IN THE SUPREME COURT OF THE UNITED STATES

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DWAYNE GILES, :

Petitioner :

v. : No. 07-6053

CALIFORNIA. :

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Washington, D.C.

Tuesday, April 22, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

MARILYN G. BURKHARDT, ESQ., Los Angeles, Cal.; on behalf of the Petitioner.

DONALD E. DE NICOLA, ESQ., Deputy State Solicitor, Los Angeles, Cal.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-6053, Giles versus California.

Ms. Burkhardt.

ORAL ARGUMENT OF MARILYN G. BURKHARDT

ON BEHALF OF THE PETITIONER

MS. BURKHARDT: Thank you, Mr. Chief Justice, and may it please the Court:

In Crawford this Court made clear that in order to determine the scope of the Confrontation Clause we look to the common law and particularly as it existed at the time of the framing. And, as we have shown in our briefs, the -- California's forfeiture rule did not exist in common law. It did not exist at the time of the framing. And the common-law concept that is embodied in the Confrontation Clause has grave, practical importance to defendants, and particularly to the defendant in this case, because the application of this new forfeiture rule that California created deprived the Petitioner of his right to present a fair claim of self-defense.

Basically, the statement that was admitted accused the Petitioner of having viciously attacked Miss Avie and having threatened her at knifepoint and

having threatened to kill her. And the admission of this statement, which he never had a chance to cross-examine or attempt a cross-examination, obviously was highly prejudicial because it indicated to the jury that he was planning to kill her.

JUSTICE GINSBURG: But he got -- he got on the stand, and he said some very nasty things about her. I mean he painted her as aggressive, vengeful. Isn't there a legitimate rebuttal when he is painting her as the aggressor, and she has given a statement that suggests that he is the one who was aggressive?

MS. BURKHARDT: Well, Justice Ginsburg, the -- her statement came in, in the prosecution's case-in-chief.

JUSTICE GINSBURG: But could it have come in as rebuttal of his testimony, the same testimony by the police? Was it the police officer that --

MS. BURKHARDT: Yes.

JUSTICE GINSBURG: -- took her statement? Okay. He gets on the stand, and he says all of these unpleasant things about her. And then the State says, okay, now we have our chance, and we are going to put in her statement through the testimony of the police officer to rebut what he has just said.

MS. BURKHARDT: Well, the difference is that

his statements about her went solely to his state of mind. They did not come in for their truth, but her statements came in for their truth. So it really isn't an apples-and-oranges comparison.

JUSTICE SCALIA: I would think that the difference is that his statements about her were subject to cross-examination.

MS. BURKHARDT: Indeed, of course.

JUSTICE SCALIA: And her statements about him were not.

MS. BURKHARDT: Exactly.

JUSTICE KENNEDY: But we are not -- well, but we are talking about the door -- the door opening here at trial. Did he give notice that he was going to testify in California? Do they have some rule that if you're going to testify, you have to give notice?

MS. BURKHARDT: He did indicate that he was going to present a claim of self-defense, and I believe he indicated that he was going to testify.

JUSTICE KENNEDY: That tends to diminish somewhat, but not entirely, your, I think, quite proper response that this came in on direct not -- not cross.

MS. BURKHARDT: Well, Justice Kennedy, the fact that it was a self-defense claim is irrelevant. This testimony would have come in -- her testimony or

hearsay statements would have come in even if he hadn't presented a self-defense claim. It just was a coincidence in this case.

And California claims that they have a right to introduce such testimonial statements in any case in which they can show that the defendant was the cause of the witness's absence. I mean the case --

JUSTICE GINSBURG: Maybe they would be wrong -- maybe they would be wrong in another case, but we have this case, and Justice Scalia has suggested, I take it, that this testimony could not come in even by way of rebuttal.

MS. BURKHARDT: Right.

JUSTICE GINSBURG: Even by way of cross-examination. Do you -- do you share that view?

MS. BURKHARDT: I do. It -- it doesn't really go to any of the claims --

JUSTICE GINSBURG: It may go to his credibility. He has just painted a picture of this woman which is quite different from what her statement to the police officer would portray.

MS. BURKHARDT: Well, the injustice here, Justice Ginsburg, is that he doesn't have a -- any meaningful opportunity to contest what the police officer says she said because he never had an

opportunity to cross-examine her.

JUSTICE KENNEDY: Well, of course -- of course, that's true. That is the reason for the confrontation -- confrontation rule. But it does seem to me that this is responsive to his defense; and you say, well, it's his state of mind, and her testimony was general. I think it does go to his state of mind.

JUSTICE SCALIA: I'm not following you. Is there -- is there an exception to the hearsay rule so long as the hearsay is brought in, in rebuttal? Is there a rebuttal exception to the hearsay rule?

MS. BURKHARDT: Not to my knowledge.

JUSTICE KENNEDY: But we are talking here about the definition or the contours of the equitable rule, the forfeiture rule, for confrontation. And I think perhaps what Justice Ginsburg was suggesting, and certainly what I was suggesting, is that when we are looking at whether or not there is a forfeiture, we are talking about equitable considerations.

Now, it's true in this case we are presented with an instance that I've never seen, which is that the murder itself makes the declarant unavailable for purposes of the equitable exception. And it is true that that goes much further than the common law did.

MS. BURKHARDT: It goes much further; and,

indeed, the State has not cited one single case at common law or after that supports its view that this rule is proper.

JUSTICE BREYER: How much are we supposed to follow the common law, in your opinion, as it was in the 18th century or 12th century, or something? I mean suppose, to take a fanciful example -- I mean -- but suppose there was a common-law rule. And I know there wasn't, but suppose there was a common-law rule that said in cases involving witches you cannot admit any evidence because either the witch, the accused witch, came up out of the water when they were dunking her, and, therefore, she is guilty, so there is no need; or she is under water, which shows she is, you know, guilty, but you can't cross-examine a person under water.

