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Giles v. California: Forfeiting Justice Instead of Confrontation Rights in the Court's Most Recent Forfeiture by Wrongdoing Jurisprudence

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Note

GILES v. CALIFORNIA: FORFEITING JUSTICE INSTEAD OF CONFRONTATION RIGHTS IN THE COURT'S MOST RECENT FORFEITURE BY WRONGDOING JURISPRUDENCE

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In *Giles v. California*,[1] the Supreme Court of the United States considered whether a defendant whose wrongful act has made a witness unavailable to testify at trial forfeits his Sixth Amendment right to confront that witness.[2] The Court concluded that a defendant forfeits his confrontation right only when a witness is absent because the defendant has sought to prevent the witness from testifying.[3] By mistakenly focusing on a historical analysis in reaching this conclusion,[4] a plurality of the Court conflated a waiver rationale with the equitable principles underlying the forfeiture by wrongdoing doctrine[5] and furthermore inadequately addressed the utilitarian principles that influence the application of the doctrine.[6] If the plurality had considered these equitable and utilitarian principles, it would have instead posited a knowledge-based intent standard and would not have needed to retreat from its opinion.[7]

I. THE CASE

On the evening of September 29, 2002, Dwayne Giles shot and killed Brenda Avie, his former girlfriend, outside his grandmother's

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1. 128 S. Ct. 2678 (2008).
2. *Id.* at 2681.
3. *See id.* at 2683, 2693 (explaining that the common-law forfeiture by wrongdoing doctrine applied only when a defendant's conduct was "designed" to prevent a witness from testifying and that the Court would not approve a doctrine broader than the one existing at common law).
4. *See infra* Part IV.
5. *See infra* Part IV.A.
6. *See infra* Part IV.B.
7. *See infra* Part IV.C.

home.[8] Shortly after Avie arrived at the home that evening, Giles's niece, Veronica Smith, heard Avie yell "Granny" several times, followed by a series of gunshots.[9] When Smith ran outside, she found Giles holding a handgun and Avie bleeding on the ground.[10] Avie, who was not carrying a weapon at the time, had been shot multiple times in the torso, and two of her wounds proved fatal.[11] Giles fled from the scene but was eventually apprehended by the police.[12]

At his trial, Giles admitted to shooting Avie, but claimed that he had done so in self-defense.[13] He claimed that he and Avie, whom he described as a jealous woman, had a tumultuous relationship, which he had tried unsuccessfully to end.[14] Giles testified that Avie threatened to kill him and Tameta Munks, his new girlfriend, when Avie arrived at his grandmother's home that evening.[15] Maintaining that he feared for his safety during this conversation, Giles testified that he retrieved a gun from the garage and that Avie "charged" him as he started walking back into the house.[16]

Several weeks prior to Avie's shooting, police officers had investigated a separate report of domestic violence involving Giles and Avie after responding to a domestic disturbance call.[17] While speaking privately with one of the officers, Avie explained that Giles had accused her of having an affair before starting to choke and punch her.[18] She had also stated that, during this encounter, Giles took out a folding knife and threatened to kill her if he found out that she had cheated on him.[19]

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8. People v. Giles, 19 Cal. Rptr. 3d 843, 844–45 (Cal. Ct. App. 2004).

9. *Id.* at 845. According to Marie Banks, a friend of Avie and Giles, Avie seemed angry when she came to the home that evening. *Id.* at 846. Banks testified that she left the home with Avie shortly before the shooting, but that Avie returned because she saw Giles's new girlfriend arriving at the home. *Id.*

10. *Id.* at 845.

11. *Id.* One of Avie's wounds was consistent with her holding up her hand when Giles shot her, one was consistent with her turning to her side when she was shot, and one was consistent with her being shot while she was lying on the ground. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* In addition, Giles claimed that Avie had previously vandalized his home and car, shot someone, and threatened someone with a knife. *Id.*

15. *Id.* at 845–46. Giles also testified that he had argued with Avie earlier that day after Avie discovered that Munks would be at his grandmother's home that evening. *Id.* at 845. He insisted that Avie first threatened to harm Munks during this conversation. *Id.*

16. *Id.* at 845–46.

17. *Id.* at 846.

18. *Id.* At trial, the officer who had spoken with Avie testified that Avie was crying when the police arrived on the scene. *Id.*

19. *Id.*

Over Giles's objection, the trial court admitted Avie's statements to the officer from that night.[20] The jury convicted Giles of first degree murder.[21] Applying the forfeiture by wrongdoing doctrine,[22] the California Court of Appeal affirmed the trial court's decision and held that Giles forfeited his right to confront Avie at trial because his own criminal violence had made her unavailable for cross-examination.[23] The Supreme Court of California affirmed the Court of Appeal's decision on the same ground.[24] Emphasizing the equitable principles underlying the forfeiture by wrongdoing doctrine, the court explained that the doctrine applies when a defendant's wrongful act causes a witness's absence at trial, even if the defendant did not seek to silence the witness.[25] The Supreme Court of the United States granted certiorari to determine whether a defendant forfeits his confrontation right when the defendant's own wrongdoing has made a witness unavailable to testify.[26]

II. LEGAL BACKGROUND

Three factors have shaped courts' interpretation of forfeiture by wrongdoing, a doctrine grounded in the Sixth Amendment to the United States Constitution: (1) historical standards; (2) the equitable rationale underlying the doctrine; and (3) utilitarian principles impacting the doctrine's application. First, courts have considered precedent to find that the forfeiture doctrine was historically invoked when a defendant wrongfully procured a witness's absence from trial.[27] In addition, courts have frequently examined the theory underlying the forfeiture doctrine, recently reiterating that equitable principles form its basis.[28] Finally, courts have also looked to utilitarian principles when applying the forfeiture doctrine to ensure that its

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20. *Id.* The trial court admitted Avie's statements pursuant to a hearsay exception in California's evidence code, which allows the admission of certain out-of-court statements that describe the infliction of physical injury upon a witness when that witness is unavailable to testify at trial and the statements are deemed trustworthy. *Id.*; CAL. EVID. CODE § 1370 (West Supp. 2009).

21. People v. Giles, 152 P.3d 433, 437 (Cal. 2007).

22. This doctrine is also referred to throughout this Note as "forfeiture," the "forfeiture doctrine," and the "doctrine."

23. *Giles*, 19 Cal. Rptr. 3d at 851–52. Although the trial court did not address the issue of forfeiture, the California Court of Appeal utilized the forfeiture by wrongdoing doctrine because neither the prosecution nor the defense disputed that Giles's actions had rendered Avie unavailable to testify. *Giles*, 152 P.3d at 437.

24. *Giles*, 152 P.3d at 443, 446–47.

25. *Id.* at 442.

26. Giles v. California, 128 S. Ct. 2678, 2681 (2008).

27. *See infra* Part II.A.

28. *See infra* Part II.B.

use comports with principles of truth-seeking and the effective administration of justice.[29]

A. *Historical Considerations Inform the Modern Forfeiture Doctrine*

Courts interpreting the forfeiture by wrongdoing doctrine have long considered historical standards, employing the forfeiture doctrine when a defendant has wrongfully procured a witness's absence from trial. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[30] Known as the Confrontation Clause, this guarantee ensures that witnesses against a defendant will testify under oath at trial, where the defendant can cross-examine them and the jury can observe their demeanor.[31] The Supreme Court of the United States, however, has long recognized the forfeiture by wrongdoing doctrine as an exception to a defendant's confrontation right.[32]

Under the forfeiture doctrine, a defendant may forfeit his right to confront a witness against him when the witness is absent from the defendant's trial as a result of the defendant's own wrongful procurement.[33] The doctrine originated in *Lord Morley's Case*,[34] a 1666 decision by the English House of Lords.[35] In that case, a defendant objected when the prosecution attempted to introduce the testimony of an absent witness.[36] The court held that when a witness was detained "by means or procurement"[37] of the defendant, the court could admit the witness's prior statement[38] even though the defendant would not have the opportunity to cross-examine the witness at

29. *See infra* Part II.C.

30. U.S. CONST. amend. VI.

31. United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976).

32. *See* Reynolds v. United States, 98 U.S. 145, 158 (1879) ("The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.").

33. *Id.*

34. 6 How. St. Tr. 769 (H.L. 1666).

35. *Id.*

36. *Id.* at 776.

37. *Id.* at 771.

