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1 P R O C E E D I N G S

2 (11:02 a.m.)

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

5 Ms. Burkhardt.

6 ORAL ARGUMENT OF MARILYN G. BURKHARDT

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

18                  MS. BURKHARDT: Yes.

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

25                  MS. BURKHARDT: Well, the difference is that

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

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

8 MS. BURKHARDT: Indeed, of course.

9 JUSTICE SCALIA: And her statements about  
10 him were not.

11 MS. BURKHARDT: Exactly.

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

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

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

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

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

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

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

13 MS. BURKHARDT: Right.

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

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

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

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

1 opportunity to cross-examine her.

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

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

12 MS. BURKHARDT: Not to my knowledge.

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

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

25 MS. BURKHARDT: It goes much further; and,

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

4 JUSTICE BREYER: How much are we supposed to  
5 follow the common law, in your opinion, as it was in the  
6 18th century or 12th century, or something? I mean  
7 suppose, to take a fanciful example -- I mean -- but  
8 suppose there was a common-law rule. And I know there  
9 wasn't, but suppose there was a common-law rule that  
10 said in cases involving witches you cannot admit any  
11 evidence because either the witch, the accused witch,  
12 came up out of the water when they were dunking her,  
13 and, therefore, she is guilty, so there is no need; or  
14 she is under water, which shows she is, you know,  
15 guilty, but you can't cross-examine a person under  
16 water.

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

20 (Laughter.)

21 MS. BURKHARDT: Yes.

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

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



1 (Laughter.)

2 JUSTICE BREYER: Okay. So there are all  
3 kinds of rules of disqualification of witnesses in the  
4 17th and 18th century. You couldn't testify. In this  
5 case there would have been no admission if she had been  
6 married to the man instead of being his girlfriend. You  
7 couldn't have a spouse; you couldn't have an interested  
8 party; you couldn't have a child who didn't understand  
9 the oath; you couldn't have a person who was an atheist;  
10 you couldn't have somebody who was a convicted felon.

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

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

15 MS. BURKHARDT: No.

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

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

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

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: But I think what Justice

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

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

13 MS. BURKHARDT: Well, Your Honor --

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

17 MS. BURKHARDT: Yes, it was.

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

22 MS. BURKHARDT: That is right.

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

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

1 MS. BURKHARDT: Yes, there was.

2 CHIEF JUSTICE ROBERTS: Well, that didn't  
3 require any inquiry into the intent of the person  
4 responsible for the death, or the imminent death, right?

5 MS. BURKHARDT: That's correct. But the  
6 dying declaration -- the fact that the dying declaration  
7 rule existed with its very specific elements shows  
8 powerfully that no general rule existed such as the  
9 California rule, because if the California rule had  
10 existed --

11 CHIEF JUSTICE ROBERTS: Well, if the dying  
12 declaration rule didn't require intent, why should  
13 yours?

14 MS. BURKHARDT: Because the forfeiture rule  
15 at -- which is a separate -- entirely a separate rule of  
16 common law, did require intent to prevent testimony. It  
17 has always been viewed that way from its inception in  
18 Lord Morley's Case --

19 JUSTICE SCALIA: Instead of intent, the  
20 dying declaration rule required knowledge by the  
21 declarant that the declarant was about to die.

22 MS. BURKHARDT: Correct.

23 JUSTICE SCALIA: Right?

24 MS. BURKHARDT: That's right.

25 JUSTICE SCALIA: And the evidence of

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

3 MS. BURKHARDT: That's right.

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

7 MS. BURKHARDT: Correct.

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

11 (Laughter.)