Now if there were a rule like that, would we now incorporate it into the Constitution of the United States? The answer is meant to be no.

(Laughter.)

MS. BURKHARDT: Yes.

JUSTICE BREYER: Now, let's get more realistic. There are all kinds of rules --

JUSTICE SCALIA: He is thinking about Cambridge and not England.

(Laughter.)

JUSTICE BREYER: Okay. So there are all kinds of rules of disqualification of witnesses in the 17th and 18th century. You couldn't testify. In this case there would have been no admission if she had been married to the man instead of being his girlfriend. You couldn't have a spouse; you couldn't have an interested party; you couldn't have a child who didn't understand the oath; you couldn't have a person who was an atheist; you couldn't have somebody who was a convicted felon.

So now are we supposed to incorporate all of these things into the Confrontation Clause?

JUSTICE SCALIA: Do any of them have anything to do with the Confrontation Clause?

MS. BURKHARDT: No.

JUSTICE BREYER: It doesn't have to do with the Confrontation Clause that you couldn't cross-examine person who didn't understand the meaning of the oath?

MS. BURKHARDT: Justice Breyer, the Confrontation Clause sets forth a basic policy, which is that we are to have live testimony in court. We have to have witnesses available in court.

JUSTICE BREYER: So what about a person who -- the same facts that he could not -- wasn't eligible to testify? At common law you never could have gotten

that person to testify in court, no matter what. And, therefore, what? That's what I'm asking, if we are supposed to follow all of the contours of that rule.

MS. BURKHARDT: Well, in Crawford this Court said we do look to --

JUSTICE BREYER: All right. But, now, does that make sense? For example, if this woman had been married, she could not. She -- her testimony -- whether your client deliberately procured her absence, accidentally procured her absence, whatever he did, that testimony could not have come in, is that right, if she was married to him?

MS. BURKHARDT: Well, that's sort of -- that sounds like, say, the situation in Crawford that --

JUSTICE KENNEDY: Well, but I think what Justice Breyer is saying --

JUSTICE BREYER: I'm trying to drive at what the contours are. Which ones do we ignore, and which don't --

MS. BURKHARDT: -- sets forth the proper contours, which is that any exception to the Confrontation Clause must be very, very narrow. And they approved an exception for witness tampering which is deeply embedded in the common law.

JUSTICE KENNEDY: But I think what Justice

Breyer's line of questioning points out is that there were other provisions of the evidence rule followed in England which would not allow the testimony to come in, in the first place. In this case, we wouldn't even have the issue before us if the testimony were not admissible as an exception to the hearsay rule. It is admissible.

Then we have to ask if it conforms with the Confrontation Clause, which is the issue we have. But because of the restrictions he points to, there was never the occasion for the common law to explore the boundaries of the forfeiture exception in the confrontation context.

MS. BURKHARDT: Well, Your Honor --

JUSTICE SCALIA: And besides which, the question that Justice Breyer was asking was already answered in Crawford; wasn't it?

MS. BURKHARDT: Yes, it was.

JUSTICE SCALIA: A case from which he dissented. But we did say that the meaning of the Confrontation Clause is the meaning it bore when the people adopted it.

MS. BURKHARDT: That is right.

JUSTICE BREYER: I don't think I did --

CHIEF JUSTICE ROBERTS: There was a dying declaration rule at the common law; wasn't there?

MS. BURKHARDT: Yes, there was.
CHIEF JUSTICE ROBERTS: Well, that didn't require any inquiry into the intent of the person responsible for the death, or the imminent death, right?
MS. BURKHARDT: That's correct. But the dying declaration -- the fact that the dying declaration rule existed with its very specific elements shows powerfully that no general rule existed such as the California rule, because if the California rule had existed --
CHIEF JUSTICE ROBERTS: Well, if the dying declaration rule didn't require intent, why should yours?
MS. BURKHARDT: Because the forfeiture rule at -- which is a separate -- entirely a separate rule of common law, did require intent to prevent testimony. It has always been viewed that way from its inception in Lord Morley's Case --
JUSTICE SCALIA: Instead of intent, the dying declaration rule required knowledge by the declarant that the declarant was about to die.
MS. BURKHARDT: Correct.
JUSTICE SCALIA: Right?
MS. BURKHARDT: That's right.
JUSTICE SCALIA: And the evidence of

truthfulness was apparently that the person was about to enter the next world.

MS. BURKHARDT: That's right.

JUSTICE SCALIA: And most of us don't lie at that particular moment. Whereas, in the Confrontation Clause situation you have a totally different situation.

MS. BURKHARDT: Correct.

JUSTICE BREYER: I joined Crawford, and Justice Scalia would like to kick me off the boat, which I'm rapidly leaving in any event, but the --

(Laughter.)

JUSTICE SCALIA: You jumped off in Crawford, I thought.

JUSTICE BREYER: Right. But my question -- I want to go back because what I'm finding difficult is -- well, let's take the specific case. Suppose they had been married. If they had been married in 1789, I guess, or 1750, or 1400, or whenever, her testimony would not have come in regardless. I think I'm right on that.

MS. BURKHARDT: Yes, as a spouse.

JUSTICE BREYER: Yes, as a spouse. And, therefore, whether he procured her absence or not is beside the point. Now, do we follow that rule under the Confrontation Clause today?

JUSTICE GINSBURG: I think your answer was that in Crawford that was the situation. It was a spouse; wasn't it?

MS. BURKHARDT: I'm sorry?

JUSTICE GINSBURG: In Crawford.

MS. BURKHARDT: In Crawford it was a spouse.

JUSTICE GINSBURG: And it was the defendant who said he didn't want her to testify.