38. The Supreme Court has held that the Confrontation Clause applies only to testimonial statements. Crawford v. Washington, 541 U.S. 36, 68 (2004). Thus, if a statement is nontestimonial, it is exempted from Confrontation Clause scrutiny entirely. *Id.* The Court recently explained that a statement is testimonial when the circumstances objectively demonstrate that there is no ongoing emergency and that the primary reason for the interrogation is to establish past actions that might be relevant to later criminal prosecution. Davis v. Washington, 547 U.S. 813, 822 (2006).

trial.[39] Applying this new doctrine to the case at bar, the court upheld the defendant's objection, noting that although the evidence indicated that the witness had run away prior to trial, the evidence failed to demonstrate that the witness had done so because of the defendant's actions.[40]

In the 1775 case of *Rex v. Barber*,[41] an American court echoed the forfeiture doctrine developed in *Lord Morley's Case*. In *Rex*, the defendant's friend, at the defendant's request, sent away a witness after the witness provided preliminary testimony in a case against the defendant for counterfeiting.[42] The court admitted other witnesses to convey the absent witness's testimony, noting that such evidence was admissible where the defendant "procured a witness to go away."[43] Similarly, in *Drayton v. Wells*,[44] the court considered whether to admit a witness's prior testimony when the witness claimed that he could no longer recall the event about which the defendant had called him to testify.[45] The court concluded that the witness's memory lapse did not fall within one of the established Confrontation Clause exceptions, one of which was the forfeiture by wrongdoing doctrine.[46] Explaining that the forfeiture doctrine applied only where a witness was absent by the defendant's "contrivance," the court reasoned that admitting the witness's testimony in this situation would create an unnecessary administrative burden for future courts.[47]

The Supreme Court first addressed the forfeiture doctrine in the 1878 case of *Reynolds v. United States*.[48] In *Reynolds*, the defendant, on trial for bigamy, objected to the introduction of his second wife's prior testimony after concealing her location so that she could not

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39. *Lord Morley's Case*, 6 How. St. Tr. at 770–71.

40. *Id.* at 777.

41. 1 Root 76 (Conn. Super. Ct. 1775).

42. *Id.*

43. *Id.*

44. 10 S.C.L. (1 Nott & McC.) 409 (1819).

45. *Id.* at 410. The *Drayton* case involved a contract dispute, and the witness had testified at the defendant's first trial, where the jury found for the plaintiff. *Id.* at 409–10. At the defendant's new trial, the witness stated that he remembered almost nothing about the contracting parties' discussion about the contract's terms, but insisted that his previous testimony was "certainly true." *Id.* at 410.

46. *Id.* at 411 (noting that the only other Confrontation Clause exceptions were a witness's death, insanity, and unavailability because "he was beyond seas").

47. *See id.* at 411–12 (explaining that if the court admitted the witness's testimony in this case, then it would have to consider admitting supplementary testimony in all cases involving a second examination).

48. 98 U.S. 145 (1879).

testify at his trial.[49] The Court rejected the defendant's contention that the forfeiture doctrine only applied after a witness had been summoned to testify,[50] reasoning that the Sixth Amendment does not protect a defendant from the "legitimate consequences" of his own wrongful acts.[51] Reflecting on the doctrine established in *Lord Morley's Case*, the *Reynolds* Court held that a defendant who voluntarily keeps witnesses away from his trial forfeits the right to confront those witnesses.[52]

In 1900, the Court clarified its approach to the forfeiture doctrine. In *Motes v. United States*,[53] one prosecution witness, a former defendant, escaped from custody and fled after giving preliminary testimony implicating several of his co-defendants in a man's murder.[54] The defendants objected to the introduction of the witness's prior testimony at their trial, arguing that its introduction violated their confrontation rights.[55] Sustaining the defendants' objection, the Court held that the forfeiture doctrine did not apply unless the witness's absence resulted from the "suggestion, procurement or act of the accused."[56] In so holding, the *Motes* Court explained that it would not extend the forfeiture doctrine to include cases where the prosecution's negligence, rather than the defendants' actions, had caused the witness's absence.[57]

B. Equitable Principles Underlie the Modern Forfeiture Doctrine

In addition to historical standards, courts interpreting the forfeiture by wrongdoing doctrine have also looked to the doctrine's under-

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49. *Id.* at 146, 148, 150. When a deputy arrived at the defendant's home to subpoena the defendant's second wife, the defendant informed the deputy that she was not at home, that the deputy would have to find out her location, and that she would not appear to testify against him at trial. *Id.* at 148–49.

50. *Id.* at 152.

51. *Id.* at 158. In *Reynolds*, the Court first articulated the equitable basis of the forfeiture by wrongdoing doctrine. *Id.* at 159; *see infra* Part II.B.1.

52. *Reynolds*, 98 U.S. at 159.

53. 178 U.S. 458 (1900).

54. *Id.* at 467–68. Specifically, the former defendant claimed that several of his co-defendants shot and killed the victim after the victim reported the defendants' illegal possession of a still to a local deputy. *Id.* at 460–61.

55. *Id.* at 467, 470.

56. *Id.* at 471. In reaching its decision, the *Motes* Court extensively cited *Queen v. Scaife*, (1851) 117 Eng. Rep. 1271 (Q.B.), a case in which an English court refused to apply the forfeiture doctrine against a group of defendants who had not caused the absence of the witness. *Motes*, 178 U.S. at 472–73 (citing *Scaife*, (1851) 117 Eng. Rep. at 1273).

57. *Motes*, 178 U.S. at 474. The Court explained that the prosecution had chosen not to place the defendant under the guard of a police officer prior to his testimony, but rather had merely asked another witness to watch over him. *Id.* at 471.

lying rationale. This rationale, however, has shifted over the centuries. Although common-law courts historically justified the forfeiture doctrine using equitable principles,[58] some modern American courts briefly adopted a waiver-based rationale.[59] Recently, however, the Court has confirmed that it evaluates forfeiture cases on equitable grounds.[60]

1. Common-Law Courts Based the Forfeiture Doctrine in Equity

In 1692, an English court first acknowledged the principles underlying the forfeiture doctrine in *Harrison's Case*.[61] In that case, the court required the prosecution to prove that the defendant had procured the witness's unavailability before admitting an absent witness's prior testimony.[62] Explaining its decision, the court emphasized that it would not allow the witness's absence to "conduce to [the defendant's] advantage."[63]

Nearly two centuries later, in *Queen v. Scaife*,[64] another English court reiterated this principle when it admitted prior witness testimony against a defendant who had obtained a witness's absence to prevent the witness's testimony at trial.[65] Examining the theory underlying the forfeiture doctrine, the court reasoned that "justice" would not permit the defendant to take advantage of his own wrongdoing.[66]

The Supreme Court of the United States first recognized this underlying equitable rationale in *Reynolds*. Explaining that the forfeiture doctrine rests both on principles of common honesty and the maxim that "no one shall be permitted to take advantage of his own wrong,"[67]

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58. *See infra* Part II.B.1.

59. *See infra* Part II.B.2.

60. *See infra* Part II.B.2.

61. 12 How. St. Tr. 833 (H.L. 1692).

62. *Id.* at 851–52. Specifically, at the defendant's murder trial, the statement of the absent witness, a young boy, was read into evidence, demonstrating that the boy had seen the defendant leaving the coach where the victim was murdered. *Id.* at 852–53. A witness to the young boy's disappearance testified that three soldiers, believed to have ties to the defendant, had enticed the boy away before he could testify against the defendant. *Id.* at 851–52.

63. *Id.* at 835–36.

64. (1851) 117 Eng. Rep. 1271 (Q.B.).

65. *Id.* at 1273 (stating that the defendant "had resorted to a contrivance to keep the witness out of the way").

66. *Id.* at 1272 (citation and internal quotation marks omitted). The *Scaife* court, however, refused to introduce the absent witness's testimony against two other defendants who were not involved in procuring the witness's absence. *Id.* at 1273.

67. Reynolds v. United States, 98 U.S. 145, 159 (1879).

the Court held that one who procures a witness's absence forfeits his constitutional right to confront that witness.[68]

2. *Modern American Courts Briefly Justified the Forfeiture Doctrine Using a Waiver Rationale Before Returning to Reliance on Equitable Principles*

In the twentieth century, some courts briefly shifted to a waiver rationale to justify the forfeiture doctrine. Reliance upon waiver principles was short-lived, however, with recent courts reiterating that the forfeiture doctrine rests in equity. The Supreme Court first illustrated the shift to a waiver rationale in *Diaz v. United States*.[69] In this case, the Court evaluated whether the lower court had violated the defendant's confrontation right by admitting testimony from the preliminary investigation and the defendant's previous assault and battery trial at his homicide trial.[70] Although it did not base its decision on the traditional forfeiture by wrongdoing doctrine,[71] the *Diaz* Court cited its decision in *Reynolds* and claimed that *Reynolds* served as an illustration of the waiver theory.[72] Discussing the concept of waiver, the Court indicated that in the present case, the defendant waived his confrontation right by voluntarily placing into evidence the testimony in question and thereby seeking to obtain an advantage at trial.[73]

Similarly, in *United States v. Thevis*,[74] the United States Court of Appeals for the Fifth Circuit relied on a waiver theory in determining whether a defendant had forfeited his confrontation right by murdering a witness in order to prevent his testimony.[75] The court explained that waiver involved a defendant's "'intentional relinquishment of a known right or privilege'"[76] and held that the defendant's murder of the witness qualified as a waiver, thus causing him to forfeit his con-

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68. *Id.* at 158.

69. 223 U.S. 442 (1912).

70. *Id.* at 449.

71. *See id.* at 449–51 (explaining that the defendant had waived his confrontation right because he was the one who had offered the testimony without qualification or restriction).

72. *See id.* at 452 ("The view that this [confrontation] right may be waived also was recognized by this court in *Reynolds* . . . ." (citing *Reynolds*, 98 U.S. at 158)).

73. *Id.* at 452–53.

74. 665 F.2d 616 (5th Cir. 1982).

75. *Id.* at 621, 630. Underhill, the witness who had agreed to testify against Thevis, had previously worked with Thevis in the adult entertainment industry and had knowledge of an arson in which Thevis was involved. *Id.* at 622–23. When Thevis discovered that Underhill planned to testify against him, he allegedly lured Underhill to a secluded location and shot and killed him. *Id.* at 624.

