence.[118] Therefore, this requirement would add nothing as far as limiting the application of the forfeiture doctrine.

Moreover, the application and extension of the forfeiture doctrine in this manner is inconsistent with its equitable nature, conflicts with the constitutional guarantees of confrontation, conflicts with the federal rule which codified the doctrine, and conflicts with the federal courts to date that have applied the doctrine.[119]

As stated earlier, the forfeiture doctrine is based on principles of honesty and wrongful conduct.[120] According to *Reynolds*, in order for the equitable doctrine to apply to a pending cause of action the defendant must have committed a wrongful act and that act must have been accompanied by a certain mens rea, that is to say, an intent to prevent the prosecution witness from testifying at trial.[121] This factor is consistent with the requirement that for equity jurisdiction to apply an accused must have committed an *unconscionable* act with respect to his pending case in order to obtain an unfair advantage.[122] In other words, there must be a violation of an equitable nature for the court to provide an equitable remedy.[123]

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118. CAL. EVID. CODE § 402(b) (1995).

119. *See supra* notes 7, 13, 67, 69-76. The same argument that the *Giles* Court made to extend the forfeiture doctrine to cases where there is no evidence that the defendant committed the act with the intent to prevent the witness's testimony at trial was presented in another case and rejected. *See* United States v. Lentz, 282 F. Supp. 2d 399, 426 (E.D. Va. 2002) (rejecting the argument that "the Court should allow the evidence to be conditionally admitted, and defer the ultimate ruling until sometime during trial").

120. *See supra* notes 38, 39.

121. *See supra* note 7.

122. Upon the second issue of good faith, the court made no finding although it is the duty of a court of equity, upon any suggestion that a plaintiff has not acted in good faith concerning the matters upon which he bases his suit, to inquire into the facts in that regard. For it is not only fraud or illegality which will prevent a suitor from obtaining equitable relief. Any unconscientious conduct upon his part which is connected with the controversy will repel him from the forum whose very foundation is good conscience.

DeGarmo v. Goldman, 123 P.2d 1, 6 (Cal. 1942) (citing Johnson v. Murphy 172 P. 616, 617 (Cal. Dist. Ct. App. 1918).

123. *Id.* "'[W]henever a party, who, . . . seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against

> Any willful act concerning the cause of action which rightfully can be said to transgress *equitable standards* of conduct is sufficient for the invocation of the maxim by the chancellor.[124]

Courts of equity decide such issues according to their own doctrine and rules of jurisprudence, which is collateral to and independent of criminal law. The objective is to render relief which would otherwise be unavailable.[125] Indeed, a basic rule limiting equity jurisdiction is that "there is no right to equitable relief or to an equitable remedy when there is an adequate remedy at law."[126] Rules of equity cannot be used to intrude on matters which are fully covered by statutes.[127] This is especially true since the equitable doctrine of forfeiture, like other maxims, addresses a normative issue, namely, whether one ought to benefit from his wrongdoing. Therefore, it is a quasi-ethical inquiry and not one concerned with violations of criminal law which is covered by the Penal Code, case law, and the Constitution.

> '[E]quity' in its broadest and most general signification, . . . denotes the spirit and heart of fairness, justness, and right dealing which would regulate the intercourse of men with men. . . . In this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law. . . . In a restricted sense, the word denotes equal and impartial justice . . . ; justice, that is, as ascertained by natural reason or ethical insight, but independent of the formulated body of law.[128]

Therefore, there must be something other than, and in addition to, the act underlying the criminal charge, but related to that charge, which transgresses equitable standards of conduct in order for the forfeiture doctrine to apply.[129] Of course, the conduct underlying the criminal

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him in limine . . . .'" *Id.* (quoting Allstead v. Laumeister, 116 P. 296, 297 (Cal. Dist. Ct. App. 1911)).

124. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945) (emphasis added).

125. BLACK'S LAW DICTIONARY 484 (5th ed. 1979).

126. 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW 681 (1990).

127. *Id.* at 682.

128. Gilles v. Dep't of Human Res. Dev., 521 P.2d 110, 116 n.10 (Cal. 1974) (quoting BLACK'S LAW DICTIONARY 634 (4th ed. 1957)).