MS. BURKHARDT: That's right.

CHIEF JUSTICE ROBERTS: Under the -- the testimony of someone who heard her say something, was that admissible?

MS. BURKHARDT: Under -- under Crawford?

CHIEF JUSTICE ROBERTS: No. No. Under the common law.

MS. BURKHARDT: I don't think it was. Hearsay was absolutely inadmissible. And there were just very, very narrow exceptions under the common law.

CHIEF JUSTICE ROBERTS: Like in the case of an unavailable witness?

MS. BURKHARDT: Of course. Especially in the case of an unavailable witness. In Lord Morley's case they set forth rules.

JUSTICE GINSBURG: There are some things that are not just testimonial. For example, suppose she

left a sealed letter. She has been murdered, and the letter is to be opened only upon her death, and the letter says: If I was done in, go after him. Could that come into evidence?

MS. BURKHARDT: Well, Justice Ginsburg, it depends on whether it was deemed to be testimonial or not.

JUSTICE GINSBURG: Well, is it? I'm just giving you --

MS. BURKHARDT: It's not an issue in our case. I mean perhaps. I mean obviously, as you point out, if she had made a statement to a -- not a police officer -- to a friend, family member, or whatever, a nontestimonial statement, then that probably could come in. But what is at issue here --

JUSTICE GINSBURG: So what's the line between what -- I understand that she is accusing him to a police officer.

MS. BURKHARDT: Yes.

JUSTICE GINSBURG: So you say that's testimonial.

MS. BURKHARDT: The courts --

JUSTICE GINSBURG: If she is talking to a friend and saying that she is scared to death of this man --

MS. BURKHARDT: That is --
JUSTICE GINSBURG: -- the friend could testify?
MS. BURKHARDT: That's perhaps nontestimonial.
JUSTICE GINSBURG: Why?
MS. BURKHARDT: Well --
JUSTICE GINSBURG: What's the difference? If this rule is going to separate the testimonial from the nontestimonial, you have to be able to tell when it's one and when it's the other.
MS. BURKHARDT: Well, the Court hasn't fully described all of the parameters of "testimonial." But our case does not involve that issue, because this statement is clearly testimonial.
JUSTICE ALITO: Could I ask you whether there is really anything involved in this case? Both the California Supreme Court and the Court of Appeals said it is inconceivable that any rational trier of fact would have concluded that the shooting was excusable or justifiable.
Doesn't that virtually guarantee that if there was an error here, it was harmless error?
MS. BURKHARDT: Well, no, not necessarily. I think it's very significant that the court of

appeals -- neither the California Supreme Court nor the Court of Appeals engaged in a harmless-error analysis. And that statement that you quote presupposed that the testimonial hearsay statement at issue was a large factor in coming to that conclusion. So, you know, no, I don't think it's necessary. That really went --

JUSTICE ALITO: No. No. Is that correct? Weren't they concluding that, based on the independent evidence, it was virtually inconceivable --

MS. BURKHARDT: No.

JUSTICE ALITO: No?

MS. BURKHARDT: No.

CHIEF JUSTICE ROBERTS: How do we know in this case that part of his intent was not to prevent her from testifying at trial? I mean, it's obvious that he was upset about something else, but maybe in his mind he is saying, oh, boy, if she has talked to people about how I'm going to kill her, I'd better do it so that she can't testify.

MS. BURKHARDT: There was a specific finding of fact by the court of appeals that he did not intend to kill her -- he did not kill her to prevent testimony.

CHIEF JUSTICE ROBERTS: How are we ever going to know that in a typical case?

MS. BURKHARDT: Well, by, you know,

analyzing the evidence. I mean, obviously, there are many ways, and perhaps he made a statement.

CHIEF JUSTICE ROBERTS: Well, take a case like this, I don't understand how that finding could have been made. He knew that she had reported -- that she had said to her friends he is going to kill me; he is going to kill me. And then he figures he'd better do it or it's going to -- his self-defense claim is going to look a lot weaker.

MS. BURKHARDT: Well, that -- I think, Mr. Chief Justice, that doesn't make an awful lot of sense because that indicates that he killed her in order to prevent her from --

CHIEF JUSTICE ROBERTS: No, I'm sorry it doesn't. It means that that may have been part of his motive, to kill her. Because I'm not just going to beat her up this time; I'm actually going to kill her because otherwise I'm going up the river. Here he gets a great benefit from murdering her which is that her testimony is not available. We usually under our system don't try to give benefits to murderers.

MS. BURKHARDT: Well, first of all, the court of appeals specifically found that he did not kill her to prevent testimony. The California Supreme Court basically adopted that finding --

CHIEF JUSTICE ROBERTS: I understand that, and you've said --

MS. BURKHARDT: -- and the State never challenged it.

CHIEF JUSTICE ROBERTS: Excuse me, Counsel. You've said that already. And what I'm saying is that I don't understand under the legal standard we might adopt, how that sort of finding makes sense. I mean, you don't ask him why did you kill her; was it to prevent her testimony or not? That's not available in the inquiry. So how can that sort of factual finding be made?

MS. BURKHARDT: Well, the courts have been -- Federal and State courts have been making that factual finding for -- for decades under the Federal rule, and under the Carlson line of cases.

JUSTICE GINSBURG: But the -- here it's his own murder trial. So he didn't murder her so that she couldn't be a witness at the trial for her murder.

MS. BURKHARDT: Correct.

JUSTICE GINSBURG: But he might have murdered her because she had good grounds to get him indicted on criminal assault charges. Maybe he murdered her so that she would not be available to testify at such a trial.

MS. BURKHARDT: Well, that's highly speculative. There was no proceeding. There was no indication in the record that -- that her assault claim was ever going to ripen into any kind of criminal proceeding at all.