76. *Id.* at 630 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

frontation right.[77] Citing *Thevis* with approval, the court in *United States v. Rouco*[78] relied on a waiver theory in finding that a defendant had forfeited his confrontation right.[79] In *Rouco*, the defendant killed an undercover agent of the United States Bureau of Alcohol, Tobacco and Firearms ("ATF") to whom he had previously sold weapons and supplied a cocaine sample when the agent attempted to apprehend him.[80] At trial, over the defendant's objection, the court admitted the agent's prior statement about obtaining the drugs from the defendant.[81] Rejecting the defendant's objection, the court explained that a defendant could waive the right to confront a witness and that by killing the ATF agent, the defendant had "waived" his confrontation right.[82]

Recently, however, in *Crawford v. Washington*,[83] the Supreme Court moved away from reliance on waiver principles as a justification for the forfeiture doctrine. The defendant in *Crawford* stabbed a man who had tried to rape the defendant's wife, and the defendant's wife witnessed the stabbing.[84] At trial, the defendant claimed that he stabbed the victim because he believed the victim had a weapon, but the testimony of the defendant's wife contradicted this claim.[85] When the prosecution attempted to introduce the wife's out-of-court statements to rebut the defendant's claim of self-defense, the defendant claimed that introduction of the statements would violate his confrontation right.[86] Although the *Crawford* Court ultimately sustained the defendant's objection by excluding the statements,[87] it noted that the forfeiture by wrongdoing doctrine extinguishes a defendant's con-

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77. *See id.* ("[W]hen confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived.").

78. 765 F.2d 983 (11th Cir. 1985).

79. *Id.* at 995 (citing *Thevis*, 665 F.2d 616).

80. *Id.* at 985–86. At the time of his death, the agent was again engaged in an undercover investigation. *Id.* at 985. The defendant became suspicious of the deal before the ATF back-up car arrived at the scene. *Id.* at 986. When the defendant attempted to leave the scene, the agent identified himself as a law enforcement official. *Id.* at 986–87. A gun battle ensued, during which the defendant shot the agent in the head. *Id.* at 987.

81. *Id.* at 988, 995.

82. *Id.* at 995 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *Thevis*, 665 F.2d at 630).

83. 541 U.S. 36 (2004).

84. *Id.* at 38.

85. *Id.* at 38–39. Specifically, the defendant's wife stated that she had seen no weapon in the victim's hands when her husband stabbed him. *Id.* at 39–40.

86. *Id.* at 40. The defendant's wife could not testify at his trial because of the state marital privilege doctrine, which bars a spouse from testifying unless the other spouse consents. *Id.*

87. *Id.* at 68. The Court concluded that the wife's inability to testify solely because of the marital privilege doctrine was insufficient to fall within the limited founding-era excep-

frontation right on "essentially equitable grounds."[88] The Court solidified this shift in *Davis v. Washington*.[89] Citing *Crawford* and *Reynolds*, the *Davis* Court reasoned that the forfeiture doctrine's equitable basis ensures that a defendant "who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."[90]

Observing this shift, lower courts have echoed these underlying equitable principles when applying the forfeiture doctrine.[91] For example, in *United States v. Garcia-Meza*,[92] a case decided by the United States Court of Appeals for the Sixth Circuit, the defendant murdered his wife following an argument.[93] Five months prior to her death, the defendant's wife had given testimony to police officers after the defendant violently assaulted her in their home.[94] When the prosecution sought to admit this testimony at trial, the defendant objected, claiming that its admission would violate his confrontation right.[95] Reasoning that the defendant would derive a benefit from his own wrongdoing if his wife's testimony was excluded, the court admitted the testimony pursuant to the forfeiture doctrine and its underlying equitable principles.[96]

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tions to the Confrontation Clause, one of which was the forfeiture by wrongdoing doctrine. *Id.* at 40, 62, 68.

88. *Id.* at 62.

89. 547 U.S. 813 (2006).

90. *Id.* at 833 (citing *Crawford*, 541 U.S. 36; Reynolds v. United States, 98 U.S. 145 (1879)). In *Davis*, the Court considered whether witness statements to police officers following acts of domestic violence qualified as testimonial. *Id.* at 817. After identifying criteria for determining whether a witness's statement qualified as testimonial, the Court then considered the forfeiture by wrongdoing doctrine. *Id.* at 826–27, 833; *see also infra* note 111 and accompanying text.

91. *See, e.g.*, United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005) (citing the forfeiture doctrine's equitable rationale when admitting the testimony of a witness whom the defendant had killed); United States v. Mayhew, 380 F. Supp. 2d 961, 966–68 (S.D. Ohio 2005) (same); State v. Meeks, 88 P.3d 789, 794–95 (Kan. 2004) (same).

92. 403 F.3d 364.

93. *Id.* at 366–67. On the evening of the murder, the defendant and his wife, who were estranged at the time, attended a party together and became involved in a physical confrontation. *Id.* at 366. Following the confrontation, the defendant's wife left the party and returned to her mother's home. *Id.* Later that night, the defendant burst into the home and attempted to lure his wife outside. *Id.* at 367. When she refused to leave the home, the defendant attacked and killed her with a kitchen knife. *Id.*

94. *Id.* at 367. The victim told the officers who interviewed her that the defendant had trapped her in a bathroom, punched her repeatedly, and threatened to kill her because she had talked to a former boyfriend earlier that day. *Id.*

95. *Id.* at 369.

96. *Id.* at 370–71 (citing Crawford v. Washington, 541 U.S. 36, 62 (2004); Reynolds v. United States, 98 U.S. 145, 158–59 (1879)). After considering the forfeiture doctrine's underlying equitable principles, the *Garcia-Meza* court explained that the forfeiture doctrine applies when a defendant's wrongful act has caused a witness's absence from trial—regardless of whether the defendant intended to prevent the witness from testifying. *Id.*

C. *Utilitarian Principles Influence the Application of the Modern Forfeiture Doctrine*

Courts have long considered utilitarian principles—such as the integrity of trial proceedings and the truth-seeking function of the judiciary—when interpreting exceptions to the Confrontation Clause, including the forfeiture by wrongdoing doctrine. In 1895, the Supreme Court considered these principles in *Mattox v. United States*[97] when the defendant objected to the admission of prior testimony from two deceased witnesses.[98] While emphasizing the importance of the confrontation right, the Court acknowledged that this right "must occasionally give way to considerations of public policy."[99] Rejecting the defendant's objection to the admission of the statements, the Court reasoned that while exceptions to the Confrontation Clause existed in part to protect the rights of the accused, they also existed to protect the rights of the greater public.[100]

Following the reasoning in *Mattox*, lower courts have routinely employed the forfeiture by wrongdoing doctrine to protect the integrity of trial proceedings. In *Steele v. Taylor*,[101] the United States Court of Appeals for the Sixth Circuit considered whether to admit the prior statement of an absent witness in a murder-for-hire case.[102] The court reasoned that the disclosure of pertinent information at trial serves a "paramount interest" and that interference with that interest, other than through a legal objection, constitutes a wrongful act.[103] Based on this rationale, the court admitted the absent witness's testimony because the evidence showed that the defendants bore a "major re-

97. 156 U.S. 237 (1895).

98. *Id.* at 240.

99. *Id.* at 243.

100. *Id.* at 243–44 ("Such exceptions [to the Confrontation Clause] were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.").

101. 684 F.2d 1193 (6th Cir. 1982).

102. *Id.* at 1196–97. In *Steele*, a state judge hired two brothers to kill his wife because she would not consent to a divorce. *Id.* at 1197. The police suspected the judge following his wife's murder, but could not solve the case until seven years later when a witness—a prostitute for one of the brothers—came forward. *Id.* After giving inculpatory testimony against the judge and the two brothers, the witness, who was living with one of the brothers and had recently had a child with him, recanted her testimony. *Id.* at 1198. The trial judge allowed her prior testimony to be introduced because he was of the opinion that the defendants "had procured her refusal to testify." *Id.* at 1199.

103. *Id.* at 1201 ("[W]rongful conduct obviously includes the use of force and threats, but it has also been held to include persuasion and control by a defendant [and] the wrongful nondisclosure of information . . . .").

sponsibility for the unavailability of the witness."[104] Similarly, the United States Court of Appeals for the Eighth Circuit in *United States v. Carlson*[105] reiterated the importance of these utilitarian principles when admitting an absent witness's testimony after the defendant had intimidated the witness to prevent him from testifying.[106] To reach its conclusion, the court considered the significance of maintaining an effective justice system, noting that the law should not permit a defendant to "subvert a criminal prosecution" by causing the absence of witnesses who possess inculpatory information.[107]

In 2006, the Supreme Court affirmed that the forfeiture by wrongdoing doctrine serves to protect the truth-seeking function of the courts in *Davis v. Washington*.[108] Although the *Davis* opinion focused on whether a witness's statement was testimonial and thus subject to Confrontation Clause scrutiny,[109] the Court noted that the equitable basis of the forfeiture doctrine imposed a duty on defendants to refrain from destroying the integrity of trial proceedings.[110]

The Supreme Court of Montana, citing *Davis* with approval, applied these utilitarian principles to a domestic violence case in *State v. Sanchez*.[111] In *Sanchez*, the defendant murdered his ex-girlfriend

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104. *Id.* at 1201–02. The *Steele* court also employed the forfeiture doctrine's equitable rationale to support its conclusion, explaining that a defendant could not "prefer the law's preference and profit from it . . . while repudiating that preference by creating the condition that prevents it." *Id.* at 1202; *see supra* Part II.B.