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

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

21 MS. BURKHARDT: Yes, as a spouse.

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

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

4 MS. BURKHARDT: I'm sorry?

5 JUSTICE GINSBURG: In Crawford.

6 MS. BURKHARDT: In Crawford it was a spouse.

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

9 MS. BURKHARDT: That's right.

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

13 MS. BURKHARDT: Under -- under Crawford?

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

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

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

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

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

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

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

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

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

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

19 MS. BURKHARDT: Yes.

20 JUSTICE GINSBURG: So you say that's  
21 testimonial.

22 MS. BURKHARDT: The courts --

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

1 MS. BURKHARDT: That is --

2 JUSTICE GINSBURG: -- the friend could  
3 testify?

4 MS. BURKHARDT: That's perhaps  
5 nontestimonial.

6 JUSTICE GINSBURG: Why?

7 MS. BURKHARDT: Well --

8 JUSTICE GINSBURG: What's the difference?  
9 If this rule is going to separate the testimonial from  
10 the nontestimonial, you have to be able to tell when  
11 it's one and when it's the other.

12 MS. BURKHARDT: Well, the Court hasn't fully  
13 described all of the parameters of "testimonial." But  
14 our case does not involve that issue, because this  
15 statement is clearly testimonial.

16 JUSTICE ALITO: Could I ask you whether  
17 there is really anything involved in this case? Both  
18 the California Supreme Court and the Court of Appeals  
19 said it is inconceivable that any rational trier of fact  
20 would have concluded that the shooting was excusable or  
21 justifiable.

22 Doesn't that virtually guarantee that if  
23 there was an error here, it was harmless error?

24 MS. BURKHARDT: Well, no, not necessarily.  
25 I think it's very significant that the court of



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

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

10 MS. BURKHARDT: No.

11 JUSTICE ALITO: No?

12 MS. BURKHARDT: No.

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

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

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

25 MS. BURKHARDT: Well, by, you know,

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

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

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

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

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

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

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

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

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

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

20 MS. BURKHARDT: Correct.

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

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

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

12 MS. BURKHARDT: That was --

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

15 MS. BURKHARDT: No.

16 JUSTICE SCALIA: I didn't think so.

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

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

25 Could we take that general language pre-1789

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

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

10 JUSTICE KENNEDY: Please -- please make the  
11 supposition.

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

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

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

25 JUSTICE KENNEDY: I -- I find that difficult

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

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

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

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

19 MS. BURKHARDT: They are just murders.

20 JUSTICE STEVENS: Pardon me?

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

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

25 MS. BURKHARDT: The ones we cite are murders

1 and they are murder cases in criminal cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 Ms. Burkhardt.

13 Mr. De Nicola.

14 ORAL ARGUMENT OF DONALD E. DE NICOLA  
15 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

25 What happens in the dying declaration

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

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

18 MR. De NICOLA: It wouldn't --

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

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

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

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

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

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

24              MR. De NICOLA: Yes.

25              JUSTICE SOUTER: But with respect to the

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

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

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

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

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

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

9 MR. De NICOLA: Yes.

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

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

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

1 same crime would not have come in.

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

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

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

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

20 MR. De NICOLA: Right.

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

25 MR. De NICOLA: Yes. Like the California

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

7 MR. De NICOLA: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 it?

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

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

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

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

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

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

4                   JUSTICE KENNEDY: California law requires  
5 that?

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

7                   JUSTICE KENNEDY: Or it does not require it?

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

14                  JUSTICE KENNEDY: All right.

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

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

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

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

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

16 JUSTICE KENNEDY: I mean over the declarant.

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

19 JUSTICE KENNEDY: Suppose it's negligence.

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

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

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

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

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



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

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

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

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

22 JUSTICE SCALIA: Okay.

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

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

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

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

16 MR. De NICOLA: Yes.

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

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

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

25 MR. De NICOLA: Yes.

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

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

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

14 MR. De NICOLA: Yes.

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

18 MR. De NICOLA: Yes. Yes.

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

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

1 domestic abuse cases, Mr. Chief Justice.

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

4 MR. De NICOLA: Yes.

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

7 MR. De NICOLA: Okay. --

8 CHIEF JUSTICE ROBERTS: -- also would --

9 MR. De NICOLA: No. No.

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

12 MR. De NICOLA: In gang cases, yes.

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

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

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

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

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

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

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

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

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

20 And on that I'll submit.

21 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

22 Ms. Burkhardt, you have four minutes  
23 remaining.

24 REBUTTAL ARGUMENT OF MARILYN G. BURKHARDT

25 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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



1     that time.

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

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

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

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

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

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

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

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