JUSTICE SCALIA: I had thought that the common law rule is that you have to have rendered the -- intentionally rendered the witness unavailable with regard to the particular trial that's before the court. Not rendering the witness unavailable for some other litigation.

MS. BURKHARDT: That was --

JUSTICE SCALIA: Do you know of any case where it was some other litigation that --

MS. BURKHARDT: No.

JUSTICE SCALIA: I didn't think so.

MS. BURKHARDT: No. That is the common law.

JUSTICE KENNEDY: Let's -- let's assume that the only case on the books pre-1789 was Morley, in which the defendant did specifically intend to keep the witness away from the trial. But let's assume, contrary to fact, that the Morley case gave a -- a very sweeping, expansive definition of the equitable forfeiture rule and said the defendant cannot profit by his own wrong.

Could we take that general language pre-1789

and say that it supports the rule today, assuming we could find that in the Morley case or other aspects of the common law? Or would we be just confined, as you understand Crawford, to the specific holding of Morton that there has to be a specific intent?

MS. BURKHARDT: Well, the hypothetical assumes something which is -- which Your Honor admits is -- is simply not the case. I'm going to suppose assuming --

JUSTICE KENNEDY: Please -- please make the supposition.

MS. BURKHARDT: -- that it was there, I suppose the Court could -- could rule on the basis of that, but that it's definitely not the case and has never been the case.

JUSTICE KENNEDY: All right. Well, suppose we read the English authorities that it does not foreclose the expansion of the equitable forfeiture rule.

MS. BURKHARDT: Well, I -- I think the English authorities do foreclose it, because the dying declaration cases, and there are dozens of them, would not have come out as they did if this expansive forfeiture rule had existed. It would make no sense.

JUSTICE KENNEDY: I -- I find that difficult

to understand because the dying declaration rule came up in many instances when the confrontation rule was not involved at all.

MS. BURKHARDT: That's right. But with this -- but the point I'm making is this: that under California's theory, if the defendant is -- causes the absence of the witness, and all you need to show is causation, then the witness's testimonial statement will come in; but under the dying declaration rule mere causation is not sufficient. You have to also show other factors in very -- particularly that the -- that the witness was aware of impending death.

That requirement is totally superfluous under the California theory; and yet it -- the fact that no lawyer or no judge for hundreds of years ever suggested that in those cases --

JUSTICE STEVENS: Your dying declaration cases are not just murders, though.

MS. BURKHARDT: They are just murders.

JUSTICE STEVENS: Pardon me?

MS. BURKHARDT: They are just murders, Your Honor.

JUSTICE KENNEDY: Really? I thought they came in, in civil cases all the time.

MS. BURKHARDT: The ones we cite are murders

and they are murder cases in criminal cases.

JUSTICE KENNEDY: Well, but I -- I agree -- I'll check the, -- check --

JUSTICE STEVENS: But the rationale for the dying declaration rule has nothing to do with who caused the death.

MS. BURKHARDT: Well, you know, it specifically goes to -- the element of the dying declaration is that the statement has to relate to the specific cause of the death. So it really does.

JUSTICE STEVENS: But it has to be imminent, too.

MS. BURKHARDT: Well, the death doesn't have to be imminent specifically.

JUSTICE STEVENS: He has to think it's imminent.

MS. BURKHARDT: But the perception is -- the declarant has to believe --

JUSTICE STEVENS: But that's an entirely different rationale from the issue we have here, because it applies across the board to civil cases and all sorts of litigation.

MS. BURKHARDT: It applies powerfully in many, many instances to criminal cases; and that fact -- and that has existed for -- for centuries -- shows that

there was no general rule that all, you know, needed to do was to be accused of murdering the victim; because otherwise if California rule had existed, there would be no need to make this other showing in the dying declaration cases.

And in many cases, as we have cited in our brief and as the NACDL has cited, evidence -- important evidence was kept out. Testimonial hearsay accusations were kept out -- from the victim accusing the defendant were kept out because they didn't meet the specific requirements, specifically the sense of impending death.

JUSTICE KENNEDY: But the forfeiture rule is designed to suspend the operation of the confrontation rule. That doesn't mean that it comes in. You still need another hearsay exception which will allow it in.

MS. BURKHARDT: Well, not under the common law. It was -- it was one rule under the common law. It was only later that it operated as two separate rules of confrontation and a hearsay rule. Under the common law all you needed to show was the dying declaration, then it was admissible for all purposes. There was no distinction between confrontation and hearsay at that time.

And so therefore, again -- it just -- if all you needed to show was that the defendant caused or

likely caused the absence or killed the victim, then all of those cases went the wrong way; all of that evidence, the victim's accusations, would have come in -- automatically. And they did not come in; in case after case we have showed that. We have cited some dozens of cases that show that. And the State has not cited even one single case, not one, which shows at common law that this evidence here would have come in.

I'd like to reserve the remainder of my time if there are no more questions.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Burkhardt.

Mr. De Nicola.

ORAL ARGUMENT OF DONALD E. DE NICOLA

ON BEHALF OF THE RESPONDENT

MR. De NICOLA: Mr. Chief Justice, and may it please the Court:

I think I want to start off by correcting, I think, the impression that the common law ever stated a rule that intent to tamper was a prerequisite for keeping out the evidence of a -- of a victim of a murderer. And I don't think this Court, in the Reynolds case, has ever -- or in the subsequent cases, has ever stated such a rule.

JUSTICE SCALIA: Well, it didn't put it in

those very words, but I think a lot of -- of the quotations from opinions cited by your friend seemed to me to say that.

But why don't you start off by telling -- by explaining to us why these many cases excluded the dying declaration of the murdered person when -- if it could not be shown that the murdered person knew when the declaration was made that he or she was dying? If the rule that you're announcing was the rule at common law, all of those would have come in because that declaration said this Defendant killed me. And, therefore, it would have been true in all of those cases that this defendant procured the absence of the witness from the trial. How do you explain that.