105. 547 F.2d 1346 (8th Cir. 1976).

106. *Id.* at 1359–60. Carlson, the defendant, was on trial for his participation in a cocaine distribution scheme. *Id.* at 1351. Tindall, one of the men who had purchased cocaine from Carlson, agreed to testify at trial about Carlson's illegal activities. *Id.* at 1352. The night before the trial began, however, Tindall stated that he feared reprisals if he testified, explaining that he had received threats from Carlson. *Id.* at 1352–53.

107. *Id.* at 1359 ("The question is one of broad public policy, whether an accused person, placed upon trial for crime . . . can with impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into a solemn farce . . . ." (quoting Diaz v. United States, 223 U.S. 443, 458 (1912))).

108. 547 U.S. 813 (2006).

109. *Id.* at 821. *Davis* involved two cases. In the first case, a domestic violence victim called 911 while her boyfriend assaulted her, and she told the operator about the assault. *Id.* at 817–18. In the second case, police responded to a domestic disturbance call and found the victim alone on the front porch. *Id.* at 819. The victim explained that her husband, who remained inside the home, had attacked her by hitting her and throwing her down into broken glass. *Id.* at 820. The defendants in both cases objected to the introduction of the victims' out-of-court statements, claiming that admission would violate their confrontation right because the statements were testimonial. *Id.* at 819–20.

110. *Id.* at 833 (citing Crawford v. Washington, 541 U.S. 36, 62 (2004)).

111. 177 P.3d 444, 447, 454–56 (Mont. 2008) (citing *Davis*, 547 U.S. 813). The *Sanchez* court also emphasized the forfeiture doctrine's underlying equitable rationale in reaching its conclusion. *Id.* at 453–54 (citing *Crawford*, 541 U.S. at 62; United States v. Garcia-Meza, 403 F.3d 364, 370 (6th Cir. 2005)).

outside her home after discovering that she had started dating one of his co-workers.[112] When the prosecution sought to introduce a note that the victim had written prior to her death implicating the defendant in her murder, the defendant objected.[113] He claimed that introducing the note violated his confrontation right because the note was testimonial, and he had not had the opportunity to cross-examine the victim prior to her death.[114] While the court agreed with the defendant on this point, it rejected his larger Confrontation Clause argument by holding that the defendant had forfeited his confrontation right when he killed the victim.[115] Reasoning that sustaining the defendant's objection would "undermine[ ] the judicial process and threaten[ ] the integrity of court proceedings," the *Sanchez* court concluded that the forfeiture doctrine was not limited to situations in which a defendant killed a witness to prevent the witness from testifying at trial.[116]

III. THE COURT'S REASONING

In *Giles v. California*,[117] the Supreme Court of the United States reversed the judgment of the California Supreme Court, concluding that a defendant only forfeits the right to confront a witness who is absent due to the defendant's wrongful act when the defendant has sought to silence the witness.[118] Writing for the plurality,[119] Justice Scalia began by noting that the Sixth Amendment generally prohibits the introduction of unconfronted witness testimony unless the situation satisfies one of the founding-era exceptions to the confrontation

112. *Id.* at 447.

113. *Id.* At trial, the defendant conceded that he had murdered the victim, but objected to the jury instructions because he felt that they allowed the jurors to consider certain sentencing factors indirectly. *Id.* at 447–48.

114. *Id.* at 451.

115. *Id.* at 453, 456.

116. *Id.* at 456. The court further noted that "though courts may not vitiate constitutional guarantees when they have the effect of allowing the guilty to go free . . . they [need not] acquiesce in the destruction of the criminal-trial system's integrity." *Id.* (internal quotation marks omitted) (quoting *Davis*, 547 U.S. at 833).

117. 128 S. Ct. 2678 (2008).

118. *See id.* at 2683, 2693 (refusing to recognize a modern forfeiture doctrine that is broader than the forfeiture doctrine recognized at common law).

119. Although Justice Scalia garnered the support of a majority of the Court in concluding that the forfeiture doctrine contained a purpose-based intent limitation, only a plurality of the Court supported his reasoning. *See id.* at 2681 (majority opinion) (noting that Justice Scalia delivered the opinion of the Court except as to one part); *id.* at 2694 (Souter, J., concurring) (noting that the historical record alone was insufficient to conclude that the forfeiture doctrine contained a purpose-based intent limitation). Thus, because only three other Justices joined the entirety of Justice Scalia's opinion, his reasoning effectively became a plurality, rather than a majority, opinion. *See id.* at 2681–94 (plurality opinion).

right.[120] The plurality explained that the doctrine of forfeiture by wrongdoing was one of those exceptions, but that the "most natural reading"[121] of the text in the founding-era forfeiture cases demonstrated that the doctrine only applied where the defendant had the purpose of causing the witness's absence from trial.[122] To arrive at this conclusion, the plurality noted that the language of the founding-era forfeiture cases embodied a purpose-based definition.[123] For example, it claimed that common-law courts frequently used the word "procure" to describe the defendant's action of keeping a witness away, and that some dictionaries at the time defined "procure" as "to *contrive* and effect," indicating a purpose-based intent limitation.[124]

In its historical analysis, the plurality also noted that it had not located any founding-era precedent admitting prior witness statements on a forfeiture theory when the defendant had not sought to prevent witness testimony through his wrongful act.[125] In other words, it reasoned that if the common-law forfeiture doctrine applied regardless of the defendant's state of mind, common-law judges and prosecutors would have routinely invoked it to admit witness testimony, which they did not do.[126] The plurality then continued its historical analysis by explaining that its review of the founding-era cases in fact demonstrated that common-law courts uniformly excluded unconfronted witness statements unless the prosecution could show that the defendant removed the witness to prevent his testimony.[127] Noting that the forfeiture doctrine existed as a disincentive for defendants to harm witnesses,[128] the plurality also explained that it had

120. *Id.* at 2682 (plurality opinion). As neither party disputed the issue, both the plurality and dissent accepted without deciding that Avie's prior statements to the police were testimonial. *Id.*; *id.* at 2695 (Breyer, J., dissenting). Justices Thomas and Alito concurred in the plurality opinion, but each wrote separately, explaining that they did not believe Avie's statements were testimonial. *Id.* at 2693 (Thomas, J., concurring); *id.* at 2694 (Alito, J., concurring).

121. *Id.* at 2688 (plurality opinion).

122. *Id.* at 2683.

123. *Id.* at 2683–84.

124. *Id.* (emphasis added by the Court) (internal quotation marks omitted) (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

125. *Id.* at 2688.

126. *Id.* at 2686.

127. *Id.* at 2688. The plurality reasoned that the lack of judicial consideration of unavailable witness statements in common-law cases where defendants had not sought to silence witnesses demonstrated that the forfeiture doctrine applied only where the defendant desired to prevent a witness from testifying. *Id.* at 2684–85.

128. *Id.* at 2686, 2691.

discovered no case prior to 1985 applying forfeiture without a purpose-based intent limitation.[129]

Finding these considerations "conclusive,"[130] the plurality then rejected the dissent's consideration of the forfeiture doctrine's "basic purposes and objectives"[131] to justify its disagreement with the plurality's historical findings.[132] The plurality described the boundaries of the doctrine as "intelligently fixed" by history, noting that even if it were to consider the principles suggested by the dissent, its analysis would be unlikely to change.[133] In doing so, the plurality also explained that positing a forfeiture doctrine without a purpose-based intent limitation would essentially permit a judge, instead of a jury, to determine a defendant's guilt.[134]

After critiquing the dissent's reasoning, the plurality concluded that the forfeiture doctrine only applies when a defendant causes a witness's absence in order to silence the witness.[135] In doing so, however, it noted special considerations that may apply in the domestic violence context.[136] Specifically, the plurality explained that prior abuse or threats of abuse made to dissuade domestic violence victims from seeking outside help might be relevant to determining whether a defendant desired to prevent a witness from testifying.[137]

In a separate opinion, Justice Souter concurred in part, explaining that he did not find the historical record alone sufficient to ascertain the common-law limitations of the forfeiture doctrine in domestic abuse cases.[138] Instead, he emphasized the equitable rationale underlying the forfeiture by wrongdoing doctrine and reasoned that applying the doctrine without a purpose-based intent limitation would

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129. *Id.* at 2687–88 (citing United States v. Rouco, 765 F.2d 983 (11th Cir. 1985)).

130. *Id.* at 2688.

131. *Id.* at 2691 (internal quotation marks omitted).

132. *See id.* at 2691–92 (recognizing that "[t]he Sixth Amendment seeks fairness indeed" but that it does so by looking to "the trial rights of [early common-law] Englishmen").

133. *Id.* at 2691.

134. *Id.* (noting that a forfeiture doctrine that applies only when a defendant seeks to prevent a witness from testifying avoids "a principle repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty . . . should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong").

135. *Id.* at 2683, 2693 (rejecting the dissent's characterization of the plurality's standard as "knowledge-based intent" (internal quotation marks omitted)).

136. *Id.* at 2693.