129. "Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor." *Precision Instrument Mfg.*, 324 U.S. at 815; "A court of equity acts only when and as conscience commands . . . ." Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933).

charge may be part of the misconduct, as for example, if the defendant murdered a witness for the prosecution with the intent to prevent that individual from testifying at trial.[130] This combination of the mens rea and wrongful act would then confer equitable jurisdiction on the parties. The reason is that if the defendant succeeded in preventing any inculpatory extrajudicial statements from being received into evidence, he would have thwarted the normal operation of the criminal justice system by virtue of his wrongful act.[131] To permit a defendant to profit from that motive would be "contrary to public policy, common sense, and the underlying purpose of the [C]onfrontation [C]lause."[132]

> The Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery. . . . A defendant who murders a witness ought not be permitted to invoke the right of confrontation to prohibit the use of his accusation. . . . Similarly, a defendant should not be afforded the protection of the [C]onfrontation [C]lause if he achieves his objective of silencing a witness by less drastic, but equally effective, means. . . . The defendant cannot now be heard to complain that he was denied the right of cross-examination and confrontation when he himself was the instrument of the denial. . . . *Naturally, considerations of public policy and effective administration of justice enter into the resolution of issues of this type*. The law will not place its imprimatur on the practice of threatening Government witnesses into not testifying at trial and courts should not permit the accused to derive any direct or tangential benefit from such conduct.[133]

For these reasons, it is necessary that in addition to an act which prevented a witness from attending trial and testifying committed by the defendant or at his behest, there must have existed an intent that the act was committed for that purpose. Without the presence of that intent there is no legal justification for the equitable reprimand.

> [Courts of Equity] apply the maxim . . . only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct . . . that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication.

Id.

130. United States v. White, 116 F.3d 903, 909-11 (D.C. Cir. 1997); *e.g.*, United States v. Thai, 29 F.3d 785, 814 (2d Cir. 1994).

131. *See White*, 116 F.3d at 911.

132. United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976).

133. *Id.* (emphasis added) (citation omitted).

2. *The Wrongful Act Need Not Be Criminal*

Moreover, the act which prevents the person from attending trial, need not be one which is criminal in nature.[134] Neither the Federal Rules of Evidence,[135] nor the federal cases which have applied forfeiture require that the act be criminal.[136]

The waiver doctrine was promulgated in 1997 as a Federal Rule of Evidence.[137] The advisory committee notes explained that the doctrine applies to those who commit an act, *which need not be criminal*, but is committed with the intention that the declarant will not be available as a witness at the wrongdoer's trial.

> Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.' (citation omitted.) *The wrongdoing need not consist of a criminal act*.[138]

The intent of the rule is to preclude a defendant from benefiting from his wrongful prevention of future testimony from a witness or a potential witness.[139] Usually, when a theory of law has a federal basis that construction of the law employed by the federal courts is adopted by the state court.[140]

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134. Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945) ("Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character.").

135. FED. R. EVID. 804(b)(6) advisory committee's note (quoting *Mastrangelo*, 693 F.2d at 273).

136. *Infra* note 141 and accompanying text; *see also* Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982).

137. Subdivision (b)(6) was added to Rule 804 of the Federal Rules of Evidence in December 1997 and provides:

> Rule 804. Hearsay Exceptions; Declarant Unavailable
>
> . . . .
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (6) Forfeiture by wrongdoing. 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.

FED. R. EVID. 804(b)(6) (effective Dec. 1997).

138. FED. R. EVID. 804 advisory committee's note (quoting *Mastrangelo*, 693 F.2d at 269, 273) (emphasis added).

139. United States v. Dhinsa, 243 F.3d 635, 652 (2d Cir. 2001).

140. People v. Simon, 886 P.2d 1271, 1283 (1995) ("When a state statute is modeled on a federal statute we presume that the Legislature intended to adopt the construction employed by the federal courts.") (citing L.A. Met. Transit Auth. v. Bhd. R.R. Trainmen,

Indeed, federal courts agree that wrongful conduct may include non-criminal conduct such as the use of threats, coercion, chicanery, persuasion, control, intimidation, nondisclosure of information, directing a witness to exercise his Fifth Amendment privilege, or as in *Reynolds*, refusing to disclose the whereabouts of a witness.[141] As the Court in *Magourik* said about forfeiture, "It is not so much the severity of the behavior, but rather the intent underlying it and its effectiveness, that constitutes a waiver."[142] Therefore, for all of the above reasons, the outrageous conduct which forms the basis for the forfeiture doctrine need not be criminal.