And there are many cases. It's not just a few. The requirement in the dying declaration cases that the -- that the declarant be aware of impending death is uniform. Why even bother with that requirement if it could all come in under -- under this procurement of the absence-of-the-witness rule?

MR. De NICOLA: Well, I think, as Justice Kennedy's question suggested, that there are different elements to -- that need to be surpassed before the dying declaration would come in.

What happens in the dying declaration

situation, Your Honor, is that there is no validation or vindication of the defendant's cross-examination rights; and that's what we are interested in here today: How the common law would have treated the cross-examination right of a defendant who killed a witness. The dying declaration rule certainly cabins the admissibility of dying declarations for reliability reasons, but it did not detract from the fact that the evidence of the dying declaration came in peculiarly when the defendant killed the victim of the crime, the witness whose testimony was coming in.

JUSTICE SCALIA: I'm not sure you've answered my question. Why wasn't it enough for the prosecution to say: This dying person said that this defendant killed her; therefore, this declaration can come in because this defendant procured the absence of this declarant by killing her?

MR. De NICOLA: It wouldn't --

JUSTICE SCALIA: Nobody even ever makes those arguments. They fight it out on whether the declarant was aware of impending death or not, but that would have been totally irrelevant if it all comes in under -- under the rule that you're arguing for here.

MR. De NICOLA: No, because under the rule I'm arguing for, and why the prosecutor wouldn't have

succeeded in making that argument, the rule I'm arguing for is simply that in the situation where the defendant kills the witness the common law did not recognize, or there is no strong case authority that would indicate that the common law would recognize, a confrontation right with respect to that defendant against his witness's statement.

Nevertheless, the common law puts some other nonconfrontation restrictions on the admissibility of the dying declaration. Those were reliability-based restrictions. Reliability-based restrictions can't determine the scope of the confrontation right.

Under Crawford, the confrontation right is a separate process that has to be adhered to and can't be substituted with another reliability-assessment machine unless there is a rule that would have let that statement in that doesn't depend on a reliability assessment.

JUSTICE SOUTER: I understand the distinction you're drawing at the present time or at least since the Bill of Rights was adopted. We have two regimes. We have the constitutional condition and we have hearsay rules.

MR. De NICOLA: Yes.

JUSTICE SOUTER: But with respect to the

common law as it stood at the time that the Bill of Rights was adopted, there wasn't such a distinction; was there? In other words, to the extent that the confrontation right is informed by the common- law antecedent, the common-law antecedents were not drawing the line that you are drawing; were they?

MR. De NICOLA: I think that's right, Your Honor.

JUSTICE SOUTER: And if that is the case, then it seems to me you haven't answered Justice Scalia's question. Because Justice Scalia's question says: Let's just talk about common-law antecedents for a moment; and, given common-law antecedents, why were people worried about the consciousness of death under the dying declaration rule if there was this broader rule which is supposed to inform our understanding of the confrontation right, which would have let it in simply because the crime had forfeited the right to object. And it seems to me that you still have not answered his question.

MR. De NICOLA: Well, let me -- let me take a different tack. Under the common-law rule, if the defendant killed the witness and the witness's statement met the dying declaration criteria, that statement would come in against the defendant. But if the defendant

killed the same victim and you had another witness who witnessed the crime and made a dying declaration that qualified under the rule, that dying declaration describing the defendant's infliction of the mortal blow, that dying declaration would not have come in.

JUSTICE KENNEDY: If it was -- if it was testimony. There are a lot of declarations that are not testimonial, and the rule is very important for those.

MR. De NICOLA: Yes.

JUSTICE KENNEDY: There are also declarations that are testimonial, in which case we look to the confrontation concept.

MR. De NICOLA: Yes, but I think -- but I think, with respect to testimonial statements, it -- I think it gives you an insight into what the common law would have done with respect to the alleged confrontation rights of the murderer against the victim to know that when the defendant murdered the victim, the victim's dying declaration came in without regard to confrontation.

It might not have been excluded because it might not have met other criteria, but it would have come in without confrontation. And it would have come in without confrontation in a way that the -- the mere witness who makes a dying declaration and witnesses the

same crime would not have come in.

CHIEF JUSTICE ROBERTS: I would suppose that there are a lot, a lot of situations in which a dead victim has made statements pertinent to the murder. So wouldn't your rule drive a pretty big hole through Crawford?

This is not an isolated instance where the victim said something about the murderer. That would seem to be a fairly common situation, because most murders involve people who know each other.

MR. De NICOLA: Well, I think it would -- it -- I think it would, it would apply in murder cases with respect to the statements of the victim. So I think the -- I think the application of the forfeiture rule on a murder basis as we are suggesting here, yes, I think it would --

JUSTICE KENNEDY: But to the extent that Crawford is confined simply to testimonial statements, any number of statements --

MR. De NICOLA: Right.

JUSTICE KENNEDY: -- that will come in under the California evidence rule are simply not controlled by the Confrontation Clause anyway. It's just -- it's a standard hearsay problem.

MR. De NICOLA: Yes. Like the California

Supreme Court recognized, and it was buttressed, I think, by this Court's decision in Davis, simply because the defendant might forfeit his confrontation rights because he murders the victim, that doesn't necessarily mean that he forfeits his other hearsay- rule protections or his other constitutional-reliability protections or his right to impeach the hearsay declarations of the unavailable witness or his right to contradict them or his right --

JUSTICE GINSBURG: Does that mean, what you just said, that this is not a problem in States that have adopted the Federal Rules of Evidence? Because, as I understand it, there is an exception, the standard exception, for when the defendant procures the witness's absence for the very purpose of preventing the witness from testifying at a particular trial. That's the exception that's in the Federal Rules of Evidence. You don't have an exception, a hearsay exception, for just being responsible for the witness's unavailability.