137. *Id.*

138. *Id.* at 2694–95 (Souter, J., concurring) ("[D]omestic abuse had no apparent significance at the time of the Framing, and there is no early example of the forfeiture rule operating in that circumstance.").

violate fundamental principles of fairness.[139] In addition, Justice Souter noted that early cases and commentary demonstrated that a defendant did not forfeit his confrontation right unless he attempted to thwart the judicial process, which Justice Souter concluded only occurred when a defendant sought to silence a witness.[140] Finally, he explained that an ongoing abusive relationship would normally support the inference that a domestic abuser desired to isolate the victim from the judicial process, thus making the victim's prior statements admissible under the forfeiture doctrine.[141]

Justice Breyer dissented, contending that the plurality erroneously concluded that the forfeiture by wrongdoing doctrine includes a purpose-based intent limitation.[142] Unlike the plurality,[143] before evaluating the forfeiture doctrine's relevant history, Justice Breyer noted that the doctrine rests "on essentially equitable grounds."[144]

In his historical analysis, Justice Breyer contended that the broad language of the founding-era cases indicated that the forfeiture doctrine applies based upon the known consequences, rather than the purpose, of the defendant's conduct.[145] For example, citing *Lord Morley's Case*[146] and *Reynolds v. United States*,[147] he explained that early forfeiture cases focused on witnesses absent by the "*means or procurement*"[148] of the defendant or due to the "*legitimate* conse-

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139. *Id.* at 2694 (explaining that introduction of an absent witness's statement where the defendant murdered the witness without seeking to silence her would result in "circularity" because a judge would admit the statement based on the judge's determination that the defendant probably committed the murder).

140. *Id.* at 2694–95.

141. *Id.* at 2695.

142. *Id.* at 2700–01 (Breyer, J., dissenting).

143. *Id.* at 2682 (plurality opinion) (noting immediately that its analysis would focus on the forfeiture doctrine as a "founding-era exception to the confrontation right").

144. *Id.* at 2695 (Breyer, J., dissenting) (internal quotation marks omitted) (quoting Crawford v. Washington, 541 U.S. 36, 62 (2004)).

145. *Id.* at 2700–01. Justice Breyer also rejected the plurality's assertion that it was significant that common-law courts invoked forfeiture only in cases where defendants sought to prevent witnesses from testifying. *Id.* at 2702. Rather, Justice Breyer explained that common-law courts rarely invoked the forfeiture doctrine because, at common law, the forfeiture doctrine only applied to prior confronted testimony. *See id.* (noting that "the most obvious reason" why common-law courts failed to invoke the forfeiture rule in murder trials was because prior statements must have been taken in the defendant's presence in order to be admissible at trial).

146. 6 How. St. Tr. 769 (H.L. 1666).

147. 98 U.S. 145 (1879).

148. *Giles*, 128 S. Ct. at 2696 (emphasis added by the dissent) (internal quotation marks omitted) (quoting *Lord Morley's Case*, 6 How. St. Tr. at 771).

quences"[149] of the defendant's act, neither of which suggested purpose-based intent.[150]

Justice Breyer thus adduced that the plurality's purpose-based intent standard not only misinterpreted the text of early forfeiture cases,[151] but also failed to uphold the doctrine's basic objective—to prevent a defendant from taking advantage of his own wrong.[152] He reasoned that, particularly in cases of domestic violence, imposing a purpose-based intent limitation on the forfeiture doctrine could permit a domestic partner who made threats, caused violence, or even murdered the victim "to avoid conviction for earlier crimes by taking advantage of later ones."[153]

In addition, Justice Breyer explained that placing a purpose-based intent limitation on the forfeiture doctrine aggravated evidentiary incongruities by excluding testimony merely because there was no evidence that a defendant was focused on his future murder trial when he killed a witness.[154] He further reasoned that the standard posited by the plurality would limit the amount of evidence that the jury would hear by excluding the victim's potentially relevant prior testimonial statements.[155] As a result, Justice Breyer concluded that "no history, no underlying purpose, no administrative consideration, and no constitutional principle" required the Court to adopt a purpose-based intent limitation on the forfeiture by wrongdoing doctrine.[156] Therefore, he posited that the forfeiture doctrine should apply when a defendant knows that his wrongful act will make a witness unavailable to testify at trial.[157]

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149. *Id.* at 2700 (emphasis added by the dissent) (internal quotation marks omitted) (quoting *Reynolds*, 98 U.S. at 158).

150. *Id.* at 2700–01.

151. *Id.*

152. *Id.* at 2697. To bolster his argument, Justice Breyer looked to related areas of law that employ similar equitable principles to prevent defendants from gaining an advantage when they have committed a wrongful act, particularly murder. *See id.* (examining common-law principles that prevent defendants who murder from collecting under the victims' life insurance policies, irrespective of the defendants' purpose in committing the murder).

153. *Id.* at 2709.

154. *Id.* at 2699.

155. *Id.* at 2708.

156. *Id.* at 2709.

157. *See id.* at 2700–01 (explaining that the forfeiture by wrongdoing doctrine applies based on the "known consequence"—rather than the desired consequences—of a defendant's actions (emphasis omitted)).

IV. ANALYSIS

In *Giles v. California*, the Supreme Court concluded that the Sixth Amendment prohibits the use of an absent witness's unconfronted testimony unless the defendant, seeking to prevent the witness from testifying, has caused the witness's absence.[158] By mistakenly relying on a historical analysis in reaching this conclusion,[159] a plurality of the Court conflated a waiver rationale with the forfeiture doctrine's underlying equitable principles[160] and inadequately considered the utilitarian principles that inform the application of the doctrine.[161] If the plurality had instead considered these equitable and utilitarian principles, it would not have needed to retreat from its opinion and would have instead posited a knowledge-based intent standard.[162]

In concluding that the forfeiture by wrongdoing doctrine contained a purpose-based intent limitation, the plurality erred by looking primarily to the doctrine's history—which is ambiguous at best. Throughout its opinion, the plurality analyzed early common-law forfeiture cases, determining that the doctrine's history conclusively demonstrated that the forfeiture doctrine only applied where a defendant sought to silence a witness.[163] After reaching this conclusion, the plurality then proceeded to attack the dissent for looking beyond the forfeiture doctrine's history to support its analysis.[164] A reading of the entire opinion, however, quickly demonstrates that the history of the doctrine is anything but conclusive, particularly as the plurality and dissent each painstakingly examined the language of the same cases,

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158. *See id.* at 2683, 2693 (majority opinion) (explaining that common-law courts employed the forfeiture doctrine only when a defendant engaged in conduct to prevent a witness from testifying and that the Court would not approve a modern forfeiture doctrine broader than the one existing at common law). As previously noted, although a majority of the Court endorsed a forfeiture doctrine containing a purpose-based limitation, only a plurality of the Court supported Justice Scalia's reasoning. *See supra* note 119.

159. *See infra* Part IV.

160. *See infra* Part IV.A.

161. *See infra* Part IV.B.

162. *See infra* Part IV.C.

163. *Giles*, 128 S. Ct. at 2688 (plurality opinion) (describing its historical analysis as "conclusive" in determining the scope of the forfeiture doctrine).

164. *See id.* at 2691 ("Having destroyed its own case, the dissent issues a thinly veiled invitation to . . . adopt an approach . . . under which the Court would create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood."); Josephine Ross, *When Murder Alone Is Not Enough: Forfeiture of the Confrontation Clause After* Giles, CRIM. JUST., Spring 2009, at 34, 36 ("In Part II-D-2, Justice Scalia attacked the dissent for basing its decision on equity grounds instead of the history of confrontation.").

yet reached opposite conclusions about its meaning.[165] In fact, a majority of the Justices acknowledged the ambiguity of the forfeiture cases, further indicating that reliance on history alone is insufficient to determine the contours of the forfeiture by wrongdoing doctrine.[166] As a result, the plurality erred in concentrating on a historical analysis, rather than looking to the forfeiture doctrine's other underlying considerations, in reaching its conclusion.[167]

A. The Plurality Conflated a Waiver Rationale with the Forfeiture Doctrine's Underlying Equitable Principles

By holding that the forfeiture by wrongdoing doctrine contained a purpose-based intent limitation, the plurality conflated the doctrine's equitable foundation with a waiver rationale. Waiver theory, briefly used as a justification for the forfeiture doctrine, is based on a defendant's intentional decision to relinquish the protection of his confrontation right.[168] In effect, waiver theory requires that the defendant have his future trial in mind at the time he acts in order for forfeiture of confrontation rights to occur.[169] As a result of this requirement, some courts relying on waiver theory have imposed an in-

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165. For example, the plurality cites the "means or procurement" test employed by the court in *Lord Morley's Case*, 6 How. St. Tr. 769, 771 (H.L. 1666), to support its proposition that the forfeiture doctrine contained a purpose-based intent limitation. *Giles*, 128 S. Ct. at 2683. The dissent then employs the same phrase to support its conclusion that forfeiture requires knowledge-based intent rather than purpose-based intent. *Id.* at 2696 (Breyer, J., dissenting).

166. *See Giles*, 128 S. Ct. at 2694 (Souter, J., concurring) (explaining that the historical record revealed by the plurality and dissent's exchange was insufficient to reach a conclusion about the forfeiture doctrine's limitations); *id.* at 2704, 2707 (Breyer, J., dissenting) (explaining that there may be "too few old records available for us to draw firm conclusions" and the fact that judges will employ different interpretations is "[a]ll the more reason then *not* to reach firm conclusions about the precise metes and bounds of a contemporary forfeiture exception by trying to guess the state of mind of 18th century lawyers").

