Dwayne GILES v. CALIFORNIA.
128 S.Ct. 2678 (2008)
(edited opinion)

We consider whether a defendant forfeits his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial.

I

On September 29, 2002, petitioner Dwayne Giles shot his ex-girlfriend, Brenda Avie, outside the garage of his grandmother's house. No witness saw the shooting, but Giles' niece heard what transpired from inside the house. She heard Giles and Avie speaking in conversational tones. Avie then yelled "Granny" several times and a series of gunshots sounded. Giles' niece and grandmother ran outside and saw Giles standing near Avie with a gun in his hand. Avie, who had not been carrying a weapon, had been shot six times.

At trial, Giles testified that he had acted in self-defense. Giles described Avie as jealous, and said he knew that she had once shot a man, that he had seen her threaten people with a knife, and that she had vandalized his home and car on prior occasions. He said that on the day of the shooting, Avie came to his grandmother's house and threatened to kill him and his new girlfriend, who had been at the house earlier. He said that Avie had also threatened to kill his new girlfriend when Giles and Avie spoke on the phone earlier that day. Giles testified that after Avie threatened him at the house, he went into the garage and retrieved a gun, took the safety off, and started walking toward the back door of the house. He said that Avie charged at him, and that he was afraid she had something in her hand. According to Giles, he closed his eyes and fired several shots, but did not intend to kill Avie.

Prosecutors sought to introduce statements that Avie had made to a police officer responding to a domestic-violence report about three weeks before the shooting. Avie, who was crying when she spoke, told the officer that Giles had accused her of having an affair, and that after the two began to argue, Giles grabbed her by the shirt, lifted her off the floor, and began to choke her. According to Avie, when she broke free and fell to the floor, Giles punched her in the face and head, and after she broke free again, he opened a folding knife, held it about three feet away from her, and threatened to kill her if he found her cheating on him. Over Giles' objection, the trial court admitted these statements into evidence under a provision of California law that permits admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy.

A jury convicted Giles of first-degree murder. He appealed. While his appeal was pending, this Court decided in *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004), that the Confrontation Clause requires that a defendant have the opportunity to confront the witnesses who give testimony against him, except in cases where an exception to the confrontation right was recognized at the time of the founding. The California Court of Appeal held that [Avie's hearsay statements could be admitted despite the fact that the defendant could not confront and cross-examine her under a doctrine called "forfeiture by wrongdoing." See Fed. R. Evid. 804(b)(6). It concluded that Giles had forfeited his right to confront Avie because he had committed the murder for which he was on trial, and because his intentional criminal act made Avie unavailable to testify.

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him. The State maintains, however, that the Sixth Amendment did not prohibit prosecutors from introducing Avie's statements because an exception to the confrontation guarantee permits the use of a witness's unconfronted testimony if a judge finds that the defendant committed a wrongful act that rendered the witness unavailable to testify at trial. We held in *Crawford* that the Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." We therefore ask whether the theory of forfeiture by wrongdoing is a founding-era exception to the confrontation right.

We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted. The first of these were ding declarations, Avie did not make the statements at issue here when she was dying, so her statements do not fall within this historic exception.

A second common-law doctrine, which we will refer to as forfeiture by wrongdoing, permitted the introduction of statements of a witness who was "detained" or "kept away" by the wrongful "means or procurement" of the defendant. The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying. The rule required the witness to have been "kept back" or "detained" by "means or procurement" of the defendant. Although there are definitions of "procure" and "procurement" that would merely require that a defendant have caused the witness's absence, other definitions would limit the causality to one that was *designed* to bring about the result "procured." Similarly, while the term "means" could sweep in all cases in which a defendant caused a witness to fail to appear, it can also connote that a defendant forfeits confrontation rights when he uses an intermediary for the purpose of making a witness absent.

Cases and treatises of the time indicate that a purpose-based definition of these terms governed. Prior testimony was admissible when a witness was kept away by the defendant's "means and contrivance." when the defendant has schemed to bring about the witness's absence from trial, *in order to prevent him from giving evidence.*

The manner in which the rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying -- as in the typical murder case involving accusatorial statements by the victim -- the testimony was excluded unless it was confronted or fell within the dying-declaration exception.

The State notes that common-law authorities justified the wrongful-procurement rule by invoking the maxim that a defendant should not be permitted to benefit from his own wrong.. But as the evidence amply shows, the "wrong" to which these statements referred was conduct *designed*

to prevent a witness from testifying. The absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them. But, there is nothing mysterious about courts' refusal to carry the rationale further. The notion that judges may strip the defendant of the right of Confrontation because a judge assumes the defendant is in fact guilty of the victim's murder does not sit well with the right to trial by jury and the presumption of innocence.

The dissent argues that a broader forfeiture rule would be particularly helpful to women in abusive relationships -- or at least particularly helpful in punishing their abusers. Not as helpful as the dissent suggests, since only *testimonial* statements are excluded by the Confrontation Clause [under *Crawford*]. Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment [are not testimonial and therefore do not implicate the Confrontation Clause in the first place. They] would be admitted or excluded by hearsay rules. In any event, we are puzzled by the dissent's decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause for all other crimes, but a different one for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means -- from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

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