So practically, this couldn't come in under a hearsay objection in places that have the Federal Rules of Evidence; is that right?

MR. De NICOLA: Yes. If the Federal rule were interpreted to require the intent to tamper, in any jurisdiction that decided as a matter of their own

hearsay policy that they wanted to govern the admissibility of evidence along those lines, then, yes.

JUSTICE SCALIA: Doesn't it have to be interpreted that way? You don't contend it could be interpreted differently?

MR. De NICOLA: Well, I don't know exactly whether the Federal rule has uniformly been -- been interpreted to require a specific intent.

JUSTICE SCALIA: Just because it says so, I mean.

MR. De NICOLA: Well, there is -- I don't think -- for example, I don't think there is a Federal case that's been cited where the forfeiture has been denied in a situation where the defendant murdered the witness.

JUSTICE SCALIA: Can you give us one case from the common law, just one, in which the procurement of a witness's absence exception to the Confrontation Clause was applied where there was no intent to prevent the witness from testifying?

MR. De NICOLA: I don't -- I don't think I have the case --

JUSTICE SCALIA: I don't think you do either.

MR. De NICOLA: -- that -- that applied the

rule. But I don't think there is a case that articulated the rule in a way that would have limited its application.

JUSTICE BREYER: The reason, I think, is -- I think, if I understand Justice Scalia's question, take ordinary hearsay?

MR. De NICOLA: Yes.

JUSTICE BREYER: Okay. There's a reason for keeping it out, though there are many exceptions. Now take that subset of ordinary hearsay where it was a statement made purposefully to go to trial. Now there is especially good reason for keeping it out, so like a double reason. And I think he finds it odd that we, under the common law, putting us back then, would say there's an exception where there's especially good reason for keeping it out, see, in the testimonial case, an exception where you go get the person murdered, but you didn't do it purposefully. But -- but there is no exception in just where there's only the ordinary reason for keeping it out. It should seem to work the other way around.

Now, to me that suggests that maybe we shouldn't follow completely the common law as it evolved in evidentiary principles. Maybe we have to assume an intent to allow the contours of the Confrontation Clause

to evolve as the law of evidence itself evolves. Otherwise, we get caught up in these logical contradictions. What do you think of that?

MR. De NICOLA: Well, I think that -- I think that we can certainly take account, for example, of situations that the common law might not have faced or might not have recognized as representing a problem of relevant evidence to a crime.

JUSTICE SCALIA: You wouldn't want us to get caught up in the limitations of the Confrontation Clause?

MR. De NICOLA: No, I'm not saying that, Your Honor. What I'm saying is that I think that, although the Confrontation Clause under Crawford would be accepted under the governing common-law rule at the time, the governing common-law rule at the time included this forfeiture doctrine, and the forfeiture doctrine I think has been recognized -- has been based on the maxim and the principle that no one may profit from wrongdoing.

JUSTICE BREYER: Do you see what my question was? My question is the same question I asked your fellow counsel. My question is, since I led you to the point where you were willing to say maybe there is some flexibility here, what? That's where I'm having the

trouble. What precisely are the principles I should follow to prevent my going back to look at they dunked witches, but allowing the heart of Crawford to be maintained. How do I do it?

I don't know if you can answer that question, but that's the problem that I'm having.

MR. De NICOLA: Well, again, I think -- I think the resort to the -- to the maxim and the equitable principles that we know that common law subscribed to and that common law subscribed to those principles in this precise -- as a rule to decide how to resolve this particular kind of issue where the defendant's wrongdoing makes the witness unavailable, that the -- that because the common law accepted this maxim, that we can -- we can look and apply those principles to the situation even though there might not have been the precise common-law case an all fours.

JUSTICE ALITO: Does the record show what happened after the police went and received the statements by Ms. Avie? Did she ask -- did she ask to have charges brought? Did the police file a complaint?

MR. De NICOLA: The record doesn't show, Your Honor. The record doesn't show.

JUSTICE ALITO: As far as the record shows, nothing happened? They took this statement and that was

it?

MR. De NICOLA: Yes, yes, in terms of -- because that was a description of the event that led to the admissibility of the statement.

JUSTICE KENNEDY: Does the record show or did the trial indicate anything that he told the police on the prior occasion? They went into different rooms and they each gave statements?

MR. De NICOLA: No. No. No. But -- but to the extent that this is a case where the -- the crime occurs after there had been this prior report to an official, this case is somewhat closer to the witness tampering scenario that my opponent says characterized the admissibility of these cases at common law. So it's not -- it wouldn't be a -- a departure from the theory that they are proposing to recognize that in this situation it's -- it's essentially similar.

JUSTICE KENNEDY: Well, I think it's an astonishingly broad exception you're asking for. On the other hand, testimonial statements are all that's involved, and so that's a narrow class, and maybe that balances out. I'm not sure.

But may I just ask and you can comment on it if you -- may I ask: The defendant gave notice that he would testify?

MR. De NICOLA: Prior to trial, there was a discussion about what sort of defense he was going to be putting on, and he clearly indicated --

JUSTICE KENNEDY: California law requires that?

MR. De NICOLA: No. No. It just --

JUSTICE KENNEDY: Or it does not require it?

MR. De NICOLA: It doesn't require that. It just -- it happened that, in discussing the admissibility of all this other evidence he wanted to bring in to put words in the mouth of the victim, the court inquired about how that would be linked up to the defense of self-defense.

JUSTICE KENNEDY: All right.

MR. De NICOLA: And that's why the defendant's lawyer indicated that the client would be testifying and putting on -- putting on a defense of self-defense.