167. *See* Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 892 (2009) (noting the historical, equitable, and utilitarian considerations that inform the modern forfeiture doctrine and reasoning that a narrow focus on only one rationale could jeopardize the longevity of the forfeiture doctrine).

168. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("[W]aiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."); Diaz v. United States, 223 U.S. 442, 451 (1912) ("The defendant undoubtedly had a constitutional right to be confronted with his witnesses. He waived that right in this case, apparently for his own supposed advantage and to obtain evidence on his own behalf."); *see also supra* Part II.B.2.

169. *See* Steele v. Taylor, 684 F.2d 1193, 1201 n.8 (6th Cir. 1982) (noting that the concept of waiver is a legal fiction based on purposeful consideration and understanding of future consequences at the time the defendant commits the wrongful act).

tent-to-silence limitation on the forfeiture by wrongdoing doctrine.[170] Such a limitation assumes that the forfeiture doctrine exists to place defendants on notice about a potential witness and to inform the defendant that harming the witness will result in a relinquishment of the defendant's confrontation right.[171] Based on this rationale, when a defendant does not act with notice that a person will testify at his trial and with the intent to abandon his right to confront that person, the defendant cannot forfeit his confrontation right.[172]

This interpretation, however, does not comport with the Court's recent reiteration that the forfeiture doctrine rests in equity.[173] Because equitable principles serve as the doctrine's basis, courts must look not to whether a defendant had notice that he would forfeit a constitutional right, but must instead look to whether a defendant would profit from his wrongful act if the absent witness's statement is not admitted.[174] Where the defendant would derive a benefit from his wrongful act, equity demands that the defendant must forfeit his confrontation right, even if he acted without the desire to prevent the witness from testifying at trial.[175]

In its opinion, the plurality erroneously invoked a waiver rationale to justify its conclusion that the forfeiture doctrine contained a purpose-based intent limitation. Criticizing the dissent for its consid-

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170. *See, e.g.*, United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982) (concluding that a defendant who murdered a witness to prevent the witness from testifying against the defendant "waived" his confrontation right).

171. *See* United States v. Houlihan, 92 F.3d 1271, 1279–80 (1st Cir. 1996) (discussing the forfeiture doctrine and waiver theory and noting that the intent-to-silence requirement provides this notice), *noted in* People v. Giles, 152 P.3d 433, 443 (Cal. 2007).

172. *See Thevis*, 665 F.2d at 630 (explaining that a defendant waives his confrontation right *only* when he procures a witness's absence with the understanding that his action will cause him to relinquish that right).

173. *See* Crawford v. Washington, 541 U.S. 36, 62 (2004) (explaining that the forfeiture by wrongdoing doctrine extinguishes confrontation rights on "essentially equitable grounds"). The plurality's interpretation also contradicts the very idea of forfeiture itself, which is the loss of a constitutional right based on a defendant's *misconduct*, not a defendant's intentional decision to relinquish that right. *See* Ralph Ruebner & Eugene Goryunov, Giles v. California*: Sixth Amendment Confrontation Right, Forfeiture by Wrongdoing, and a Misguided Departure from the Common Law and the Constitution*, 40 U. TOL. L. REV. 577, 588 (2009) (emphasizing that forfeiture does not require that a defendant make a "deliberate, informed decision to relinquish [his rights]" (internal quotation marks omitted)).

174. *See* Reynolds v. United States, 98 U.S. 145, 159 (1879) (noting that the forfeiture doctrine rests on the maxim that "no one shall be permitted to take advantage of his own wrong").

175. *See* United States v. Garcia-Meza, 403 F.3d 364, 370–71 (6th Cir. 2005) (considering the equitable basis of the forfeiture doctrine and concluding that a defendant had forfeited his right to confront his ex-girlfriend by killing her in an act of domestic violence even though the defendant did not act to prevent the victim from testifying).

eration of the forfeiture doctrine's "basic purposes and objectives,"[176] the plurality explained that the forfeiture doctrine existed solely to provide a disincentive for defendants to harm witnesses.[177] Such a justification, however, improperly rests on waiver principles by defining forfeiture as a mechanism to put defendants on notice that they will relinquish their confrontation right if they seek to obtain an advantage at trial.[178] As a result, to justify the forfeiture by wrongdoing doctrine, the plurality effectively reverted to a waiver rationale, which the Court had previously repudiated when it concluded that the forfeiture doctrine rests in equity.[179]

The plurality thus overlooked entirely the equitable principles underlying the forfeiture doctrine and posited a standard that essentially permits defendants to take advantage of their own wrongful acts by excluding inculpatory statements of absent witnesses.[180] In effect, the plurality's purpose-based intent standard allows defendants to use the Sixth Amendment as a shield from their own misconduct,[181] an action that courts have long found to be contrary to the interests of justice.[182]

B. The Plurality Inadequately Addressed the Utilitarian Principles that Inform the Application of the Modern Forfeiture Doctrine

In holding that the forfeiture by wrongdoing doctrine applies only when a defendant has sought to prevent a witness from testifying,

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176. Giles v. California, 128 S. Ct. 2678, 2691 (2008) (plurality opinion) (internal quotation marks omitted).

177. *Id.*

178. *See* People v. Giles, 152 P.3d 433, 442–43 (Cal. 2007) (explaining that placing an intent-to-silence requirement on the forfeiture doctrine is an erroneous characterization of forfeiture as waiver).

179. *See* Crawford v. Washington, 541 U.S. 36, 62 (2004) ("[T]he rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds . . . .").

180. *See Giles*, 128 S. Ct. at 2697 (Breyer, J., dissenting) (explaining that the plurality's interpretation fails to recognize the "basic purposes," that is, the equitable nature, of the forfeiture doctrine). In fact, Justice Scalia himself appears to acknowledge that the plurality disregarded the equitable principles underlying the forfeiture doctrine: "If we *were* to reason from the 'basic purposes and objectives' of the forfeiture doctrine, we are not at all sure we would come to the dissent's favored result." *Id.* at 2691 (plurality opinion) (emphasis added).

181. *See* United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985) ("'The Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery.'" (quoting United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976))).

182. *See* Harrison's Case, 12 How. St. Tr. 833, 835–36 (H.L. 1692) (explaining that procuring a witness's absence was "a very ill thing" and that the court would not permit the witness's absence to benefit the defendant); Queen v. Scaife, (1851) 117 Eng. Rep. 1271, 1272 (Q.B.) (noting that "justice" would not allow a defendant to take advantage of his procurement of a witness's absence (citation and internal quotation marks omitted)).

the plurality inadequately addressed the utilitarian principles that forfeiture cases have long emphasized. As a result, the plurality's purpose-based intent standard compromised both the truth-seeking function of the trial process and the integrity of court proceedings.

It is well-established that the mission of the Confrontation Clause is to "advance the accuracy of the truth-seeking process in criminal trials."[183] This mission, however, carries with it the explicit recognition that the confrontation right may be limited when a defendant attempts to use it in a way that would sacrifice the rights of the public or undermine the criminal justice system.[184] Although many of the forfeiture by wrongdoing cases that utilize utilitarian principles to limit the confrontation right involve overt attempts to prevent witness testimony,[185] courts employing these principles have not limited their application to cases in which a defendant sought to silence a witness.[186] As a result, utilitarian principles can influence the application of the forfeiture doctrine even when a defendant whose wrongful act caused a witness's unavailability did not desire to prevent the witness from testifying.[187]

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183. United States v. Inadi, 475 U.S. 387, 396 (1986) (internal quotation marks omitted) (quoting Tennessee v. Street, 471 U.S. 409, 415 (1985)); *see also* Kentucky v. Stincer, 482 U.S. 730, 737 (1987) (noting that a defendant's right to cross-examine witnesses is a "functional right designed to promote reliability in the truth-finding functions of a criminal trial" (internal quotation marks omitted)); Mattox v. United States, 156 U.S. 237, 242–43 (1895) (explaining that the primary object of the Confrontation Clause is to allow the jury to see witnesses in order to determine whether their testimony is worthy of belief).

184. *Mattox*, 156 U.S. at 243; *Carlson*, 547 F.2d at 1359 (explaining that notions of public policy and the administration of the justice system must enter into the resolution of forfeiture cases).

185. *See, e.g.*, Steele v. Taylor, 684 F.2d 1193, 1201–02 (6th Cir. 1982) (employing the forfeiture doctrine when defendants sought to prevent a witness's inculpatory testimony through various means); *Carlson*, 547 F.2d at 1359–60 (utilizing the doctrine to admit a witness's prior testimony after the defendant intimidated the witness to prevent him from testifying).

186. For example, in *Steele v. Taylor*, although the court compared the case to other cases in which the defendants sought to prevent testimony, the court alluded to a broader forfeiture rule that would admit prior witness statements when a defendant's wrongful conduct made a witness unavailable. *See Steele*, 684 F.2d at 1202 ("A prior statement given by a witness made unavailable by the wrongful conduct of a party is admissible against the party if the statement would have been admissible had the witness testified."). Similarly, the court in *United States v. Carlson* focused on the witness's absence as a result of the defendant's wrongful acts, irrespective of whether the defendant acted with the purpose of preventing testimony. *See Carlson*, 547 F.2d at 1359 ("Nor should the law permit an accused to subvert a criminal prosecution by causing witnesses not to testify at trial who have, at the pretrial stage, disclosed information which is inculpatory as to the accused.").