3. The Giles Extension Violates the Constitutional Guarantee of Confrontation

The forfeiture principle is distinct from the confrontation clause. As shown, the doctrine is designed to prevent an accused from abusing the normal operation of the criminal justice system and perverting the protections put in place for his benefit.[143] To extend the doctrine to cases where there is no evidence that the accused intended to prevent the witness from testifying at trial is to apply the doctrine where there is no equitable basis for its invocation. Without the requisite mens rea the accused has not acted with the intent to benefit from his conduct. In that situation, the accused has not waived his right of confrontation and the admission of an unavailable witness's testimony which had not been subjected to cross-examination would be in contravention of the protections of the Constitution. When there is no evidence the defendant has attempted to thwart the criminal justice system, equity jurisdiction does not exist. "A court of equity acts only when and as conscience commands."[144] Because there is no unconscionable behavior, the

355 P.2d 905 (Cal. 1960)); People v. Butler, 51 Cal. Rptr. 2d 150, 155-56 (1996); *accord* L.A. Metro. Transit Auth. v. Bhd. R.R. Trainmen, 355 P.2d 905, 907 (Cal. 1960).

141. *Dhinsa*, 243 F.2d at 651-53; Magouirk v. Warden, Winn Corr. Ctr., 237 F.3d. 549, 554-55 (5th Cir. 2001); Geraci v. Senkowski, 211 F.3d 6, 9 (2d Cir. 2000); United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997); United States v. Houlihan, 92 F.3d 1271, 1279-83 (1st Cir. 1996); United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir. 1984); *Mastrangelo*, 693 F.2d at 272-73; *Steele* 684 F.2d at 1203; United States v. Balano, 618 F.2d 624, 628-29 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346, 1358-59 (8th Cir. 1976).

142. *Magouirk*, 237 F.3d at 554.

143. Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982); *see also Houlihan*, 92 F.3d at 1280.

144. Keystone Driller Co. v. Gen. Excavation Co., 290 U.S. 240, 245 (1933); DeGarmo v. Goldman, 123 P.2d 1, 6 (Cal. 1942).

conduct is governed by the statutes in the Penal Code, constitutional law, and case law.

As *Crawford* points out, there are two "inferences about the meaning of the Sixth Amendment. First, the principal evil at which the Confrontation Clause was directed was . . . its use of *ex parte* examinations as evidence against the accused."[145] The second proposition is that the "Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[146]

If the *Giles* court is correct, then in all cases of murder, or other cases where the underlying charge makes the subject of that charge unavailable to testify in court, ex parte hearsay and untested statements by that witness would be admissible evidence in contravention of the dictates of *Crawford*.

In place of the live testimony of an individual secondary evidence could be introduced.[147] The trier of fact would not be able to view the demeanor of the witness, nor assess credibility on that basis, nor look for body language which may be meaningful, nor watch the witness in the presence of the person against whom the testimony is offered.[148] Moreover, nor would that testimony be tested by the time-honored craft of cross-examination—a technique meant to assist the search for truth.[149]

In effect, the accused would have lost his right of confrontation. This cannot and should not be the law because the Sixth Amendment right

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145. Crawford v. Washington, 541 U.S. 36, 50 (2004).

146. *Id*. at 53-54.

147. United States v. White, 116, F.3d 903, 912 (D.C. Cir. 1997) ("Both the [Confrontation Clause] and [hearsay rule] incorporate a preference for testimony tested by cross-examination, given under oath with the attendant penalty for perjury, and uttered before a jury able to observe the witness's demeanor."); *Steele*, 684 F.3d at 1202 ("The law prefers live testimony over hearsay, a preference designed to protect everyone, particularly the defendant.").

148. United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976).

> Nor should the law permit an accused to subvert a criminal prosecution by causing witnesses not to testify at trial who have, at the pretrial stage, disclosed information which is inculpatory as to the accused. To permit the defendant to profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the [C]onfrontation [C]lause.

Id.; *accord* Magouirk v. Warden, Winn Corr. Ctr., 237 F.3d 549, 552 (5th Cir. 2001); United States v. Cherry, 217 F.3d 811, 815 (10th Cir. 2000); *White*, 116 F.3d at 911-12; *Houlihan*, 92 F.3d at 1279; United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979).