Now, I think if you look at the -- if you look at the maxim, the logic or the rational of the forfeiture rule, it doesn't admit of any exception for motive to tamper. The motive-to-tamper rule that my opponent is proffering here I think is alien to the rationale of the maxim. The maxim is that no one shall profit from wrongdoing. The superimposition of an

intent requirement or a motive requirement wouldn't change the fact that, with that intent or without the intent, there would be the same profit from the wrongdoing. There would be the same damage to the integrity of the criminal trial because the truth-finding function of the criminal trial would be damaged by allowing the wrongdoing to be used as the basis for keeping out the statement of the -- of the witness, of the victim of the crime, and allowing the defendant to substitute in its stead his own one-sided or half-true version of the --

JUSTICE KENNEDY: Suppose the unavailability is caused by the defendant's negligence. Defendant negligently runs over the victim.

MR. De NICOLA: I think if that were --

JUSTICE KENNEDY: I mean over the declarant.

MR. De NICOLA: Yes. I think if that were a crime, certainly, I think it would clearly satisfy --

JUSTICE KENNEDY: Suppose it's negligence.

MR. De NICOLA: If it's mere negligence? If it's mere negligence, certainly that's a -- that's a tougher call, and it might be that in a situation of noncriminal conduct the intent to tamper conceivably could play a role in elevating that conduct to the kind of wrongdoing that would trigger the rule. But I think

as long as you have criminal conduct and certainly where you have a murder, the rule would be triggered and the -- the inquiry would then be whether or not there was causation and whether or not there would be this profit. And the intent to tamper doesn't really relate to the purpose of the rule to prevent the profiting.

So you have the same profit, the same damage to the criminal justice system, and the same prejudice to the State, which is denied the live testimony of the victim.

JUSTICE GINSBURG: Isn't there a problem that was brought out in the briefs with -- this man is standing trial before a jury that's going to determine guilt beyond a reasonable doubt, but if this testimony is going to come in, the judge has to make some kind of a preliminary finding that he killed her in advance of the jury making that determination.

MR. De NICOLA: Yes, Your Honor. And that happened -- that didn't happen in this case, so that would be, I think, the template for what would happen in future cases. One I think preliminary point is that in the California Supreme Court, Giles essentially conceded that the forfeiture rule, when it was otherwise applicable, does apply in the case where you have the wrongdoing being the same crime that's charged.

JUSTICE SCALIA: If that's a fault, it's a fault that also exists with the rule being argued by your opponent, isn't it?

MR. De NICOLA: I think that's true, Your Honor. And it's also -- it's not -- it's not unlike the way a Federal court would have a foundational hearing to make a preliminary determination about the admissibility of a co-conspirator's hearsay statement in a case where the crime charged is conspiracy.

JUSTICE SCALIA: Maybe I have to take that back. Maybe it -- it's very -- it would be very unusual that someone would kill a victim in order to prevent her testifying at a murder trial which is not yet in prospect because you haven't murdered her. So these cases may be very rare. So maybe that is an advantage of her rule over yours, that you would very rarely have to find the defendant guilty of the very crime for which he's being prosecuted in order to apply the -- the exception to the Confrontation Clause.

MR. De NICOLA: I think it -- I think it would be rare.

JUSTICE SCALIA: Okay.

MR. De NICOLA: But -- but it's not -- but it's not unheard of, and there is -- there is a pedigree for it, and --

JUSTICE SCALIA: It would be rare on her theory; it wouldn't be rare on yours. It happens all the time on yours, I would think.

MR. De NICOLA: But nevertheless I think the -- the idea that you could have the hearing even though it's the same issue that goes before the jury, I think is not an obstacle to applying the rule in this case.

JUSTICE BREYER: I would think these cases come in -- this problem comes in with spousal abuse. Now, I don't know what the numbers are, but I bet you could find numbers. I suspect, but I don't know, that in many cases where there's a death in that kind of situation, maybe it is accidental. Maybe the -- maybe the man who is beating up his wife didn't really want her to die.

MR. De NICOLA: Yes.

JUSTICE BREYER: All right. So that to me, I guess, suggests that that's in favor of your rule, I think. Isn't it?

MR. De NICOLA: Yes, I think it -- I think, again, regardless of what defendant's intent is, the rule and the logic of the rule applies.

JUSTICE BREYER: And so that would be true, whether it was intended or whether it isn't intended.

MR. De NICOLA: Yes.

JUSTICE BREYER: Whether it's -- I mean, I'm not sure how to even administer even a criminal/civil distinction.

MR. De NICOLA: But I think the same, you know, as was said before, the argument that what came in, in this case, was this damaging evidence that -- that undermined the defendant's self-defense claim. Well, that evidence would come in even under the theory that intent to tamper were required for -- for the forfeiture, as well as under our theory.

CHIEF JUSTICE ROBERTS: I think you're -- it's certainly true that this issue would come up in domestic abuse cases --

MR. De NICOLA: Yes.

CHIEF JUSTICE ROBERTS: -- but I'm not sure that it would be at all limited. I assume you have, you know, gang cases --

MR. De NICOLA: Yes. Yes.

CHIEF JUSTICE ROBERTS: -- any case in which have you familiarity between the victim and the defendant, which, as I understand it, is the most typical case, but it's not simply in any way limited to the domestic abuse cases.

MR. De NICOLA: No. It wouldn't be limited to the -- this case, it wouldn't be limited to the

domestic abuse cases, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: No, I know your rule wouldn't --

MR. De NICOLA: Yes.

CHIEF JUSTICE ROBERTS: -- but the situation in which the case arises --

MR. De NICOLA: Okay. --

CHIEF JUSTICE ROBERTS: -- also would --

MR. De NICOLA: No. No.