187. *See* State v. Sanchez, 177 P.3d 444, 456 (Mont. 2008) (noting that permitting a defendant who murdered his ex-girlfriend to invoke the protection of the Confrontation Clause would threaten the integrity of court proceedings, even though the defendant did not commit the murder in order to stop the victim from testifying).

The plurality, however, failed to consider these principles in its analysis.[188] Nowhere in its opinion did the plurality seriously examine the implications of its purpose-based intent standard on public policy and the administration of justice,[189] two long-standing components of utilitarian principles.[190] Specifically, the plurality summarily dismissed the suggestion that its purpose-based intent standard could actually hinder the criminal trial process by excluding relevant information from the jury's consideration.[191] In so doing, the plurality disregarded the fact that the disclosure of relevant information, such as inculpatory witness testimony, is a "paramount interest" at trial, such that any significant interference with that interest constitutes a wrongful act.[192] As a result, the plurality failed to consider that a defendant whose wrongful act causes a witness's unavailability at trial has interfered with that "paramount interest" to an extent that demands the admission of the absent witness's prior statements at trial.[193]

In addition to disregarding the importance of disclosing relevant information at trial, the plurality ignored the impact of its purpose-based intent standard on the integrity of trial proceedings.[194] The plurality did not address the fact that its standard permits defendants to subvert their criminal prosecutions by presenting only one self-serving side of the story to the jury.[195] Courts, however, have long looked to such a consideration when applying the forfeiture by wrongdoing

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188. *See* Lininger, *supra* note 167, at 892 (explaining that the plurality's "exclusively originalist conception of forfeiture" resulted in a standard that offends utilitarian sensibilities).

189. *Id.*; *see* Giles v. California, 128 S. Ct. 2678, 2678–93 (2008) (plurality opinion).

190. *See* United States v. Mattox, 156 U.S. 237, 243 (1895) (explaining that a defendant's confrontation right must occasionally yield to considerations of public policy); *Carlson*, 547 F.2d at 1359 (noting that courts must consider the effective administration of justice when determining whether a defendant has forfeited his confrontation right).

191. *Giles*, 128 S. Ct. at 2692 n.7 (briefly noting that its purpose-based intent standard intentionally limited the introduction of evidence by the prosecution without imposing a corresponding limitation on the evidence that a defendant could introduce).

192. Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir. 1982).

193. *See id.* (noting that wrongful nondisclosure of information is a substantial interference with the "paramount interest" of disclosing relevant information at trial); People v. Giles, 152 P.3d 433, 444 (Cal. 2007) (explaining that courts should be able to advance the truth-seeking function of the trial process by allowing the jury to hear relevant evidence that the defendant's actions have made unavailable through live testimony).

194. *See* Davis v. Washington, 547 U.S. 813, 833 (2006) (discussing a defendant's duty to refrain from destroying the integrity of criminal trials by procuring the absence of witnesses).

195. *See Giles*, 128 S. Ct. at 2699 (Breyer, J., dissenting) (explaining that the plurality's standard permits an abuser to testify at length and "in damning detail" about the victim's behavior "as he remembers [it]," without generally permitting the victim to reply).

doctrine,[196] noting that the Sixth Amendment does not oblige courts to acquiesce when defendants undermine the judicial process in such a way.[197] By failing to consider the importance of maintaining the integrity of court proceedings and providing jurors with relevant information at trial, the plurality inadequately addressed the utilitarian principles that impact the forfeiture by wrongdoing doctrine.

In fact, the plurality's one cursory attempt to invoke utilitarian principles to support its purpose-based intent standard failed at the first step. The plurality claimed that use of a forfeiture by wrongdoing doctrine without a purpose-based intent limitation would undermine the criminal trial system by permitting a judge, rather than a jury, to determine a defendant's guilt.[198] But such a conclusion rests on a faulty premise. Contrary to the plurality's assertions, *any* forfeiture by wrongdoing doctrine would require a judge to determine whether a defendant's wrongful act caused the witness's unavailability before admitting an absent witness's prior statements.[199] This determination, however, would not remove a defendant's right to a trial by jury because jurors would never learn of the judge's preliminary determination in admitting the evidence at trial.[200] In fact, judges have long made such preliminary determinations of guilt before admitting incul-

196. *See* United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976) (noting that the law will not permit a defendant to cloak himself in constitutional and procedural safeguards while "'defy[ing]'" with impunity the processes of the law and "'paralyz[ing]'" courtroom and jury proceedings (quoting Diaz v. United States, 233 U.S. 442, 458 (1912))).

197. *See* State v. Sanchez, 177 P.3d 444, 456 (Mont. 2008) (citing *Davis*, 547 U.S. at 833) (explaining that a purpose-based intent standard would permit certain defendants who commit intentional criminal acts resulting in a victim's death to use the death to exclude the victim's admissible testimony, thereby subverting the judicial process). The *Davis* Court's reference to defendants who "'seek to undermine the judicial process by procuring or coercing'" witness silence does not change the conclusion that the forfeiture doctrine applies when a defendant knowingly causes a witness's absence from trial. *See Giles*, 152 P.3d at 443 n.5 (emphasis omitted) (quoting *Davis*, 547 U.S. at 833) (explaining that while this language may have described the traditional form of witness tampering cases, it did not limit the forfeiture doctrine to witness tampering cases alone, particularly because the *Davis* Court reiterated the equitable basis of the forfeiture doctrine).

198. *Giles*, 128 S. Ct. at 2691–92 (plurality opinion).

199. *Id.* at 2707 (Breyer, J., dissenting). The plurality appears to concede this point when noting that its own standard would "sometimes" require a judge to determine whether a defendant sought to prevent a witness's testimony before admitting that witness's prior statements. *Id.* at 2692 n.6 (plurality opinion).

200. *See* United States v. Mayhew, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005) (explaining that a preliminary judicial determination of guilt does not violate a defendant's right to a jury trial because the jury "will never learn of the judge's preliminary finding" and the jury "will use different information and a different standard of proof to decide the defendant's guilt").

patory testimony.[201] Therefore, the plurality's fleeting reference to the utilitarian principles influencing the forfeiture doctrine fails to support its own case for a purpose-based intent standard, merely reinforcing the observation that the plurality inadequately addressed these principles in reaching its conclusion.[202]

C. If It Had Considered Equitable and Utilitarian Principles, the Plurality Would Not Have Needed to Retreat from Its Opinion and Would Have Instead Posited a Knowledge-Based Intent Standard

As a result of its failure to consider the equitable and utilitarian principles underlying the forfeiture doctrine, the plurality posited a purpose-based intent standard from which it had to retreat at the end of its opinion.[203] If the plurality had instead considered these equitable and utilitarian principles in its analysis, it would have posited a knowledge-based intent standard from which it would not have needed to withdraw.[204]

1. The Tension Between the Plurality's Purpose-Based Intent Standard and the Doctrine's Underlying Equitable and Utilitarian Principles Caused the Plurality to Retreat from Its Own Opinion

Although the plurality concluded that the forfeiture by wrongdoing doctrine applied only when a defendant sought to silence an ab-

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201. *Giles*, 128 S. Ct. at 2707 (Breyer, J., dissenting). In addition to forfeiture cases, judges have also routinely made preliminary findings of guilt in conspiracy cases. *See* Bourjaily v. United States, 483 U.S. 171, 175–76 (1987) (permitting a judge to make an initial finding regarding the existence of a conspiracy in order to determine whether a co-conspirator's statement can be admitted under an exception to the hearsay rule). The plurality attempts to distinguish *Bourjaily* on the ground that it does not implicate the Confrontation Clause. *See Giles*, 128 S. Ct. at 2692 n.6 (plurality opinion) (explaining that the statement in *Bourjaily* was not testimonial). This effort, however, necessarily fails because *Bourjaily* stands for the proposition that a judge can make an initial determination of a defendant's guilt without violating the defendant's constitutional right to a jury trial. *Bourjaily*, 483 U.S. at 175–76. It is this proposition, not one relating to the defendant's confrontation right, with which the plurality takes issue when declaring that the knowledge-based intent standard posited by the dissent would sacrifice a defendant's right to a jury trial. *See Giles*, 128 S. Ct. at 2691–92 & n.6; *Bourjaily*, 483 U.S. at 181 (separately addressing the defendant's Confrontation Clause objection after determining that the trial court could make a preliminary determination of the defendant's guilt).

202. *See* Lininger, *supra* note 167, at 892 (acknowledging the plurality's failure to address adequately the utilitarian principles impacting the forfeiture doctrine).

203. *See infra* Part IV.C.1.