149. Smith v. Estelle, 569 F.2d 944, 946 (5th Cir. 1978).

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' (citation omitted) It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'

Id. (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

enjoyed by a criminal defendant is a fundamental right essential to a fair trial in a criminal prosecution.[150] "The central concern of the Confrontation Clause is to ensure the reliability of [that evidence] by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[151] When there is no evidence of chicanery, wrongdoing, or an intent to silence a prosecution witness, forfeiture simply does not apply and the application of the doctrine in that case is a denial of one's constitutional rights and is simply wrong. As stated earlier, rules of equity have no place in matters that are plainly covered by existing law, and courts are not free to interject equitable doctrines into areas covered by criminal jurisprudence.[152] To do otherwise would be in direct violation of what *Crawford* and its historical origins mandates.

III. CONCLUSION

Before a court may apply the forfeiture doctrine, an accused, or one at his behest, must have committed a wrongful act which prevented a prosecution witness from testifying at his trial. That wrongful act, which need not be criminal, must have been committed with the intent that the person be unavailable to the prosecution to testify at the defendant's trial. If as a result of the defendant's wrongdoing, the prosecution must resort to the use of extrajudicial statements of that witness, then the forfeiture doctrine applies to prevent the accused from obtaining an unfair legal advantage.

As shown, the *Giles* extension of the doctrine is incompatible with the *Reynolds* formulation and with the federal courts who have applied forfeiture, ignores its equitable heritage, and is inconsistent with the federal rule of evidence which codifies the doctrine. Moreover, to extend the doctrine to cases, such as *Giles*, where the absence of the requisite mens rea results in a violation of the defendant's Sixth Amendment right of confrontation under *Crawford*.

The right enjoyed by a criminal defendant to confront witnesses against him is a fundamental right essential to a fair trial in a criminal prosecution and it is designed to secure for the defendant an opportunity

150. *See* Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986).

151. Tilly v. Virginia, 527 U.S. 116, 123-24 (1999); s*ee also* Pointer v. Texas, 380 U.S. 400, 406 (1965).

152. 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW 681-82 (9th ed. 1990); Timberlane Inc. v. Jaisinghani, 64 Cal. Rptr. 2d 4, 9 n.5 (Ct. App. 1997) (quoting Gardiner v. Solder Co. v. SupAlloy Corp., 284 Cal. Rptr. 206, 210 (Ct. App. 1991)).

of cross-examination.[153] The fact that a statement comes within a hearsay exception does not change the fact that a defendant's right of confrontation has been violated. As *Crawford* points out, the ultimate goal of the Clause—reliable evidence—is not a substantive guarantee but a procedural guarantee.[154] "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[155]

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.[156]

The *Giles* extension would result in a procedure specifically eschewed by *Crawford*. It would allow "a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability."[157] Thus, it would "[replace] the constitutionally prescribed method of assessing reliability with a wholly foreign one"[158] not prescribed by the Constitution.

> Where testimonial statements are involved, we do not think the Framers [of the Constitution] meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability. . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.[159]

The Giles extension would allow the use of ex parte hearsay statements as evidence against the accused. It would also allow untested testimonial statements of unavailable witnesses—statements which the defendant has not had an opportunity to test and challenge by cross-examination. This result is exactly what Crawford states the Sixth Amendment was intended to prevent.[160]

The forfeiture doctrine, however, is an *exception* to the requirements of confrontation. It says nothing about reliability because it is not intended to be used to assess reliability. Application of the doctrine is an equitable punishment which extinguishes an accused's right of confrontation. It divests the defendant of his right to raise those objections to the admission of the secondary hearsay evidence because of his wrongful conduct and mens rea.

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153. *Pointer*, 380 U.S. at 401.
154. Crawford v. Washington, 541 U.S. 36, 61 (2004).
155. *Id.*
156. *Id.* at 62.
157. *Id.*
158. *Id.*
159. *Id.* at 61.
160. *Id.* at 50-56.

However, if there are no equitable grounds which command its application, then any attempt to implement its censure results in a denial of Sixth Amendment rights when such censure is unwarranted.[161] Hence, the extension of the forfeiture doctrine as contemplated by the *Giles* Court would result in the denial of a defendant's constitutional right to confront witnesses in violation of *Crawford* and *Reynolds*. In an attempt to implement the *Crawford* forfeiture exception, the *Giles* extension results in a violation of what *Crawford* commands—confrontation. For that reason, the extension must be rejected.

161. *See supra* note 5 and accompanying text.