CHIEF JUSTICE ROBERTS: -- certainly not. It comes up quite frequently, I would assume --

MR. De NICOLA: In gang cases, yes.

CHIEF JUSTICE ROBERTS: -- because you often have an association with --

MR. De NICOLA: Yes. And I think it can come up in cases of -- of abuse of children, as another example.

So I think because there's no equitable argument on the part of the defendant about why this rule, this no-profit rule, would depend on an intent to tamper, I think if you transport that back into the common law, the same rule and the same principles of applying, and you would -- you would have I think the same results.

Excuse me. I think -- again, well, I don't

want to repeat myself, but I guess I just want to again emphasize that the -- that the logic of the rule really doesn't admit of an intent requirement. Nothing in this Court's cases has ever dictated an intent requirement. Nothing in the common-law cases has ever articulated an intent requirement, and in the common-law cases the rule that we are advancing is justified by the maxim that applied at the common law, and it was also justified -- well, at least I think an insight into how common law would have devalued the confrontation rights of the killer against the witness can be seen in the dying declarations case. Because even though they might ultimately have proved inadmissible on another ground, where the special criteria for the dying declaration cases was not met, those cases nevertheless are instances where the evidence comes in against the defendant where he kills the victim.

The slayer's cases that were recognized at common law where no intent was required before somebody would be barred from receiving an inequitable distribution from an insurance policy, or from a testator, those cases were also decided at common law under this maxim.

And the ultimate -- I think the ultimate element to the analysis that proves dispositive is

whether or not the defendant is benefitting from the wrongdoing. My opponent says that there's no benefit from the wrongdoing unless there is an intent to commit the wrongdoing in the first place, but that's palpably not so because you -- because you have the benefit if you have the benefit. And to the extent that there is -- an intent requirement might be perceived as necessary to provide some level of moral blameworthiness in terms of exploiting the wrongdoing, that exploitation occurs in any event when the defendant seeks to take advantage of the wrongdoing by making the objection and, as in this case, exploiting it even further at trial.

So the equities of the situation -- there's no, I think, personal equity that weighs in the balance on the basis of -- in -- on the side of keeping -- keeping the evidence out. Where there is the wrongdoing and the causation and the profit from the wrongdoing, the statement should come out -- should be admitted without regard to the mental state of the defendant.

And on that I'll submit.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Ms. Burkhardt, you have four minutes remaining.

REBUTTAL ARGUMENT OF MARILYN G. BURKHARDT

ON BEHALF OF THE PETITIONER

MS. BURKHARDT: It State said that there is no equity on the side -- on Petitioner's side, and that's simply not true. The statement is a testimony statement; under Crawford, it clearly must be excluded; and for the reason that it is -- you know, he has been deprived of his right to test the accuracy of that statement and to expose its falsity.

He claims the statement isn't true; and under Crawford, the -- the Framers have prescribed a categorical procedural rule for testing whether a statement is reliable, and that's the right to confrontation; and he was deprived of that right and this in turn derived him of fair -- of a fair trial.

Now, the Framers in adopting the Confrontation Clause understood its parameters to include certain narrow exceptions. And the exception -- one of the exceptions was a witness tampering exception; and that had a very rational basis, because what it meant, in essence, is if the defendant is going to act against the criminal trial system from which he demands and requires justice, he cannot at the same time intentionally, deliberately manipulate and thwart the criminal justice system by preventing the appearance of -- of necessary witnesses. So in that case, when he does something of -- to that effect, then it's fair,

it's equitable and reasonable; he cannot profit from his own wrong.

And that maxim that a person cannot profit from his own wrong was meant to apply to that situation. It wasn't meant to apply in the broad, generalized, amorphous sense that the State suggests, because that would effectively substitute in some sort of amorphous notions for reliability of -- I'm sorry, fairness -- for the amorphous notions of reliability standard that this Court just rejected by overruling Roberts.

In fact, what's happened here is the State is attempting to resuscitate Roberts and to eviscerate Crawford; and it is no accident that this whole issue arose after Crawford. This is a post-Crawford invention. It did not even exist before. And it's not -- the ink on Crawford was barely dry before the Supreme Court of Kansas, like six weeks later, enacted this -- this first forfeiture-by-causation rule; and then a number of States such as California followed, and they all cite each other as authority.

But nothing before, because nothing before existed. And when this Court in Crawford said we accept the rule of forfeiture by wrongdoing, we submit that the Court couldn't possibly have meant this broad standard that California created, because it did not exist at

that time.

We suggest that what this Court meant, as it indicated in Davis, is the -- essentially the Federal rule entitled forfeiture by wrongdoing, which is specifically directed to witness tampering. And that said -- and codifies, as this Court said in Davis, the doctrine of forfeiture that has existed at the common law; that was -- that has been understood for hundreds of years, that was carried forward and preserved in Reynolds, and then it was further carried forward to the Federal rule.

That's all we want. We want the rule as it has always existed, not some new expanded rule that the -- California has just created to undermine and eviscerate my client's rights to confrontation. We are just asking for a fair trial, which he did not get. And the notion that he is profiting. Well, in that sense, everyone profits from the Confrontation Clause. It was designed to protect defendants from encroachment on the State. It was designed to provide defendants a fair trial.

JUSTICE GINSBURG: If you're right, it would go back on the harmless error question, right?

MS. BURKHARDT: Yes. It could go back to a harmless error question or perhaps a new trial.

They can retrial -- retry him. They have plenty of evidence on which to retry him in this case. This is why -- that's all we are asking for, a fair trial, not a trial under a brand-new standard which they concocted for the purpose of eviscerating Crawford, which is exactly what happened.

CHIEF JUSTICE ROBERTS: Thank you, Counsel. The case is submitted.

(Whereupon, at 12:00 p.m., the case in the above-entitled matter was submitted.)