204. *See infra* Part IV.C.2.

sent witness,[205] it retreated from this standard at the end of its opinion.[206] Specifically, in its conclusion, the plurality unexpectedly addressed the application of its standard to the context of domestic violence, noting that a history of domestic violence could satisfy its stringent purpose-based intent standard without requiring a showing that the defendant desired to prevent the witness from testifying.[207] Although it repeatedly asserted that founding-era cases alone serve as the touchstone for the modern forfeiture doctrine,[208] the plurality did not cite to a single case in its opinion as an illustration of domestic violence.[209] Therefore, the plurality's sudden discussion of domestic violence at the end of its opinion is inconsistent with the remainder of its opinion, which relied upon the analysis of early common-law forfeiture cases to demonstrate the strict confines of the forfeiture doctrine.[210]

The tension between the plurality's purpose-based intent standard and the equitable and utilitarian principles that inform the forfeiture doctrine's application drove this retreat.[211] As previously discussed, the plurality's analysis failed to examine diligently any rationale other than history.[212] As a result of its reliance upon an "exclusively" historical analysis, the plurality posited a purpose-based standard that contradicted both equitable and utilitarian princi-

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205. *See Giles*, 128 S. Ct. at 2683, 2693 (explaining that the common-law forfeiture by wrongdoing doctrine applied only when a defendant's conduct was "designed" to prevent a witness from testifying and that the Court would not approve a doctrine broader than the one existing at common law).

206. *See id.* at 2693 (explaining how the standard may operate differently in cases involving domestic violence).

207. *See id.* (noting that evidence of an abusive relationship resulting in a murder "may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities" and that such evidence would result in the defendant's forfeiture of his confrontation right).

208. *Id.* at 2682–83, 2692.

209. *See id.* at 2681–93. In fact, the plurality did not even employ the phrase "domestic violence" until the end of its opinion, when it abruptly began discussing the implications of its forfeiture doctrine for domestic violence cases. *Id.* at 2693.

210. *See* Lininger, *supra* note 167, at 886 (explaining that the plurality's discussion of the forfeiture doctrine in the domestic violence context "seemed at odds with the preceding analysis in which Scalia had repeatedly insisted upon proof of specific intent to thwart testimony"); *see also* David G. Savage, *Justices Side with Accused*, L.A. TIMES, June 26, 2008, at A19 (describing as "puzzling" the plurality's discussion of forfeiture in the domestic violence context). In fact, the dissent also seemed to recognize this inconsistency. *See Giles*, 128 S. Ct. at 2708 (Breyer, J., dissenting) (discussing the plurality's apparent use of a knowledge-based intent standard in domestic violence cases).

211. See *supra* Part IV.A–B for discussion of the plurality's disregard of these equitable and utilitarian principles.

212. *See Giles*, 128 S. Ct. at 2691–92 (plurality opinion) (criticizing the dissent for looking beyond the forfeiture doctrine's history to determine the boundaries of the doctrine).

ples.[213] Apparently recognizing this tension and the need to mollify those who would criticize its standard as unjust, the plurality had to backpedal from its stringent purpose-based standard.[214] By briefly explaining the ways that a history of domestic abuse could permit a prosecutor to sidestep the plurality's strict standard, the plurality thus retreated from its own opinion, attempting to compensate for its earlier disregard for the forfeiture doctrine's underlying equitable and utilitarian rationales.[215]

2. *If It Had Considered These Equitable and Utilitarian Principles in Its Analysis, the Plurality Would Have Posited a Knowledge-Based Intent Standard*

The plurality would have appropriately preserved the equitable and utilitarian rationales for the forfeiture by wrongdoing doctrine if it had posited a knowledge-based intent standard. First, concluding that the forfeiture by wrongdoing doctrine applies when a defendant knows, rather than desires, that his wrongful act will prevent a witness's testimony ensures that a defendant does not profit from his wrongdoing,[216] a concept emphasized by courts for centuries.[217] Such a standard thus precludes defendants from excluding inculpatory witness testimony and from using the Sixth Amendment as a shield from their own misconduct.[218] The standard also rejects the theory that the forfeiture doctrine exists to place defendants on notice that they will relinquish their confrontation rights by causing a witness to be absent from trial.[219] As a result, use of the forfeiture by wrongdoing doctrine

213. *See* Lininger, *supra* note 167, at 892 (describing the purpose-based intent standard resulting from the plurality's "narrow" historical focus as "untenable" when compared to the doctrine's underlying equitable and utilitarian principles); *see also supra* Part IV.A–B.

214. *See* Lininger, *supra* note 167, at 887 ("The first 90% of the opinion[ ] set forth originalist analysis . . . . [But t]he last 10% then [sought] to assure the liberal Justices that more confrontation in court will not mean more confrontation at home.").

215. *See supra* Part IV.A–B.

216. *See Giles*, 128 S. Ct. at 2699 (Breyer, J., dissenting) (explaining that inequity results when a defendant knows that his wrongful action will cause a witness's absence at trial and the defendant acts nonetheless).

217. *See, e.g.*, Harrison's Case, 12 How. St. Tr. 833, 835–36 (H.L. 1692) (refusing to allow a witness's absence to "conduce to [the defendant's] advantage" when the defendant procured the witness's absence from trial).

218. *See* United States v. Rouco, 765 F.2d 983, 995 (11th Cir. 1985) ("'The Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery.'" (quoting United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976))).

219. *See* People v. Giles, 152 P.3d 433, 443 (Cal. 2007) (explaining that placing an intent-to-silence limitation on the forfeiture by wrongdoing doctrine incorrectly assumes that the forfeiture doctrine exists in order to place defendants on notice that they will relinquish their confrontation rights by procuring the absence of witnesses at trial).

when a defendant has knowingly caused a witness's absence from trial comports with the Court's recent affirmation of the forfeiture doctrine's equitable basis.[220]

In addition, a knowledge-based intent standard furthers the utilitarian principles underlying the forfeiture doctrine.[221] It advances the truth-seeking function of the trial system by allowing the jury to hear relevant evidence that a defendant has made unavailable.[222] Employing the forfeiture doctrine when a defendant has wrongfully caused a witness's absence from trial also protects the integrity of trial proceedings.[223] Specifically, it limits a defendant's ability to succeed in presenting a one-sided story to the jury when the defendant's own wrongful act has prevented a witness from providing the jury with more complete information.[224] As a result, a knowledge-based intent standard ensures that courts do not acquiesce when a defendant's wrongful act risks undermining the judicial process.[225] Thus, if the plurality had considered these equitable and utilitarian principles, it would not have needed to retreat from its own opinion because it would have appropriately considered the full scope of the rationales underlying the forfeiture doctrine.[226]

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220. *See* Davis v. Washington, 547 U.S. 813, 833 (2006) (noting that the forfeiture doctrine "'extinguishes'" a defendant's confrontation right on "'equitable grounds'" (quoting Crawford v. Washington, 541 U.S. 36, 62 (2004))). A knowledge-based intent standard would also align with related areas of law that employ equitable principles to prevent wrongdoers from benefiting from their wrongful acts. *See Giles*, 128 S. Ct. at 2697 (likening the equitable principles underlying the forfeiture doctrine to those underlying property and insurance laws, which prohibit a person who wrongfully kills another, regardless of motive, from inheriting under the decedent's will or receiving funds from the decedent's life insurance contract).

221. *See, e.g.*, *Giles*, 152 P.3d at 443–44 (explaining that utilizing the forfeiture by wrongdoing doctrine when a defendant knowingly and wrongfully causes a witness's absence from trial protects the integrity of courtroom proceedings).

222. *See* Steele v. Taylor, 684 F.2d 1193, 1201–02 (6th Cir. 1982) (explaining that the disclosure of relevant information to a jury serves a "paramount interest" and reasoning that a defendant's wrongful nondisclosure of information at trial, such as by procuring a witness's absence, constitutes an interference with that interest).

223. *Giles*, 152 P.3d at 444.

224. *See Giles*, 128 S. Ct. at 2699 (decrying the fact that, aside from evidentiary considerations, a purpose-based intent standard would permit a defendant to testify "in damning detail" about the victim's actions while excluding the victim's relevant testimony).

225. *See Davis*, 547 U.S. at 833 (explaining that the Sixth Amendment does not oblige courts to acquiesce when defendants undermine the judicial process by wrongfully causing a witness's absence at trial).

226. *See* Lininger, *supra* note 167, at 892 (noting that only by acknowledging each of the forfeiture doctrine's underlying rationales—history, equity, and utility—can the forfeiture doctrine achieve its objectives).

V. CONCLUSION

In *Giles v. California*, the Supreme Court improperly concluded that a defendant forfeits his right to confront an absent witness only when the defendant has sought to prevent the witness from testifying.[227] In so concluding, a plurality of the Court mistakenly focused on a historical analysis when it posited a purpose-based intent standard.[228] As a result, the plurality conflated a waiver rationale with the forfeiture doctrine's underlying equitable principles[229] and essentially disregarded the utilitarian principles that inform the application of the doctrine,[230] thus causing the plurality to retreat from its own opinion.[231] If the plurality had instead looked to these equitable and utilitarian principles, it would have posited a knowledge-based intent standard that focused on the forfeiture of confrontation rights rather than a purpose-based intent standard that results in the forfeiture of justice.[232]

227. *See Giles*, 128 S. Ct. at 2683, 2693 (majority opinion) (explaining that the forfeiture doctrine applied at common law only when a defendant engaged in conduct "designed" to prevent a witness from testifying and that the Court would not approve a doctrine broader than the one existing at common law); *see also supra* note 119.

228. *See supra* Part IV.

229. *See supra* Part IV.A.

230. *See supra* Part IV.B.

231. *See supra* Part IV.C.1.

232. *See supra* Part IV.C.2.